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(179 Cal. 557)

STEVENS v. CHISHOLM. (Sac. 2726.)

(Supreme Court of California. Jan. 4, 1919.)

1. Malicious Prosecution 🔑64(2) — Civil Action Against Attorney — Want of Probable Cause—Evidence.

In attorney's action for malicious prosecution of civil action against him by his former client, evidence *held* to show want of probable cause for institution of action.

2. Malicious Prosecution 🔑64(2)—Civil Action Against Attorney—Malice—Evidence.

In attorney's action for malicious prosecution of civil action against him by his former client, evidence *held* to show that such client was actuated by malice.

3. Malicious Prosecution 🔑21(1) — Civil Action Against Attorney — Advice of Counsel.

Where attorney's former client, actuated by malice, and without probable cause, instituted civil action against him, she cannot successfully set up advice of counsel as defense to attorney's action against her for malicious prosecution of civil action.

4. Malicious Prosecution 🔑52—Special Damage—Expense of Defense—Pleading.

Attorney suing for malicious prosecution of civil action against him could recover as special damage amount he had reasonably been compelled to expend in his defense, though his complaint did not state amount of costs incurred by him was reasonable sum.

5. Malicious Prosecution 🔑67 — Special Damages—Expense of Defense.

Attorney in his action for malicious prosecution of civil action against him by his former client was entitled to recover as special damage amount which he had been compelled necessarily and reasonably to expend in his defense.

6. Malicious Prosecution 🔑58(3) — Civil Action Against Attorney—Evidence.

In attorney's action for malicious prosecution of civil action against him by his former client, all papers in such civil action were admissible on issue of reasonable attorney's fee in defending action, recoverable as special damage, being competent to show amount of work done by attorney.

7. Evidence 🔑317(2)—Hearsay.

In attorney's action against former client for malicious prosecution of civil action, testimony of defendant regarding declarations of witness in action by bank against her *held* inadmissible as hearsay.

8. Evidence 🔑370(4)—Receipt—Authentication.

In attorney's action against former client for malicious prosecution of civil action against him, purported receipt, there being nothing to connect it in any way with plaintiff, or his conduct of defendant's business, *held* inadmissible.

9. Malicious Prosecution 🔑58(1) — Evidence.

In attorney's action against former client for malicious prosecution of civil action against him, testimony, whereby witness sought to repeat certain declarations made by defendant to another, *held* properly excluded as irrelevant to issues.

Department 2.

Appeal from Superior Court, Solano County; Malcolm C. Glenn, Judge.

Action by C. P. Stevens against Christy Chisholm. From judgment for plaintiff, defendant appeals. Affirmed.

Frank McGowan, of San Francisco, Arthur Lindauer, of Vallejo, and Blaine McGowan, of San Francisco, for appellant.

W. U. Goodman, of Fairfield, for respondent.

MELVIN, J. The plaintiff, an attorney at law, was successful in an action for damages for malicious prosecution. The defendant appeals from the judgment.

In their brief, counsel for appellant contend that actions for alleged malicious prosecution of civil causes are not favored by law; that as matter of law, under undisputed testimony, the court should have found that defendant had probable cause for instituting the action against Mr. Stevens; that evidence of malice is entirely lacking; and that defendant is relieved of liability because she acted upon advice of counsel in bringing suit against said Stevens. As all of these contentions are discussed and proper conclusions reached in an opinion filed by the Hon. Malcolm C. Glenn, who presided at the trial in the superior court, we hereby adopt the said opinion, which is as follows:

"Plaintiff sues to recover damages for the alleged malicious prosecution by defendant of a certain action instituted by her against plaintiff and one L. B. Cooper, in the superior court of the state of California, in and for the county of Solano.

"In the month of February, 1908, Flora Avilla (now Mrs. Flora Crockett) was the owner of a certain shoe store located at Benicia. At that time she entered into negotiations for the sale of the business to defendant herein. Said Cooper was her nephew-in-law and also was the stepson of plaintiff, C. P. Stevens. All the parties were friendly at that time. Defendant's main object in buying said business was to assist and aid said Cooper, whom she intended to, and subsequently after the purchase did, put in charge thereof. In carrying out the details of the transfer, the usual notice of intended sale and purchase was recorded; also, a written agreement was made and entered into between Flora Avilla, as the seller, and Christy Chisholm, as the purchaser, embodying the terms and conditions thereof, wherein it was provided that the purchase price should be 97½ per cent. of the inventoried value of the stock, the inventory to be thereafter taken. The purchase price was to be paid as follows: $300 being paid down as a deposit, $1,700 to be paid in cash, and the balance to be evidenced by a promissory note of Christy Chisholm, payable one day after date, with interest at 7 per cent. per annum. Flora Avilla was represented in the transaction by Messrs. Lippett & Lippett, attorneys at law, and Christy Chisholm by C. P. Stevens, who was then and is now an attorney at law. Subsequently an inventory was taken of the stock, which amounted to something over $4,300. Thereupon the deal was closed, to the apparent satisfaction of all parties concerned.

"While there seems to be a strong intimation that prior to the month of December, 1915, to be hereafter referred to, the friendly relations existing during the original transaction between Stevens, Cooper, and defendant had become somewhat strained, yet we find nothing bearing directly on the transaction until said last-mentioned date. At that time, Kay Frame, a relative of defendant, who had been placed in possession of the premises occupied as a shoe store, and formerly conducted by Cooper, discovered a promissory note for $2,275.24, purporting to have been signed by Christy Chisholm, together with several checks made by Cooper and payable to Stevens. The finding of the note under the circumstances as related by Frame, together with the canceled checks, was communicated to defendant. Defendant, having lost a considerable sum of money in the business as conducted by Cooper, felt none too friendly towards Cooper and Stevens, and, upon the relating of the facts to her by Frame concerning the finding of the note and the checks, she immediately suspicioned that in the transaction of February, 1908, she had been defrauded. Upon reporting the matter to her attorney, the latter advised her to see Mrs. Avilla. This she did. Defendant testified that she was told by Mrs. Avilla that the amount of the note, $2,275.24, and $300 was all she had received. That nothing was said about the payment of any bills. A letter was later written under Mrs. Avilla's direction stating that, if Lippett & Lippett stated that the purchase price was $2,200, then that amount must be correct. The latter firm was written to, but their answer threw no particular light on the subject. A letter was also written to Stevens and Cooper stating in effect that they were indebted to defendant in the sum of $925, but failed to disclose the facts or circumstances by reason of which the said amount was claimed to be due her. In reply to this letter, the plaintiff denied in positive terms that there was any sum whatever due or owing as claimed.

"Subsequently, an action was commenced by defendant against Stevens and Cooper for the recovery of the sum of $925, it being alleged in the complaint that defendants therein had conspired together to defraud and had defrauded her out of said sum of money and had appropriated the same to their own use. After issue joined, plaintiff dismissed said action.

"That the allegations in the complaint in the action of Chisholm v. Stevens, whereby said last-mentioned parties were charged to have conspired together to defraud and to have defrauded the said plaintiff therein of the sum of $925, were untrue, appears conclusively, nor was any attempt made either in that case or in this to substantiate such charges. Indeed, it is admitted in this case that the said action was dismissed by defendant as soon as she discovered the incorrectness of the allegations of her complaint. There being no foundation in fact for the charges thus made, what then were the circumstances claimed by defendant upon which her alleged cause of action was predicated? Defendant asserts that she had personally paid but little attention to the transaction, leaving the matter to her attorney Stevens, who had promised to look out for her; that her remembrance was that she had signed a note for $3,500, and furthermore both Cooper and Stevens had told her the purchase price was $3,500; that she never signed the note for $2,275.24 found by witness Frame and that her name was forged thereto; that this note was not the note contemplated in the agreement, and had been apparently secreted; that Mrs. Avilla had positively assured her that all she received as the purchase price was $300 in cash and the note referred to; she had written both Stevens and Cooper in regard to her claim, the former contenting himself with a caustic reply, and the latter failing to reply at all.

"In the original transaction between the parties, Stevens represented defendant in the matter of looking over the papers and attending to the legal aspects thereof. He did all that ordinarily would be expected of an attorney. That the legal phases of the transaction were properly attended to has not been questioned. But the defendant asserts that he promised to also look out for her interests in the matter, leaving the impression that Stevens was to keep in touch with the business thereafter to be managed by Cooper, and to protect defendant's interests therein. The testimony fails to substantiate anything further than that plaintiff was representing defendant as the purchaser in the transfer to her of the shoe business and looking out for her interests in that regard; furthermore, the allegations of the complaint in the suit brought by defendant have reference to fraud and conspiracy in the original transaction, and therefore, whatever may have occurred subsequently, in the conduct of the business by Cooper, can have no significance in this case, unless such subsequent conduct is shown to have some bearing on the question of fraud in connection with said original transaction. No such proof was offered.

"The fact has been established that the purchase price was 97½ per cent. of the inventoried value of the stock of goods, and the defendant knew that such was to be the purchase price; whether she subsequently learned that the stock had inventoried at a little over $4,300, or had been told by Cooper and Stevens that it was $3,500, seems to be of no particular importance, excepting as fixing the amount which defendant would have been entitled to if she had shown in her suit against Stevens and Cooper that Mrs. Avilla had only received the promissory note for $2,275.24 plus $300 in cash; for, if Mrs. Chisholm had then discovered that the real purchase price was $4,300, the amount claimed in said suit would have been augmented accordingly. If this case was based upon the claim that Stevens and Cooper had represented that the purchase price was more than it actually was, for the purpose of retaining the difference, an entirely different situation would be presented, and the reason for such a representation would be at once apparent; but the claim is that the purchase price was represented to be less than in fact it was. Under such circumstances, no reason is apparent, nor has any been suggested, why such representations should have been made, nor what advantage either Stevens or Cooper expected to realize by the making of such representations. In addition, the notes signed by defendant, together with the cash deposit paid by her, demonstrate that at the time the transaction was closed she knew the amount of the purchase price. It may be that in the preliminary negotiations some mention was made as to the purchase price being $3,500, but no proof was offered in regard to such being the fact.

"Defendant claims that the note for $2,275.24 is a forgery, the reasons assigned for such assertion being that she did not sign it, and that while it looks very similar to her signature the letter 'm' is not turned like hers, and the signature is in a lighter hand. Considering the evidence in the case as well as the signature to the note itself, the court unhesitatingly finds the signature to be that of defendant; nor is defendant's denial of the genuineness of the signature any stronger than the reasons assigned therefor. Her signature has many peculiar characteristics, and I fail to find any dissimilarity between the signature under discussion and other signatures admittedly signed by defendant either in the particulars suggested or in any other respect. Whether defendant claimed that this note was a forgery at the time her suit against plaintiff and Cooper was commenced has not been argued by counsel, but this note seems at least to have been used as a basis for the determination of the sum therein sued for, to wit, $925, and no other note for a like sum has been referred to.

"In regard to the conversation between Mrs. Avilla and defendant in which conversation defendant claims nothing was said in respect to the payment of any bills, I am of the opinion that the only conclusion which a reasonable person could have drawn from that conversation was that Mrs. Avilla had forgotten the details of the original transaction, and that her remembrance was not to be depended upon. This conclusion is but a natural one under the circumstances, for the transaction had been closed some six or seven years. Beyond this, however, we have the testimony of Mrs. Avilla, together with a letter subsequently written under her direction, showing that she did not pretend to remember some of the details of the transaction; again, her manner as well as her testimony while on the witness stand indicated plainly that the details of the transaction had passed from her mind, and only by refreshing her memory by an inspection of the various bank records and other papers was she able to recall the details thereof.

[1] "From the foregoing, as well as from the many other circumstances in the case which I have deemed unnecessary to refer to in detail, it appears that the plaintiff has affirmatively shown a want of probable cause on the part of defendant in the institution by the latter of the action hereinbefore referred to, and I fail to find any circumstance or circumstances sufficiently strong to warrant a reasonable person in the belief that the charges of conspiracy and fraud were true, or that the defendants in that

action were indebted to the plaintiff therein in any sum whatever by reason of the transaction involving the purchase of the said shoe store business.

[2] "In regard to the question of malice, I likewise hold that the same has been established by the facts in the case. There was no evidence whatever tending to show conspiracy or fraud on the part of plaintiff, nor were there any facts or circumstances upon which a reasonable person might suspicion fraud or conspiracy. The note which defendant alleges was a forgery was not in fact such; the transactions at the bank when defendant signed the various notes were known to her; defendant was aware of the terms of the contract entered into with Mrs. Avilla for she had signed and kept a copy of the agreement. She knew that the stock was to be inventoried and that the amount of the purchase price was to be a certain percentage of the inventoried value, and subsequently she signed notes which together with the cash deposit made at the date of the original agreement totaled the said percentage agreed upon as the purchase price.

[3] "Under these facts, the advice of counsel cannot be successfully set up as a defense to the action.

[4, 5] "Defendant objects to the allowance of any damages for costs incurred by plaintiff in said action hereinbefore referred to, on the ground that the complaint fails to state that the amount of such costs so incurred is a reasonable sum, citing in support thereof several cases. In the first case cited, Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106, 56 Am. St. Rep. 77, the allegations of the complaint in regard to attorneys' fees and costs were similar to the allegations in the case at bar, it being alleged that the plaintiff 'was obliged to employ counsel to defend the suit at a cost of $600. * * *' No question was presented as to the insufficiency of this allegation, but the point decided was that the court failed to instruct the jury that only such allowance could be made as would be reasonable and proper. Marshall v. Betner, 17 Ala. 832, likewise fails to support the contention of defendant. On the other hand, it has been expressly held in that state that such an allegation is unnecessary. Strain v. Irwin, 195 Ala. 414, 70 South. 734. In the last-mentioned case the allegation in the complaint was as follows: 'Plaintiff avers that he incurred a liability of $25 as attorney's fee for services of attorney in representing him in said prosecution, and in procuring his discharge, and said sum is hereby claimed as special damages.' There was no averment in regard to the reasonableness of such charge or liability, and the point was made that the allegation was insufficient. The court said: 'In such a count the claim for attorneys fees as damages, being no part of the cause of action, and being intended only as a warning to the defendant of an issue to be met, does not render the count demurrable, although it is not alleged that such a fee was either reasonable in amount or necessary in fact. These are questions of evidence merely.' In the case of Drumm v. Cessnum, 61 Kan. 467, 59 Pac. 1078, cited by defendant, it is said: 'Plaintiff below testified as to the expense he had been put to in defending himself from the charge brought against him, stating that it was about $500, consisting of $300 attorney's fee, and $200 in traveling back and forth. We can see no objection to the admission of this testimony or the recovery of the amounts stated. Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408. When it does not appear that the attorneys' fees and other expenses are obviously excessive, testimony of the amounts paid will constitute a prima facie case; and it will be assumed in such case that the attorneys' fees so paid were reasonable, unless the contrary appears.' In the case of Wheeler v. Hanson, supra, it is said: 'The expenses to which the plaintiff was put in procuring sureties and in employing counsel were the direct and necessary result of the defendant's act, and constituted a part of the damages to which the plaintiff was subjected in consequence thereof (citing a large number of cases). It has been held more than once in this state that when the plaintiff has, in consequence of the wrongful conduct of the defendant, been put to expense in the employment of counsel, the amount so paid is an element of damage in an action against the defendant arising out of such wrongful conduct' (citing many cases).

"The special damage to the plaintiff therefore is the amount which he has been compelled to expend or incur in his defense, but he can only recover such part thereof as constitutes a necessary and reasonable charge; the latter question being one to be determined from the evidence."

[6] There was no error in permitting the introduction in evidence of all the papers in the former suit. The question of reasonable attorney's fee was an issue, and it was competent for plaintiff here to show the amount of work done by the attorney in the former case.

[7] The court properly refused to permit Mrs. Chisholm to testify regarding the declarations of a witness in an action by a bank against her that $3,500 was the purchase price of the shoe store at Benicia. Such testimony would have been hearsay, and moreover she was in a position to know that, if made, the alleged statement was false.

[8] The court refused to admit in evidence a purported receipt bearing the name of Mrs. Avilla. This ruling was proper. There was nothing in the testimony to connect this receipt in any way with Mr. Stevens or his conduct of Mrs. Chisholm's business.

[9] It was also proper to sustain objections to the testimony of Miss McArthur by which she sought to repeat certain declarations regarding a note for $1,200 made by Mrs. Chisholm to Mr. Cooper. There was no explanation at the trial, nor is there any satisfactory one in appellant's brief, that such testimony could be relevant to the issues being then tried.

No other alleged errors require notice.

The judgment is affirmed.

We concur: LORIGAN, J.; WILBUR, J.

179 Cal. 575

PEOPLE v. TYREN. (Cr. 2201.)

(Supreme Court of California. Jan. 7, 1919.)

1. Criminal Law 🔑1166½(6)—Harmless Error—Limiting Examination of Talesmen.

Where defendant charged with murder, having exercised only 13 of his 20 peremptory challenges, could have removed from the box any or all of three talesmen whose examination on voir dire was limited by court, if he had doubt as to their desirability as jurors, he was not prejudiced by limitation of examination.

2. Criminal Law 🔑1170(4) — Harmless Error—Exclusion of Evidence.

In prosecution for murder, any error in excluding testimony of defendant's former employer as to what illness he had formerly complained of *held* harmless; matter not being excluded absolutely, and witness later testifying in full on subject.

3. Criminal Law 🔑452(1) — Evidence — Opinion.

Former employer of defendant charged with murder, after testifying that defendant was nervous, trembly, and as if spitting from his mouth, was not qualified to give opinion that he had apoplectic fit.

4. Homicide 🔑339 — Harmless Error — Exclusion of Evidence.

In prosecution for murder of defendant's children, any error in sustaining objections to questions put to witness to show that defendant was fond of children was harmless, where witness was later permitted to describe defendant's conduct and demeanor toward them, etc.

5. Criminal Law 🔑1144(12) — Appeal — Presumption—Rejection of Evidence.

Error in exclusion of evidence must be shown affirmatively, and action of court below in excluding evidence, such as two photographs, not incorporated in record, will be presumed to be correct unless record is made to show their character and admissibility.

6. Witnesses 🔑277(4) — Cross-Examination of Defendant.

Under Pen. Code, § 1323, it was not error to permit defendant charged with murder of his children to be cross-examined on subject of what he had written on back of summons served on him on behalf of his wife; he having testified that he had no memory of what had occurred that day.

7. Homicide 🔑340(2)—Harmless Error—Unnecessary Instruction.

In prosecution for murder of defendant's children, instruction with reference to irresistible impulse, no such defense being interposed, *held* harmless to defendant.

8. Criminal Law 🔑829(1) — Trial — Instructions—Repetition.

There was no error in refusing instructions requested by defendant, which, so far as correctly stating the law, were governed by those given by the court of its own motion, or at the request of the prosecution.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

James Tyren was convicted of murder in the first degree, and, from the judgment and order denying his motion for new trial, he appeals. Affirmed.

Mark L. Burns, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

SLOSS, J. The defendant was convicted of murder of the first degree and sentenced to death. He appeals from the judgment and from an order denying his motion for a new trial.

The only defense sought to be made at the trial was that of insanity. No question is, or could be, made of the sufficiency of the evidence to establish the commission of the homicide by the defendant. It is conceded, as well, that the jury was warranted in finding against the plea of insanity. The appeal is rested upon the claim of error in the conduct of the trial. For a proper understanding of the points made, a brief outline of the facts may be given.

The defendant, Tyren, lived at Sacramento with his wife and two children, one a boy of about twelve years, who had been adopted in infancy by the Tyrens, the other a girl of seven years. The murder charged was that of the boy, Holland Tyren. The family had been living in a house on J street, in Sacramento. Early in May, 1918, differences arose between Tyren and his wife, and the latter left the family home, taking the children with her. She instituted an action for divorce, praying in her complaint for alimony, an award of community property, and the custody of the children. Summons in this action was served on the defendant on the 6th of May, 1918. On the following day, May 7th, the children, who were attending school, went to the home on J street during the noon recess, and there had their midday meal with the defendant. They attended the afternoon session of school, which closed about 3 o'clock. They did not return to their mother's new abode, and in the evening of the same day, alarmed by their absence, she caused search for them to be made. Two police officers, together with her attorney, went to the defendant's house on J street. They entered, made their way to a bathroom on the second floor, and there found the bathtub half filled with water strongly tinged with the color of blood. In an adjoining room, lying upon a bed, were the dead bodies of the two children, and kneeling by the side of the bed was the defendant with a gash, apparently self-inflicted, in his throat. Testimony of physicians tended to show that the boy, Holland, had been strangled to death, and that his body had been immersed in the water of the tub while he was being strangled, or shortly thereafter.

[1] The appellant's first contention is that the court erred in sustaining objections of the district attorney to various questions asked of talesmen on their examination on voir dire. Nearly all of these questions were improper, and if, in one or two instances, the ruling may have been somewhat strict, it must be held that the defendant was not prejudiced thereby. The defendant exercised only 13 of the 20 peremptory challenges allowed him by law. Objections were sustained in the examination of but three of the talesmen who ultimately found places on the jury. The defendant had it in his power to remove from the box any or all of the three, if he had any doubt regarding their desirability as jurors. The ensuing situation was therefore the result of his own acquiescence, and he cannot complain of it. This is the settled rule where a challenge for cause has been erroneously overruled. People v. Durrant, 116 Cal. 179, 196, 48 Pac. 75; People v. Winthrop, 118 Cal. 85, 88, 50 Pac. 390; People v. Schafer, 161 Cal. 573, 577, 119 Pac. 920. And the reasons on which it is based apply equally to a case like the present, where it is claimed that the court erred in limiting the examination of talesmen. See People v. Freeman, 92 Cal. 359, 365, 28 Pac. 261.

The appellant makes a number of assignments of error in the admission or rejection of evidence. Taken singly or collectively they have little substantial merit. The gravity of the case requires, however, that those which are argued be given brief notice.

[2, 3] One Gray was called by the defendant as a witness to support the plea of insanity. He testified that the defendant, Tyren, had been in his employ some ten years before the trial, and that he had at that time complained of ailments. He was then asked: "Q. Well now, you may state what he complained of." And to this question the court sustained an objection. The ruling, if erroneous, was harmless. In the first place, the matter sought to be elicited was not excluded absolutely. In making its ruling, the court directed counsel for the defendant to take up one complaint at a time, and thus afforded ample opportunity to go on with the inquiry. Furthermore, other questions were put, and, in answer to them, the witness did testify fully on the subject. The same witness, after testifying that on one occasion the defendant "was nervous, trembly, and kind of as if he was spitting a little from his mouth," added, "I thought he had an apoplectic fit." The court ordered the last statement stricken out. The ruling was obviously correct. The witness was not qualified to give an opinion of the nature of Tyren's ailment.

[4] The defendant undertook to show that he had always manifested a deep affection for his children, and was allowed to develop the point in considerable detail. The appellant urges that the court erred in sustaining objections to one or two questions put to the witness Ford on this line. The witness was, however, permitted to describe Tyren's conduct and demeanor toward his children, his testimony being to the effect that he appeared "very affectionate towards the children." The defendant had the benefit of everything of substantial importance that he desired to prove by this witness.

Objections to questions asked of defendant's witnesses Weaver and Barrett were properly sustained on the ground that the questions were leading and suggestive. Furthermore, in the case of the latter witness, the subject was fully covered by the answer to a question put after the ruling complained of.

[5] The court sustained an objection to defendant's offer in evidence of two photographs of himself, taken about a week after the homicide. It is claimed that they tended to support the appellant's claims regarding his mental condition. But this does not appear. The photographs are not incorporated in the record, and there is nothing before us to show that they had any relevancy whatever. Error must be shown affirmatively, and the action of the court below in rejecting evidence will be presumed to be correct, unless the record is made to show the character and the admissibility of such evidence. 4 C. J. 760; Barrell v. L. V. L. Co., 122 Cal. 129, 54 Pac. 594; In re Angle, 148 Cal. 102, 82 Pac. 668.

Any error that may have been committed in excluding testimony of the defendant regarding the effect upon his mind of the war and of the war pictures which he had seen displayed in theaters was fully cured by the action of the court in permitting him to testify fully on this subject at a later stage.

[6] The defendant took the stand as a witness in his own behalf. He testified at length regarding the relations between himself, his wife, and his children, and gave a full account of his actions upon the day of the homicide (May 7th) up to the return of the children to school in the afternoon. He had, so he declared, no memory or knowledge of anything that had occurred from the time the children left the house until he found himself in the hospital on the following day. On cross-examination he was asked to state whether he had written a certain indorsement on the summons which had been served upon him. The writing, which was subsequently admitted in evidence, was addressed

to the defendant's wife. After declaring that the allegations of her complaint were false, it went on to say:

> "Now that I have worked so hard for what we have got and you want to take the children and everything in it is too much for me and I never was in court and I hope I never will be only before my God and you will suffer just as much as I by the time you see this I hope me and my boy and my little sunshine will be no more trouble to from yours James Tyren." (The defendant was in the habit of referring to his little daughter as "Sunshine.")

It was not error to permit the defendant to be cross-examined on this subject. Where a defendant testifies in his own behalf, he may be cross-examined "as to all matters about which he was examined in chief." Pen. Code, § 1323. "The cross-examination may extend to the whole transaction, of which he gives a part" (People v. Teshara, 141 Cal. 633, 75 Pac. 338), and may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination (People v. Gallagher, 100 Cal. 475, 476, 35 Pac. 80; People v. Buckley, 143 Cal. 375, 388, 389, 77 Pac. 169; People v. Creeks, 170 Cal. 368, 378, 149 Pac. 821). The defendant's testimony regarding his mental condition on May 7th was designed to show that, if he had in fact killed the boy, his act had been committed without consciousness or volition on his part. But the notation on the summons might well be interpreted as a declaration by him of a definite purpose and intent to kill both children. The identification and introduction of the paper were directly connected with the matter concerning which the defendant had testified in chief.

[7] Finally, the appellant complains of the action of the court in giving certain instructions and in refusing others. We see no error in any of the instructions given. The court charged the jury carefully and impartially regarding the rules of law governing the case. The subject of insanity was adequately and correctly covered. There is no merit in the claim that the court failed to make it clear that the question in this regard turned upon the state of the defendant's mind at the time of the alleged commission of the act charged. Taking the charge as a whole, the jury could not have been left in any uncertainty on this point. One of the instructions on the subject of insanity is more particularly criticized, the claim being made that the jury were directed to find the defendant guilty although they believed him to be insane. Without quoting the instruction in full, we may say that this contention is based upon a strained interpretation of the language. While the instruction may have been inartistically phrased, its purport plainly was that the defendant is to be found guilty only if the jury should conclude that he had not sustained the burden of proving insanity. The court gave an instruction with reference to irresistible impulse, and the point made is that no such defense was interposed in the case. But we cannot see that the giving of the instruction could have prejudiced the defendant in any way. The same observation may be made regarding the succeeding instruction, which dealt with partial insanity.

[8] With respect to the instructions requested by the defendant and refused, it will suffice to say that, so far as they correctly stated the law, they were covered by the instructions given by the court of its own motion or at the request of the prosecution.

On the whole case, we see no ground for interfering with the judgment. The judge below conducted the proceedings with marked fairness and patience, and every substantial right of the defendant was accorded him.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.

179 Cal. 581

Ex parte LOCKETT.

Ex parte GONO.

(Cr. 2215, 2220.)

(Supreme Court of California. Jan. 9, 1919.)

1. CRIMINAL LAW ⚷13—STATUTES—USE OF ENGLISH LANGUAGE—CONSTITUTION.

Pen. Code, § 288a, denouncing offenses of "fellatio" and "cunnilingus," *held* violative of Const. art. 4, § 24, as not in English.

2. CRIMINAL LAW ⚷13—CREATION OF OFFENSE—UNCERTAINTY.

Pen. Code, § 288a, denouncing offenses of fellatio and cunnilingus, is void for uncertainty and vagueness.

Wilbur, J., dissenting.

In Bank.

Applications by Clarence Lockett and Don A. Gono for writs of habeas corpus. Prisoners discharged.

Edwin V. McKenzie, Harry A. McKenzie, A. S. Newburgh, and Oscar Hudson, all of San Francisco, for petitioners.

John H. Riordan, of San Francisco, for respondent.

MELVIN, J. Both petitioners are held, one under commitment after preliminary examination, and the other after such commitment and the filing of an information. Each is charged with an offense sought to be defined by section 288a of the Penal Code by the use of the word "fellatio." The sole question involved in each petition is whether or not the section is constitutional; therefore we shall examine and consider both petitions together.

It is contended on behalf of both petitioners that the statute is unconstitutional because it is not in the English language, and because it is so indefinite and uncertain and unintelligible that it fails to inform a person charged thereunder with reasonable precision what acts are intended to be denounced by it, and therefore denies "due process of law" to any one prosecuted for its supposed violation.

The constitutionality of the same statute was considered by this court in a proceeding entitled "In the matter of the Application of William R. Soady for a Writ of Habeas Corpus," a bare majority of the justices holding it to be constitutional. 56 Cal. Dec. 247. Subsequently the court of its own motion granted a rehearing, but, as the petitioner had meanwhile been tried and acquitted, the proceeding became of merely academic interest, and was therefore very properly dismissed. In that proceeding the author of this opinion was a dissenter from the views held originally by a majority of the court, and wrote an opinion in which he attempted to set forth his views. As no one concurred in the language of that opinion (although two of the justices reached the same conclusion), the writer of this opinion will take the liberty of adopting herein some of the same language without the formality of quotation marks.

The section in question is in the words and figures following:

> "The acts technically known as fellatio and cunnilingus are hereby declared to be felonies and any person convicted of the commission of either thereof shall be punishable by imprisonment in the state prison for not more than fifteen years."

As published in the Penal Code the statute contains no hint of its meaning except the two unusual words, with the first one of which we are here concerned; but as originally enacted it contained the preliminary recital that it was "an act to add a new section to the Penal Code, to be numbered 288a, relating to sex perversions and defining the same to be felonies."

This forms the only hint of the purpose of the Legislature in enacting the section; but unless the word "fellatio" itself is an English word, which clearly expresses an exact meaning, the hint furnished by the title is of little value.

That the Legislature, in the exercise of its power to define crimes and to provide for the punishment of offenses, should make laws tending to the suppression of sins against decency is most commendable, and that statutes should be drawn in language to offend the sensibilities of normal people to as small a degree as possible is a truth that none should gainsay; yet so important is the liberty of the individual that it may not be taken away even from the most debased wretch in the land, except upon conviction of a crime which has been so clearly defined that all might know in what act or omission the violation of the law should consist. For this reason the people, through their Constitution, have wisely decreed that all laws, all official writings, shall be preserved and published in the English language. It is also true that in construing statutes courts should readily regard the words from other languages as being Anglicized, and therefore as escaping the constitutional objection in all cases where they had come into common use or were easily understood by reference to lexicons commonly accessible, and that in the interests of decency courts should sanction the use of such words euphemistically employed to describe offenses against morality, thus avoiding the bald nastiness involved in the use of the vernacular, if the words in the statutes from other languages than our own bore clear, definite meanings easily ascertained. This court should do much to uphold the Legislature in its efforts to avoid shocking specifications in the definitions of crimes of indecency. But the faults of the statute before us arise from the circumstances that not only is the word "fellatio" one not found in the English language, but it is not a word having a definite, technical meaning either in law or in psychopathology.

The form of the word "fellatio" would indicate that it is a Latin word intended to denote the act of the "fellator," a word of ancient origin and use, derived from the verb "fellare," and applied originally to a child at its mother's breast, but having an acquired meaning as applied to a certain sort of degenerate person. Martial (Marcus Valerius Martialis), who wrote of the debased Romans of the latter part of the first and the early years of the second century (he who insisted that although his verses were sometimes obscene his life was not bad), used the word "fellator" in more than one of his epigrams. For example, in the fifty-ninth epigram of the twelfth book entitled "De Importunis Basiartoribus," in which the poet describes the annoyances to which importunate persons subject a man returning to Rome after a long absence, occurs the line, "Fellatorque, recensque cunnilingus." The seventy-fourth epigram of the fourteenth book is entitled "Corvus," and denies a popular libel upon that bird. The first line is as follows: "Corve salutator, quare fellator haberis?" meaning, "O crow, salutor, why are you called fellator?" The epithet "salutator" refers to the legend to the effect that a crow once addressed to Julius Cæsar the words "Salve, Imperator!" In the thirtieth epigram of Book XI the word occurs in the form "fellatori." The last two lines of the sixty-sixth epigram in Book XI, in which the poet expresses surprise that the object of his lines has not accumulated money, are as follows:

> "Et fellator es, et lanista: miror
> "Quare non habeas, Vacerra, nummos."

In Book I, epigram 95, is the feminine form of the word in the title "Ad Æglen Fellatricem," and the word "fellatorum" in the ninety-fifth of Book XI.

The earliest use of the word "fellatio" which has been called to our attention is in a Latin note to Valpy's edition of Martial published in 1823, where it appears in the ablative "fellatione." It does not occur in any of the English dictionaries in common use. In Harper's Latin Dictionary is found the word "fellator" applied originally to a child at its mother's breast and having an acquired meaning with reference to a degenerate person. In Lippincott the word "fellator" is defined as "a Latin term for the pathic agent in irrumation." The word "irrumation," as therein defined, seems limited to the person upon whom a certain disgusting act is performed rather than the one practicing it. "Fellatio" is used and defined in Stedman's Medical Dictionary and in Dorland's American Illustrated Dictionary (published in 1917, two years after the adoption of section 288a of the Penal Code). In "Studies in the Psychology of Sex," by Havelock Ellis (Vol. VI, published in 1911), we find the word "fellatio" (pages 555, 557). In both paragraphs in which the word is employed the author seems to be describing an act committed by a woman upon a man. Whether he intended to limit the word to such relation of opposite sexes it is, of course, impossible for us to know. In the volume of the same work published in 1912 the word is again used not so much to describe the act as some of its consequences (Vol. V, p. 172). In the work known as "Psychopathia Sexualis," by Dr. K. v. Krafft-Ebing, Rebman's translation, edition of 1906, we find at page 504 the word "fellare" defined in Latin as the committing of an act upon a man by a woman.

Clearly "fellatio" is a Latin word, and, unless we can say that it has become Anglicized, the conclusion is unescapable that its use in the statute under review renders that section obnoxious to section 24 of article 4 of the Constitution of California. When the Matter of Soady was before the court Mr. Justice Lucien Shaw, in an opinion in which Mr. Justice Victor Shaw concurred, thus expressed the rule and its application to this statute:

> "When a word from a foreign language has been used in English speech and writing so often that its meaning has become generally understood, it is said to have been Anglicized, and it is then a part of the English language, with the meaning it has acquired by such use. But the fact that a foreign word may be found in a medical dictionary, or in any other dictionary of technical words used by one of the learned professions, and that its meaning is there defined, does not establish it as a part of the English language. Such dictionaries define many words which are not in ordinary use, and of which none except men of the profession, and not all of them, know the meaning. Law dictionaries contain a large number of words and phrases from the Latin and French languages and give their meaning. Laws might easily be framed couched entirely in these words. It would not be considered that such a law was valid under our Constitution."

That the word "fellatio" has not become Anglicized is so clearly apparent that further comment seems unnecessary.

But it has been suggested that this court is bound to decide that the word is English in view of the presumption that an act of the Legislature is constitutional, and that where the existence or nonexistence of a fact or facts is involved in a law the determination of the Legislature may not be disturbed unless error clearly appears. One answer to this argument is that the Legislature has not found nor declared that the word is English, nor that it has been adopted by common use into the language. The section merely declares that there is an act "technically known as fellatio." To whom so known is not specified. To what technique, art, profession, cult, or practice the term belongs is not stated. The mere use of the word does not involve any presumption that the Legislature took evidence from which a conclusion was drawn that it was a legitimate English word. On the contrary, the statement of the lawmakers that the act denounced is "technically" known as "fellatio" would seem to indicate that its meaning was familiar only to the members of the calling or profession using the word. Again, there is no attempt to define the word by the Legislature, and this court is charged with the duty of deciding whether or not it conveys any idea by the English language. If the rule for which contention is made were to attach to all language used in statutes, then would the court's duty to construe statutes stand helpless before an impassable wall of presumption. When the Legislature uses language in a statute we must interpret it as language. No peculiar sanctity attaches to it because it is language used in a legislative enactment. Ambiguity is not presumed to be intelligibility merely because it attaches to a statute, nor is hopeless obscurity illuminated by the fact that two houses have passed, and a busy governor has signed, a bill. In short, we may not declare "fellatio" Anglicized by presumption.

It has also been suggested that, because section 24 of article 4 of the Constitution succeeded a part of the old Constitution which required laws to be published in English and in Spanish, the mere function of the later provision was to dispense with the publication of statutes in Spanish. This contention is not tenable. With reference to the meaning of section 24 of article 4 of California's Constitution, it seems to me that, no matter what its origin and irrespective of the fact that it took the place of a former regulation for the publication of laws in two languages, it unmistakably requires that laws shall be published "in no other" than the English language. I care not what may be its origin. I am bound by its unambiguous terms. It means that English—understandable English—is to be used in the declaration of laws by the Legislature, and that failure to employ that language vitiates a statute. The Constitutions of other states that have never required publication of laws in a foreign language contain, or have contained, provisions similar to ours. In Illinois the language is just as emphatic as that used in our Constitution, which prescribes publication "in no other than the English language." Const. of Illinois 1848, § 18, Schedule; Const. of Illinois 1870, § 18, Schedule. The Constitution of Kansas of 1857 contained the following provision (section 3, art. 15): "The laws * * * and the written, judicial, and legislative proceedings of the state, shall be conducted, promulgated, and preserved in the English language." This has been omitted from later Constitutions. In Michigan there have been two constitutional provisions similar to ours: "The laws, public records, and the written judicial and legislative proceedings of the state, shall be conducted, promulgated and preserved in the English language." Const. of Michigan 1850, § 6, art. 18; Const. of Michigan 1908, § 6, art. 16. The mere fact that our constitutional provision on this subject historically follows a former requirement for publication of laws in Spanish does not alter in the slightest degree its plain meaning.

Nor is it surprising that no authority has been called to our attention whereby any law has been declared unconstitutional because not expressed in the English language. The absence of such authority would seem to indicate that the constitutional direction to legislate for English-speaking constituencies in the English language had been generally obeyed. Authority may be found, however, for the rejection of pleadings not drawn in English when the statutes prescribe that language, and surely the constitutional requirement that English and no other language may be used in our laws should receive a construction at least as strict as that applied to such statutes. In State v. Town of Jericho, 40 Vt. 121, 94 Am. Dec. 387, it was held that a demurrer should have been sustained to an indictment in which signs instead of words were used to describe degrees and minutes. In New Jersey it was held that a statute requiring a physician to deliver his account "in plain English words" was violated by the use of contractions, initials, and symbols in a medical man's bill of particulars. Hedges v. Boyle, 7 N. J. Law, 68. In People v. Ah Sum, 92 Cal. 648, 28 Pac. 680, the court examined an information by which it was sought to charge the defendant with perjury committed at his trial for selling lottery tickets. In the information the lottery ticket regarding which it was alleged Ah Sum had falsely testified was set out in the Chinese language. The court held that this vitiated the pleading, not only because of the violation of section 950 of the Penal Code, but also for the reason that the use of the Chinese language in an essential part of the information was contrary to section 24 of article 4 of the Constitution. If a pleading fails because a vital part of the charge is expressed in a foreign language, what saves an enactment similarly tainted? The very same section of the Constitution requires *both* to be in English.

In line with the authorities last cited and also supporting the contention of petitioners that the statute is not understandable is a very recent decision. In the case of People v. Carrell, 31 Cal. App. 793, 161 Pac. 995, which this court refused to transfer from the District Court of Appeal after decision, that court was considering the sufficiency of an information charging a defendant in the language of section 288a of the Penal Code. While the question before the court in that case was purely one of pleading, not involving the constitutionality of the statute, nevertheless the discussion in the opinion by Mr. Presiding Justice Chipman is of great value in considering the matter now before this court. His language was, in part as follows:

> "Unexplained, the word 'fellatio' would, to a man of common understanding (indeed, we think also to one of uncommon understanding), be as cabalistic as if written in Egyptian or Mexican hieroglyphics or in Japanese or Chinese characters. The attorney for the defendants says in his brief: 'The defendant entered into the trial of this case, and so did his attorney, without any knowledge of what the word "fellatio" would be defined to mean as used in the statute, or what the elements constituting the offense might be, but rather supposed' the court would instruct in accordance with a definition the attorney found in Andrew's Latin-English Lexicon. In this sense the definition might not meet the act proven, but would seem to apply to the woman rather than the man. This is mentioned to emphasize the soundness of the statutory rule that the offense must be so stated as to be intelligible to a person of common understanding. Under no other rule could a defendant safely go to trial. The circumstance is mentioned also for the reason that it is by no means certain what acts the Legislature intended to characterize as the crime of 'fellatio.' We do not find it spoken of in any work on criminal law, and its introduction into our statutes is of so recent a date that the courts have not been called upon to deal with it so far as we are aware until this case arose.
>
> "The exigencies of the case do not seem to

require that we should stain the pages of our reports with the definition as given, or to enlighten the profession or the public as to what the learned trial judge found it necessary to inform the jury the Legislature meant when it announced 'fellatio' as a felony."

[1] This language has been solemnly approved by the Supreme Court, because a petition for transfer of the cause to this court for decision has been denied. The case is still authority. It has never been reversed nor criticized. Thus this court has decided that a pleading in the language of the statute is insufficient because "it is by no means certain what acts the Legislature intended to characterize as the crime of 'fellatio.'" The mandate of the Constitution regarding the use of no other than the English language not only applies to statutes and to all "official writings" and "judicial proceedings" (which I believe would include pleadings), but such command is expressed in the same section and the same sentence. Evidently the framers of the Constitution intended that English-speaking people should understand, or should at least be in a position to learn, not only the meaning of indictments against individuals, but the significance and purport of general laws having application to everybody. We say to the man in custody, "You cannot understand the word embodying the charge against you; therefore the indictment fails." But to the people of the state and to every one of them, if we held this law to be constitutional, this court, in effect, would say: "You are bound to understand the same unintelligible word, although it is the very essence of the statute, without which section 288a of the Penal Code could mean absolutely nothing in any language." I cannot assume a position so antagonistic to reason.

[2] From an examination of the text-books and lexicons containing the word "fellatio" or kindred words, we find that these so-called "authorities" are by no means in accord nor consistent in their definitions. In Stedman's Medical Dictionary there is a contradiction in definitions which throws the whole matter into confusion so far as that work is concerned. In that book "fellator" is defined as "one who takes the buccal part in fellatorism." This is thoroughly in accord with the meaning evidently implied in Martial's writings. But "fellatio" is by Stedman given as a synonym for "fellatorism," which in turn is described as a synonym for "irrumation," and that word defined by reference to its underlying verb "irrumare" seems to apply to the passive and not to the active agent in a perverted practice. As defined in the ninth edition of Dorland, "fellatio" relates only to the conduct of the active agent. The definition is unmistakable. Indeed, it is so bluntly expressed that it may not with propriety be here quoted. But strangely enough "fellatorism" is defined as a practice relating to the person upon whom another performs a certain act. Krafft-Ebing, as we have seen, limits the practice to a woman as the active agent, and Havelock Ellis seems to follow the same definition, as does also Andrew, as Mr. Justice Chipman in his opinion in the case of People v. Carrell, supra, has stated. With the books in confusion so hopeless we cannot say that the word has a definite technical meaning. It seems to me that, without arrogating to ourselves the function of legislation, we cannot definitely declare what the statute means, and that, even if we could bring ourselves thus to go outside of our constitutional duty, we would be compelled to choose among conflicting definitions. Section 288a of the Penal Code is void for uncertainty as well as for the reason that it is not expressed in the English language.

It is not necessary to examine at length the other Latin word of the statute, because it is not used in the commitments of the petitioners now before this court. It may be said in passing that "cunnilingus" is found, but not clearly defined (doubtless for reasons of modesty), in Lewis and Short's revision of Harper's Latin Dictionary, the lexicographers contenting themselves by giving the meaning of one of the words from which it is derived. The word as employed by Martial does not denote an *act* as its use in the statute would imply, but an *individual*. For example, the epigram in Book IV of Martial, numbered 43, ends with the line, "Dixi te, Coracine, cunnilingum," meaning "I have called you, Coracinus, 'a cunnilingus.'" This definition is accepted by Dorland, who uses the word "cunnilinguist" to denote the person guilty of a certain act of perversion, but gives "cunnilingus" as the Latin synonym. Krafft-Ebing seems to use "cunnilingus" as meaning an act, while apparently the same act is described by Ellis as "cunnilinctus." While this part of the statute is not under review in the present proceedings, I think it proper to indicate that in my opinion it is also void.

The statute under which the petitioners were prosecuted was in violation of both the letter and the reason of the constitutional provisions invoked by them.

The prisoners are discharged.

VICTOR E. SHAW, Judge pro tem. I concur in the judgment. The crime denounced by the statute is not defined, but designated by words concededly not found in or constituting any part of the English language, in which, as provided by section 24, art. 4 of the Constitution, all laws of the state must be published and *in no other*. Not only is it obnoxious to this provision of the Constitution, but the words, no doubt intended by the Legislature to apply to some one of the many forms of sexual perversion, are, even when reference is had to Latin lexicons, of no determinate signification in determining the particular act which is penalized. This being true, the Legislature might with equal propriety have used Chinese characters, or, indeed, have coined new words for use in prescribing the act in place of those adopted, which, in the absence of definition, would have been just as intelligible to the citizen as the words used for the purpose of defining the offense.

ANGELLOTTI, C. J. I concur in the judgment. Further consideration has satisfied me that section 288a of the Penal Code is so vague and uncertain in its attempted statement of the acts declared to be felonies that it may not fairly be upheld as a valid statute. It must be conceded, I think, that it is essential to the validity of a statute creating a criminal offense that it show in language capable of being understood by a person of ordinary intelligence what it is that is prohibited. This, it has been said, can only be done by the use of terms or words of settled meaning, or words which indicate offenses well known to, and defined by, the common law. See, generally, 16 Corpus Juris, pp. 67 and 68.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

WILBUR, J., dissents from the judgment.

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179 Cal. 566

FRIEDMAN et al. v. McKAY LEATHER CO.

(Sac. 2731.)

(Supreme Court of California. Jan. 4, 1919.)

1. DAMAGES 🔑40(2)—SPECULATIVE DAMAGES.

Where an agency contract for the sale of leather provided for commissions, but the agency was not exclusive, the agents upon breach by their principals could not recover as damages profits to be realized as commissions on purely suppositive sales; such damages being speculative.

2. DAMAGES 🔑40(2)—SPECULATIVE DAMAGES.

Where an agency contract for the sale of leather goods provided for commissions on sales made to certain named dealers, whether made directly or by reason of the agency, commissions on actual sales made to such dealers, whether by the agents or not, might be recovered in an action for breach of the contract; such profits not being speculative.

Department 2.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by N. W. Friedman and another against the McKay Leather Company. Judgment for plaintiffs, and from an order granting a new trial they appeal. Affirmed.

T. T. C. Gregory and D. Hadsell, both of San Francisco, and Thos. A. Allen, for appellants.

Frank McGowan, of San Francisco, Arthur Lindauer, of Vallejo, and Blaine McGowan, of San Francisco, for respondent.

WILBUR, J. Appellants claim that this is an action for breach of contract, but the respondent claims it is an action for an accounting. Respondent demanded a jury and appellants recovered judgment after verdict, the respondent's motion for a new trial was granted, and the appeal is from this order. The parties entered into a contract by which the respondent appointed the appellants "its representatives" for the "handling" of leather, agreeing to pay a commission "on all orders placed through" appellants "or received direct from" 16 "factories, finding houses," and "commission houses on the Pacific Coast" specifically named in the contract. Respondent also agreed to pay commissions on all "orders booked" by respondent for shoe factories, etc., on the Pacific Coast or in the Orient. Respondent also agreed to consult with appellants "at regular intervals regarding preparation of leather, selections, prices and the booking of orders as regards quantities"; to mail appellants copies of invoices; to pay commissions monthly; to furnish samples from time to time as requested; to keep appellants posted regarding any change in prices. The contract was for a term of four years, with an option on the part of respondent to renew the agreement for "a further term of five years." There was no agreement by the appellants to devote their time, or any part of it, to the selling of the leather goods of the respondent. The complaint alleges that orders had been received by respondent direct from the shoe houses, etc., named in the agreement and, that it had failed to render an accounting to appellants therefor, and had failed to mail invoices therefor, or to pay commissions thereon, after demand; that on June 26, 1914, respondent notified appellants that it would not pay past or future commissions "on direct orders as provided in the agreement or at all"; that appellants had been ready, able, and willing to perform the contract, and, "unless prevented by the repudiation" thereof by respondent, would have secured a large number of orders during the term of the contract, to wit, to February 26, 1918; "that by reason of the facts hereinbefore set forth" appellants have been damaged in the sum of $10,000, and prayed judgment for said amount. The answer specifically denies each alleged violation of the agreement and denies that the appellants had been at all damaged. The following letter of June 26, 1914, from respondent to appellants, is counted on as evidence of the breach of contract:

> "We found you to be a failure as a salesman and detrimental to our business. * * * You went out in competition to us and sold another tanner's leather to our trade. * * * We don't want you to represent us and we certainly will not pay you for what we ourselves sell. * * * Are we to send you a check and you not make any effort to do anything for it? You want to come back on us for commission on trade we had before we ever knew you," etc.

On July 6, 1914, appellants wrote respondent that an agent of one of the dealers mentioned in the commission agreement would call, and also asked for prices on certain leather. The letter was returned with the indorsement: "We refer you to our letter of June 26, 1914. McKay Leather Co." The court, in effect, instructed the jury that, if respondent repudiated the contract without just or legal cause, the appellants could treat such repudiation as putting an end to the contract, and that, if such repudiation resulted in damage to appellants, "in considering the amount of such damage they could allow as damages the profits that would have been realized during the full term of the contract by carrying it out," and for the purpose of ascertaining the same could consider "the profits which the plaintiffs had made under the contract before the breach." The court refused respondent's request that the jury be instructed that the recovery must be limited to commissions earned under the contract.

As the appellants did not agree to give all or any definite portion of their time to respondent's business, it was wholly optional with them whether or not they would endeavor to secure orders for respondent. Appellants' commissions were to be based upon sales actually made. The sales made were not only dependent upon the effort put forth by the plaintiff, but also upon the number of other agents of defendant in the field competing with the plaintiffs, and as well upon the condition of the market. The case differs materially from an exclusive agency. In the case of an exclusive agency the loss suffered by the wrongfully discharged agent has been "measured by the sales actually made in the territory in which the agent had exclusive authority to sell" (Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, 110 Pac. 460), or by the loss of profits (Bredemeier v. Pacific Supply Co., 64 Or. 576, 131 Pac. 312). In Corpus Juris, vol. 2, p. 790, the rule is thus stated:

> "The measure of damages to which the exclusive agent is entitled where the principal, in violation of his contract, sells his goods in the agent's territory, is the actual loss suffered by the latter, and that ordinarily is the commission which would have accrued to him, if he had made the sale in person. Speculative damages are not recoverable. Thus, where the compensation of the agent is a commission on sales by him, damages on the basis of the suppositive sales are not recoverable, unless it is shown that the sales would in fact have been made by the agent."

In the case of Parke v. Frank, 75 Cal. 364, 17 Pac. 427, this court, in determining the measure of damages in a case of a breach of an agency contract, said:

> "The plaintiffs (the agents) very properly made no effort to establish the profits they might have made, during any definite period, had defendant complied with his contract. From the nature of the case such damages must have been purely speculative."

To the same effect, see Beck v. West, 87 Ala. 213, 6 South. 70, and Washburn v. Hubbard, 6 Lans. (N. Y.) 11.

In the case of McConnell v. Corona City Water Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171, the question of future profits as an element of damage for breach of contract is discussed. The contract was for driving a tunnel. It was held that the profits to be made in driving the remaining portion of the tunnel were properly allowed, based upon the profits made up to the time of the breach. After stating the general rule that prospective profits are too speculative and remote to justify an award, it is said:

> "Such is the undoubted rule, but it is to be noted that this is not an objection to the inclusion of profits as a proper element of damages, but is a declaration merely that when they are too speculative and remote to be capable of anything like reasonable ascertainment, when they are collateral merely and do not arise directly or by natural consequence out of the tort complained of, they cease to become a proper element. * * * No one may contest the soundness of this principle, but the converse of it is equally true, that where prospective profits are not too speculative and remote, where they do arise directly and as a natural consequence out of the injury, they are always allowed as an element of damage."

[1, 2] In the instant case as to the damage suffered by the plaintiffs by reason of the refusal to further recognize them as agents, the profits to be realized as commissions on purely suppositive sales were under the circumstances too speculative to justify a recovery; but the contract provided a commission on sales made to certain named dealers, whether made directly or by reason of the plaintiffs' agency, and we think that the commissions on such sales are sufficiently certain to justify a recovery thereof. While not strictly an exclusive agency, it is in some respects even more definite and certain. The respondent claims, however, that there was nothing in the contract to prevent other agents appointed by it from soliciting the trade of these named dealers, and that sales made by such other agents of defendant ought not to be considered in estimating profits. It may be that some of the orders given by such dealers would have been secured by

other agents, but, as was said in the case of McConnell v. Corona City Water Co., supra:

> "As these were matters which could not be determined except by a completion of the contract, which defendant's conduct had prohibited, the court was justified in accepting the evidence, which under the circumstances was the best and most convincing that could be offered."

Since the trial, the term of the agency has fully expired, and the damages actually suffered can now be more certainly ascertained by the proof of sales actually made to the designated dealers.

Order affirmed.

We concur: MELVIN, J.; LORIGAN, J.

179 Cal. 570

SMITH v. UNITED CRUDE OIL CO.

(L. A. 4314.)

(Supreme Court of California. Jan. 4, 1919.)

1. LANDLORD AND TENANT 🔑146—LEASE—"INCUMBRANCE."

Where the lessees agreed to keep premises free of incumbrances and liens, nothing being said as to subletting, a sublease could not be considered an "incumbrance" within the meaning of the lease.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbrance.]

2. LANDLORD AND TENANT 🔑134(3)—USE OF PREMISES FOR PURPOSES NOT CONTEMPLATED.

Civ. Code, § 1930, providing that, when a thing is let for a particular purpose, the hirer must not use it for any other purpose, and, if he does, he is liable to the latter for damages resulting, or the latter may treat the contract as rescinded, as far as the remedy is concerned, applied to a subsequent unwarranted use of premises by a lessee under lease executed prior to the amendment of such statute.

3. LANDLORD AND TENANT 🔑80(2)—VIOLATION OF COVENANT BY SUBTENANT.

A lessee is liable in damages to the lessor for improper use of the premises by a sublessee, under Civ. Code, § 1930.

4. MINES AND MINERALS 🔑79(7)—OIL LEASE—RENTS—SUBLETTING.

Where owner leased land to oil company for development of oil, lessee having right to possession of so much of surface as was necessary, and oil company sublet part thereof to one who used it for a purpose not contemplated, owner was not entitled to recover from lessee rents collected from subtenant; his remedy being for damages, under Civ. Code, § 1930.

In Bank.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Mark B. Smith against the United Crude Oil Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. E. Whitaker, of Bakersfield, and Frank Short, of Fresno, for appellant.

W. W. Kaye, of Bakersfield, Anderson & Anderson, and Kaye & Siemon, of Bakersfield, for respondent.

WILBUR, J. Plaintiff and defendant are the successors of the lessor and lessee, respectively, in a 20-year lease executed November 27, 1900, of 20 acres of land for the development of oil, reserving a royalty therefrom. On May 6, 1910, defendant sublet for five years two pieces of land, 150 by 250 feet each, in the northwest and northeast corners, respectively, of said 20 acres, to the Associated Supply Company, for the erection of the necessary buildings and the carrying on of an oil well supply business thereon, reserving a rental of $100 per month. Plaintiff brought this action, alleging that his predecessors were the owners of "the north half of the southeast quarter of the northeast quarter of section 2, township 11 north, range 24 west, S. B. B. & M. in Kern county, California," and that "said owners as lessors executed to A. C. Leibdedofer and E. H. Loveland, as lessees, that certain indenture of lease bearing date on said day, wherein and whereby said lessors leased, let, and demised to the said lessees the said land for the term of 20 years from and after said day, for the purposes in said lease set forth, and thereupon said lessees entered into and upon said land and took possession thereof under said lease," and set forth a copy of said lease, and made the same a part of his complaint. Plaintiff alleged the subletting to the Associated Supply Company "for a purpose not contemplated" by the provisions of the lease, claiming that the execution of the sublease created an incumbrance upon the land, in violation of a covenant of the lease, and, because of said incumbrance, demanded a decree forfeiting said lease, an accounting for royalties, and "for all funds * * * received from the Associated Supply Company, * * * for the use of any surface rights of said premises," and for "judgment for all sums found due him by said accounting." The defendant did not deny the collection of the $100 per month rental, but in answer to the claim of forfeiture alleged facts showing that plaintiff was estopped from claiming a forfeiture, by reason of his own delay in bringing the proceedings after knowledge of the contract between the defendant and the Associated Supply Company, during which time defendant had spent more than $15,000 in further development of the property, plaintiff having during that period received the rental reserved by him. At the trial plaintiff abandoned his claim for an accounting for royalty, and merely proved the existence of the sublease. The court rendered judgment for plaintiff for the full amount of the rents ($5,843.20) collected by the defendant from the Associated Supply Company, and refused to declare a forfeiture of defendant's lease on the ground of estoppel by reason of plaintiff's acquiescence in the contract of the Associated Supply Company. Defendant appeals.

[1-3] Let us first consider plaintiff's claim that by the sublease in question the defendant violated the provision of the lease against creating incumbrances upon the land. The lease provided that all the expenditures in connection with the boring for oil, erection of derricks, pumps, pipes, engines, tanks, and material should be provided by the lessees at their own expense, and that they should also furnish all labor employed in the development of the premises and the production of oil, "and the lessees hereby agree that they will at all times keep said premises free and clear of all incumbrances and liens, particularly mechanics', materialmen and laborers' liens caused by reason of any debt or obligation contracted or handed down by lessees under the terms of this agreement. Lessees agree to pay all taxes that may be levied upon the personal property and upon their portion of the oil stored on said premises." There was no agreement in the lease against subletting. The lessee, therefore, had a right to sublease portions of said land for the purposes specified in its lease, namely, the development of oil. Chandler v. Hart, 161 Cal. 405, 419, 119 Pac. 516, Ann. Cas. 1913B, 1094. Such a sublease, therefore, could not be considered an incumbrance within the meaning of the lease. Plaintiff's contention in this respect, then, narrows down to the proposition that the sublease is for purposes not contemplated by or within the provisions of the lease. Upon this subject section 1930 of the Civil Code provides:

> "When a thing is let for a particular purpose the hirer must not use it for any other purpose; and, if he does, he is liable to the letter for all the damages resulting from such use, or the letter may treat the contract as thereby rescinded."

The fact that, in the instant case, the use for a purpose not contemplated by the lease is by a subtenant does not change the situation. In effect, the lessee, through its subtenant, is using a portion of the land for purposes not contemplated by the lease. Section 1930 of the Civil Code prescribes the remedy in such cases. It is pointed out by the respondent that this section was amended in 1905, subsequent to the lease of November 27, 1900, between the predecessors of the parties herein. The amendment, however, occurred before the use of the premises by the subtenant, and the remedy, therefore, is that prescribed by the law in effect at the time of the violation of the lease. The complaint does not aver any damage, nor was proof offered of any damage by reason of said mentioned use. Respondent, however, now claims that his action is not for a violation of the covenant against incumbrances, but rather one for "money had and received," and seeks to sustain the judgment upon the theory that appellant has collected rents to which it is not entitled and for which it is liable to respondent. This argument, in turn, is based upon the contention that by the "oil lease" respondent gained no right in the surface of the land (citing Brookshire Oil Co. v. Casmalia, etc., Co., 156 Cal. 211, 103 Pac. 927), and that its lease to the Associated Supply Company was without right or authority, and that thereby it became liable for the use and occupation of said surface, and that the rental received therefor was a proper measure of its responsibility for such wrongful use and occupation. Without pausing to consider the novel proposition that an action for the forfeiture of a lease and an accounting for rentals can be considered an action on the common count for money had and received, we will consider the merits of respondent's position. The lease in question makes no reservation whatever of the surface, as was the case in the lease considered in Brookshire Oil Co. v. Casmalia, etc., Co., supra, and no such reservation of the surface as that contained in the lease considered in Chandler v. Hart, supra (161 Cal. pp. 406, 410, 119 Pac. 516, Ann. Cas. 1913B, 1094). Respondent's predecessors by said lease did "grant, lease, let and demise unto the said lessees (appellant's assignors), and said lessees hereby take and accept of and from said lessors, the exclusive right to mine, dig, excavate, bore and drill for, and otherwise to collect, develop and obtain * * * petroleum * * * etc., * * * also to sever and remove said substances" from said 20 acres, describing them, "also the right to enter in and upon the premises * * * to construct roads, etc., needed to carry on the said business and the said running operations. To have and to hold the premises described for twenty years for the purpose and use aforesaid, * * * to take immediate possession by placing an employé on said land and to commence the work of developing said land for oil by placing a derrick thereon by December 20th, etc. To continue drilling wells at the rate of two each year until ten wells are sunk, and as many more as the lessees desire, but no well to be drilled within seventy-five feet of other land owned by the lessors." In the event of the failure of the lessees to drill within the time limit as aforesaid for such work, "the right to drill the same, or any other wells, shall cease and be forfeited, *together with all the lands covered by this lease* (italics ours) that are not within seventy-five feet of a well drilled or being drilled. * * * Said lessees agree to pay to said lessors as rent or royalty *for the premises leased* one-fourth part," etc. It was also agreed that the lessees might, within 12 months buy "the whole of the above-described lands." The lessees had a right to sink wells upon any and every part of said land not within 75 feet of the lessor's land, and to the possession of so much of the surface thereof as was necessary for such purpose. This right extended to the two parcels sublet by the appellant. The case, therefore, in this view, again resolves itself into the proposition that the appellant, by its subtenant, has been using said premises for a purpose not contemplated by the lease. Respondent, in his complaint, takes the position that the parcels sublet were included in the premises let, for he alleges that the 20 acres had been leased to the appellant, that the leased premises had been incumbered by the sublease, in violation of the covenants in the lease, and for that reason demanded a forfeiture of the lease.

[4] We are therefore satisfied that plaintiff is not entitled to recover the amount of rents collected by the appellant from its subtenant, on the theory that such sublease was a violation of the covenant against incumbrance, and, for that reason, that the judgment should be reversed. Nor was the respondent entitled to recover such rents upon the theory that his complaint was, in effect, an action for money had and received. His remedy was for damages under the provisions of section 1930 of the Civil Code.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

(179 Cal. 528)

In re PAULSEN'S ESTATE.

UNITED STATES FIDELITY & GUARANTY CO. v. SUPERIOR COURT OF SAN DIEGO COUNTY et al.

(L. A. 5816.)

(Supreme Court of California. Dec. 31, 1918.)

1. Certiorari 🔑29—Availability—Error.

The writ of certiorari lies only where an inferior court or tribunal has acted without, or in excess of, its jurisdiction, and is not available to attack mere error.

2. Courts 🔑36—Jurisdiction—Jurisdictional Fact.

A court whose authority to act depends upon the existence of a given fact can act only upon evidence tending to establish such fact.

3. Certiorari 🔑64(2)—Scope of Review—Jurisdictional Fact.

Court's review under writ of certiorari extends, not only to the whole of the record of the lower court, but even to the evidence itself, where necessary to determine a jurisdictional fact.

4. Executors and Administrators 🔑4—Appointment—Proof of Death.

On application to the superior court for appointment of administrator, the death of the alleged decedent is a jurisdictional fact.

5. Evidence 🔑322(3)—Hearsay—Reputation—Death.

On application for administration upon estate of applicant's sister alleged to have died in Denmark, letters to applicant from members of family in Denmark telling of decedent's death and burial and of monument erected over the grave, of which a photograph had been sent to applicant, were admissible in proof of death under Code Civ. Proc. §§ 1852, and 1870, subd. 11.

6. Evidence 🔑285, 290—Common Reputation—"Pedigree."

The term "pedigree," in Code Civ. Proc. § 1870, subd. 11, providing that evidence may be given of common reputation existing previous to controversy in cases of pedigree, and section 1852, providing that such evidence is admissible, where in the nature of a declaration, act, or omission of a member of a family who is a decedent or out of court's jurisdiction, embraces not only descent and relationship, but also birth, marriage, and death, and times when these events happened.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pedigree.]

7. Evidence 🔑288—Common Reputation in Family—"Pedigree."

An application for administration involving right of succession, questions of descent and inheritance, and facts concerning death and time of death and applicant's preferred right to appointment, under Code Civ. Proc. §§ 1365, 1413, *held* a case of pedigree within section 1870, subd. 11, and section 1852, providing for admissibility of evidence of family reputation in cases of pedigree.

In Bank.

Certiorari to Superior Court, San Diego County; S. M. Marsh, Judge.

In the matter of the estate of Bjelka Paulsen, deceased. Certiorari by the United States Fidelity & Guaranty Company, a corporation, against the Superior Court of San Diego County, and the Honorable S. M. Marsh, Judge of said court, to review an order of such court appointing Ingina Ostergard special administratrix of the estate of Bjelka Paulsen, deceased. Affirmed.

Patterson Sprigg, of San Diego, and Thomas, Beedy & Lanagan, of San Francisco, for petitioner.

Bischoff & Thompson, of Escondido, for respondents.

SLOSS, J. A writ of certiorari was issued by the District Court of Appeal for the second Appellate District to review an order of the superior court of San Diego county appointing Ingina Ostergard special administratrix of the estate of Bjelka Paulsen, deceased. A return was made, and the reviewing court gave judgment annulling the order of appointment upon the ground that the superior court had acted without any competent evidence of the jurisdictional fact of the death of the alleged decedent. A prior order appointing said Ingina Ostergard special administratrix of the estate had theretofore been annulled on certiorari by the same appellate court. Est. of Paulsen, 170 Pac. 855. No petition for transfer of the earlier proceeding was presented, but the later one has been ordered to this court for hearing and determination.

The petitioner for the present writ, as for the former one, is United States Fidelity & Guaranty Company, a corporation. Its relation to the order of appointment made by the superior court is set forth in the opinion of the District Court of Appeal on the first writ. In each of the two proceedings before it, that court held such petitioner to be a party "beneficially interested." Code Civ. Proc. § 1069. We pass this point, which is preliminary and of relatively minor importance, with the mere statement that we regard the correctness of the conclusion reached thereon as open to grave doubt. The case may more properly, we think, be decided on the merits of the attack directed against the jurisdiction of the superior court.

[1-4] The writ of certiorari is not available to attack mere error; it lies only where an inferior court or tribunal has acted without or in excess of its jurisdiction. Pac. Tel., etc., Co. v. Eshleman, 166 Cal. 640, 694, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. Where authority to act depends upon the existence of a given fact, the inferior court or tribunal can act only upon evidence tending to establish such fact. The review under the writ extends, "not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact." Schwarz v. Superior Court, 111 Cal. 106, 112, 43 Pac. 580. It may readily be conceded that the superior court is without authority to appoint an administrator of the estate of a living person, and that, on an application for letters, the death of the alleged decedent is a jurisdictional fact.

On the hearing in the superior court, the petitioner, Ingina Ostergard, was sworn as a witness. She testified, on direct examination, that she was a resident of this state; that Bjelka Paulsen was her sister, had been residing in Denmark, and had died about the 20th of November, 1914. The witness had first learned of her said sister's death through a cablegram from her (the decedent's) daughter. Upon cross-examination Miss Ostergard testified that she had been in this country for ten years; that when she left Denmark, where her abode had been, her sister, Bjelka Paulsen, was still alive; that she had not seen her sister since that time. Her information was that derived through the cablegram above mentioned, and through letters received from another sister and from the children of Bjelka Pausen, written from the place where Bjelka Paulsen had died. She had also received a photograph of the monument on the grave of her said sister. The cablegram announcing the death of Mrs. Pausen was offered in evidence.

The petitioner's claim is that this evidence constituted hearsay merely, and that it furnished no basis upon which the court below could find the fact of death. Proof of death, it is said, should have been made by the testimony of some one who had seen the dead body of Mrs. Paulsen, or, at least, had personal knowledge of facts from which it might reasonably be inferred that she had died. No such witness being available within the jurisdiction, a commission should have been issued to take the testimony abroad.

[5] It is quite apparent that under this view of the law, if it be the correct one, there might be considerable difficulty in obtaining letters of administration of the estate of a person whose death had occurred far beyond the boundaries of the state. In any event, a prompt grant of letters, however necessary for the preservation of the estate or the protection of the interests of the heirs, would most often be impossible in such a case. Upon testimony like that here offered (assuming its truthfulness), the ordinary mind, unhampered by an acquaintance with technical rules of evidence, would, we think, have little hesitation in forming the belief that Mrs. Paulsen was, in fact, dead. We should regret to be obliged to hold that a court of law is without authority to receive such testimony, or to act upon it. The law does not, we think, impose such necessity upon us. Under section 1870 of the Code of Civil Procedure, evidence may be given of "(11) Common reputation existing previous to the controversy, * * * in cases of pedigree. * * *" And section 1852 of the same Code declares that—

> "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible."

These provisions enunciate, in statutory form, a long-established and familiar exception to the general rule excluding hearsay. 1 Greenl. Ev. (16th Ed.) § 114b et seq. See Estate of Heaton, 135 Cal. 385, 67 Pac. 321. When the applicant for letters testified that she had heard from the various members of the family residing in Denmark (i. e., "out of the jurisdiction") that Mrs. Paulsen had died and been buried there, and that a monument, a photograph of which was sent to the applicant, had been erected over the grave, she furnished evidence which, under the express provisions of our statute, the court was authorized to receive and consider as tending to show that the fact that Mrs. Paulsen was dead was a matter of common reputation in her family. Testimony of like character has frequently been held to be admissible in proof of death. In Anderson v. Parker, 6 Cal. 197, a case in which it was incumbent upon the plaintiff in ejectment to show the death of his ancestor, the court said:

> "We are of opinion that hearsay information of the death, derived from the immediate family of the deceased, is sufficient prima facie to establish the fact, and was properly admitted."

See, also, Secrist v. Green, 3 Wall. 744, 18 L. Ed. 153; Morrill v. Foster, 33 N. H. 379; American Life Ins. Co. v. Rosenagle, 77 Pa. 507; Mason v. Fuller, 45 Vt. 29; Eaton v. Tallmadge, 24 Wis. 217; Van Sickle v. Gibson, 40 Mich. 170.

[6] It is said, however, that this is not a case of pedigree. "The term 'pedigree' embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened." 1 Greenl. Ev. (16th Ed.) § 114f. Whether evidence of reputation or declarations may be given wherever proof of the facts of birth, marriage, or death may be relevant, or only in litigation in which the matter of descent is directly in issue, is a point upon which the authorities are in conflict. The English rule, followed in some American jurisdictions, is that evidence of the kind under discussion is admissible only in the latter class of cases. The majority of American jurisdictions have, however, adopted the broader rule of permitting the evidence in all cases where the fact is relevant. 1 Greenl. Ev. (16th Ed.) § 114g; Wig. Ev. § 1503. If a choice between the opposing views were required here, we should incline to the doctrine last stated. As was said by Bigelow, C. J., in North Brookfield v. Warren, 16 Gray (Mass.) 171, 174:

> "If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation."

The petitioner points with confidence to People v. Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256, where this court used expressions indicating an acceptance of the narrower rule. But what was there said was not necessary to the decision, which seems to have gone, finally, upon the ground that the declaration offered to show the date of the birth of a child (i. e., an entry in a Bible) should have been rejected because the declarant (the mother) was herself present as a witness at the trial. In two other cases, one decided after People v. Mayne, the court held that evidence of the kind there rejected had been properly received. People v. Ratz, 115 Cal. 132, 46 Pac. 915; People v. Slater, 119 Cal. 623, 51 Pac. 957.

[7] We need, not, however, undertake to define here the exact class of cases which may be said to involve questions of pedigree, within the meaning of the rule under discussion. People v. Mayne was a prosecution for acts alleged to have been committed upon a girl under a given age. There is no similarity between such a case and an application to a probate court for letters of administration. In order to establish her preferred right, as a relative, to appointment, the applicant alleged, and might have been called upon to prove, not only the fact of death, but her own relationship to the decedent and her interest in the estate. Code Civ. Proc. §§ 1365, 1413. The right of succession was thus necessarily presented for determination. Furthermore, the grant of letters is but a step in a proceeding having for its purpose the administration and distribution of the estate of a decedent. Such a proceeding directly involves questions of descent and inheritance, and, as incidental thereto, the facts of the death and time of death of the alleged decedent. Under any reasonable interpretation, such a proceeding should be held to be a case of pedigree.

We conclude, therefore, that the court below was warranted in accepting the testimony of Miss Ostergard as competent evidence tending to prove the death of Mrs. Paulsen.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; LORIGAN, J.

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36 Cal. App. 342

LOUIS M. HICKMAN v. JOHNSON.

(Civ. 1780.)

(District Court of Appeal, Third District, California. Feb. 21, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

1. FRAUD 🔑47—ACTION FOR FRAUD—PLEADING.

A cross-complaint, based on fraudulent representations of plaintiff, must show that defendant was damaged by plaintiff's conduct.

2. FRAUD 🔑47—DAMAGES—PLEADING—SUFFICIENCY.

In action on note representing balance of purchase price of lands and to foreclose mortgage given to secure payment, defendant's cross-complaint, based upon fraudulent representations of plaintiff as to ownership of an irrigation ditch, *held* insufficient to show that defendant was damaged by representations.

3. DAMAGES 🔑62(1)—INCURRING EXPENSE—KNOWLEDGE OF FRAUD.

Where vendee of land, sued on contract, cross-complained for fraudulent representations as to title to irrigation ditch, and after knowledge of the fraud planted a crop, loss caused by want of irrigation is not an element of damage.

4. FRAUD ⚷42—PROMISE TO DO SOMETHING IN THE FUTURE—PLEADING.

To state a cause of action for fraud based upon a promise to do something in the future, it must be alleged that the promise was made with the intent to deceive or mislead; it being insufficient to allege that promise was false and fraudulent.

5. FRAUD ⚷34—ACTION—CONDITION PRECEDENT—TENDER OF AMOUNT DUE.

Defendants' counterclaim, based upon fraudulent representations of plaintiff vendor with reference to irrigation ditch, was insufficient, where it did not show that defendant had tendered the difference between the damages suffered because of representations and amount due under the contract; defendant having elected to stand upon the contract which is executory and not executed.

6. VENDOR AND PURCHASER ⚷122—REPUDIATION OF CONTRACT IN PART.

If purchaser, instead of disavowing the contract when he discovered the fraud, chooses to appropriate whatever advantages he may receive through the terms of the contract, he cannot repudiate the terms that are of advantage to the other party.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Louis M. Hickman, a corporation, against William J. Johnson. From a judgment decreeing the foreclosure of a mortgage and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

L. J. Maddux, of Modesto, and H. C. McPike and James F. Peck, both of Oakland, for respondent.

BURNETT, J. This appeal is from the judgment decreeing the foreclosure of a mortgage and from the order denying the motion for a new trial.

The only complaint against the action of the court is based upon the order sustaining the demurrer to the amended cross-complaint and dismissing it from the files.

The action was brought upon several promissory notes for the sum of $24,075 and interest and for the foreclosure of a mortgage to secure the payment of the same. The notes provided that in case of a failure to pay the interest, as it became due, the payee might elect to consider the whole amount due and bring an action accordingly. There is no controversy as to the failure of the defendant to make the required payments of interest. Indeed, the only payment made by him was the sum of about $6,000 on the selling price of $30,175, made at the time of the execution of the conveyance and of said promissory notes. The defense, however, upon which defendant relied and still relies is based upon the claim of fraudulent representations made by the plaintiff. Involved therein are two elements or examples of fraudulent conduct. The first relates to a misrepresentation as to the ownership of a certain ditch, known as the "Dallas Ditch"; the second, to the failure of plaintiff to construct another ditch from the said Dallas ditch to the land conveyed by plaintiff to defendant.

The material representation as to the Dallas ditch which the defendant claims to have been fraudulent is as follows:

> "That as an inducement to enter into the said contract of purchase, that is to say, as an inducement to pay the said purchase price, execute the said notes and mortgage, and accept the said land, the said plaintiff, through its agents, officers, or representatives, represented to this defendant that it was able and entitled to grant to him the right to use the said Dallas ditch referred to in said agreement, and that said Dallas ditch was of sufficient size to irrigate all of the land entitled to be irrigated therefrom, and more particularly the premises conveyed to this defendant, and that it carried at least 27 second feet of water."

As seen, this is not an express allegation that plaintiff represented that it owned the said Dallas ditch. But we may accept it as a sufficient averment of that fact. This ownership is negatived in appropriate language, as is also the capacity of said Dallas ditch to supply the needed water.

Again it is alleged:

> "That at said time it was represented to this defendant, in said agreement of April 26th, that the said plaintiff would make an extension of what is known as the 'Dallas Ditch,' and that said extension would be brought west and flumed across the Ceres canal on the west line of said land at a point north, and that said ditch and flume would be complete and ready for the conveyance of water therein by October 1, 1910. That all of said representations were false and fraudulent and were known by the plaintiff and its agents to be false and fraudulent, and were made with the specific purpose of inducing this defendant to enter into the said transaction and agreement, and did so induce him."

[1] We may assume for the purposes of the case that said representations were material, and that defendant had a right to and did rely upon them. But it is apparent that an additional element must be shown in order to constitute a cause of action in behalf of defendant, and that is that he was damaged by said conduct of the plaintiff. If it appears from said cross-complaint that there is no sufficient allegation of facts to show that defendant was injured without his own fault by the conduct of plaintiff—reprehensible as it might be—then the action of the court in sustaining the demurrer to said

amended cross-complaint was entirely justified. It is claimed by respondent that such is the case, and this consideration may invite inquiry.

[2] We may first direct our attention to the injury, if any, caused by the plaintiff's representations as to the ownership of said Dallas ditch. It is apparent that there is no express allegation as to any appreciable damage done to the defendant by reason of the failure of the plaintiff to convey the ownership of said ditch. There is no averment as to what said ditch cost, or of its value, or what expense would be incurred in obtaining a substitute for it, nor how much the market value of the land would be affected by the question as to whether the said ditch was appurtenant thereto.

Indeed, in reference to both specifications of fraud, it may be said that the allegations of damage are quite defective. We may notice them briefly.

The first is:

> "That said land without water is not worth to exceed $20 per acre, and is only valuable in an amount greater because of the capacity or power of obtaining water, and if the said plaintiff fails to furnish the adequate means for irrigating said premises, then said premises not irrigated are not worth to exceed $20 per acre."

But it is clear from the other allegations of the cross-complaint that plaintiff did not promise to furnish water to said lands, and it is quite apparent that the ownership of the Dallas ditch is entirely distinct from the ownership of sufficient water to irrigate said premises.

[3, 4] Again, special damage is claimed in consequence of the money expended in planting a crop, and of the fact that the crop failed and perished for lack of water, and "that said failure to obtain said water was caused wholly by the failure of the plaintiff to furnish the defendant with the necessary ditches to convey the said water to his said land as agreed by it and hereinabove set forth." The failure of said crop was placed at the sum of $5,200, and the cost of putting in the crop at the sum of $600, but it is apparent that this element of damage cannot be considered for the reason that, according to the allegations of the cross-complaint, the defendant, before planting said crop, had complete knowledge that plaintiff did not own the said Dallas ditch and could not therefore convey any interest in it to the defendant, and also that it had failed according to its agreement to complete an adequate connecting ditch, and, indeed, it further appears that the plaintiff had refused to make good its said representations. Therefore, if defendant, with knowledge of these facts and the failure of plaintiff to complete its agreement, planted a crop, incurring the cost thereof, and took a chance of having a crop without irrigation, it must be apparent that any loss thereby incurred must be chargeable to his own want of care, no matter how remiss might have been plaintiff in its conduct toward the defendant. Besides, it may be said, as to the allegation in reference to the connecting ditches, that it was a promise to do something in the future, and, in order to state a cause of action for fraud, it must be alleged that said promise was made with the intention of deceiving or misleading the defendant.

There is no such allegation. It is not sufficient to allege that such promise was false and fraudulent. Rheingans v. Smith, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140. Then follows this allegation:

> "That it would cost this defendant the sum of at least $3,000 to acquire rights of way and construct an irrigation ditch sufficient for the carrying of the water from the distributing lateral or canal of the Turlock Irrigation District sufficient to irrigate the said premises, and and that unless such ditch is constructed in accordance with said agreement the defendant will be compelled to incur such expense."

We may assume that by this averment the cross-complainant intended to state the cost of a waterway that would answer the same purpose as the Dallas and the connecting ditch, if furnished, as represented and agreed, by plaintiff. Thus considered, it may be regarded as an allegation of damage suffered by reason of the dereliction of the plaintiff. It is, however, uncertain for the reason that it does not appear how much it would cost to construct a substitute for the Dallas ditch, concerning which the fraud is sufficiently pleaded.

The only other specification of damage is as follows:

> "That by reason of the failure of the plaintiff to furnish said ditches and comply with said agreement, the consideration for said notes and mortgage has entirely and completely failed, and that without such water the said land is not worth a sum greater than that heretofore paid by this defendant, and that this defendant has been damaged by such breach of contract and failure to comply with the terms of said agreement, in addition to the sums herein elsewhere set forth, in the sum of $9,000."

But, as already seen, there was no promise or agreement on the part of plaintiff to furnish said water to said land, and therefore the difference in value between the land as irrigated and without water cannot be considered. Indeed, this general allegation is nullified, or at least modified, by the averment that it would cost the sum of $3,000 to acquire and construct ditches sufficient for the irrigation of said premises. In other words, it sufficiently appears that the failure of the plaintiff as to said ditches involved a loss in the value of the land to the extent of only $3,000. It is thus apparent that in the respects indicated, the cross-complaint is decidedly open to criticism, but probably it is not fatally so in view of the liberality with which pleadings should be regarded. We may even admit for the present purposes that it legally appears that appellant was damaged to the extent of $8,800 by the fraudulent representations of respondent.

[5] But if we grant a fraud was committed, as claimed by the defendant, there was due on said promissory notes to plaintiff the sum of $15,275, in excess of the counterclaim, together with interest, but it nowhere appears in said cross-complaint that this amount or any amount was tendered or that appellant is ready, willing, or able to pay said amount or any amount. In fact, he insists that he is not required to do so before he can maintain his action for damages; and that brings us to the question, admittedly important and vital, whether the doctrine declared and expounded in the case of Hines v. Brodie, 168 Cal. 507, 143 Pac. 729, is applicable to the cross-complaint of defendant filed herein.

[6] Therein are pointed out the two different remedies that are open to one who has been defrauded in a transaction. One of these is rescission, whereby, upon the discovery of the fraud, he repudiates the contract and offers to return what he has received and seeks a restoration to his original position, claiming, of course, whatever damage he may have suffered by reason of the unconscionable conduct of the other party. The pursuit of the other remedy involves an affirmation of the contract, and also a claim for damages on account of the fraud. There is no claim of rescission in the case before us. It is admitted that the defendant elected to stand upon the contract. In such case it is held in the Hines decision, supra, that he must assume the burdens as well as receive the benefits of the contract. In other words, if, instead of disavowing the contract when he discovers the fraud, he chooses to appropriate whatever advantages he may receive through the terms of said agreement, he cannot in the same breath repudiate the terms that are of advantage to the other party. He can neither affirm nor disaffirm in part. In the said decision, it is declared:

> "Here the vendee is obliged to accept the burden of the contract with its benefits, according to its terms, with the right to a recovery for the fraud based upon the fact that the benefits which he receives are not those which, under the representations of the vendor, he was entitled to receive."

It is therein stated that the true principle is well declared in the following quotation from Whitney v. Allaire, 1 N. Y. 305:

> "It is true that if a party affirms a contract with knowledge of the fraud, he affirms it wholly, and this whether it is executory, or partially executed. But in neither case does he affirm it as a contract made in good faith. He consents to be bound by the provisions of the agreement, but does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement."

It is true that the Hines Case was somewhat different from this in its facts, but the principle announced and emphasized in the decision, is that where the defrauded party affirms the contract, but seeks damages for the collateral fraud, he must, antecedently to his recovery, perform his matured obligations and avow his readiness and ability to perform whatever by the terms of the contract may be required of him in the future. The purchaser therein was not in default, as no installment of the price was due at the time suit was brought, and, of course, the question of performance or default did not arise. But the consideration of ability and willingness to perform the covenants which were to mature in the future did arise, and it was this that the Supreme Court had in view; and it was held to be insufficient to allege that the plaintiff "at the time of said offer to pay, ever since and now is ready, able, and willing to pay said purchase price upon the conditions in said contract *until discovery of said fraud.*" It was this latter phrase, which we have italicized, that the Supreme Court regarded as vitiating the tender. If the party relies upon the contract and seeks its protection he must be ready and willing to meet its demands, not only up to the time of the discovery of the fraud, but at all times during which he claims its benefits.

It is the claim of appellant that a difference must be recognized between an executory and an executed contract. Manifestly, a different situation is created in these two instances. If the contract is executed there is, of course, nothing to be done or performed under its terms. There exists no necessity nor propriety for a tender or offer of performance, and nothing is required of the defrauded party prior to his maintenance of an action for damages for the fraud. But the contract before us is not executed; it is partly executed and partly executory, as was the contract in the Hines Case. Therein the purchaser had paid a part of the purchase price of the land, and had entered into the possession of it. To that extent it was executed. The balance of the price he had not paid, however, nor had he received the conveyance, and therein the contract was executory.

So here, the purchaser paid a part of the purchase price and entered into possession, but he also received a deed. Nevertheless, he owed and still owes the balance of the purchase price, and to that extent the contract is executory. It is true that he gave his promissory notes for the balance, but that constitutes simply written evidence of the indebtedness. He must make the payment of those notes in order to execute the contract. Nor does it matter that he gave a mortgage to secure their payment. That does not relieve him from the obligation to pay the indebtedness, nor would his relation to the contract be different in the case of a mortgage from that of a vendor's lien. In either event there is security for the performance and the duty to perform his promise is just the same.

Nor is there anything inequitable in this requirement. The defendant can avoid it by rescinding after discovery of the fraud. But if he chooses to take advantage of the complete execution of the contract on the part of the vendor, there is nothing unjust in compelling him also to execute before he is permitted to avail himself of the other remedy. Applying this principle to the present case, we may notice that as early as October 1, 1910, appellant discovered the fraud. Nevertheless, he made no effort to rescind, but entered into possession of the property, and thereafter made no further payment either of interest or principal of the indebtedness. The suit was commenced on the notes in April, 1912. The answer and cross-complaint of the defendant was filed in May of the same year. The cause did not come on for trial until January, 1914, when appellant was permitted to file an amended cross-complaint. By stipulation the decision was reserved until the Supreme Court had finally determined the Hines Case. The decree was not rendered, then, until March 31, 1915. Therefore for nearly four years we must presume the defendant remained in possession and enjoyed the property without the payment of any interest or rent, and he may still be in possession. Under such circumstances, it is not unfair to insist that he shall supplement his constructive affirmance by actual performance of the contract.

It is not a question of whether the same result might not be reached by allowing the defendant credit for the fraud, but whether he shall be permitted to blow hot and cold at the same time, and insist upon the contract as far as advantageous to himself, but speculate upon his chances of recovery for the fraud as a substitute for the performance of his own covenants under the contract.

But, at any rate, in the case here it is plain that appellant has suffered damages in a sum no greater than $8,800, and he should, at least, have tendered the difference between that and the amount due under the contract.

We think the decision was just, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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39 Cal. App. 91

Ex parte HITTSON. (Cr. 637.)

(District Court of Appeal, Second District, Division 1, California. Dec. 9, 1918.)

ATTORNEY AND CLIENT ⚿60—DISBARMENT—PRACTICE IN JUSTICE COURT—STATUTES.

In view of Code Civ. Proc. §§ 277, 842, general judgment disbarring attorney, pursuant to section 289 et seq., *held* to deprive him only of the privileges granted by his license, and not to prevent disbarred attorney from appearing as attorney in justice court.

In the matter of the application of W. J. Hittson for a writ of habeas corpus. Petitioner ordered discharged.

Gesner Williams and W. I. Gilbert, both of Los Angeles, for petitioner.

Frank C. Collier, of Los Angeles, for respondent.

JAMES, J. Habeas corpus. Petitioner seeks to be discharged from the custody of the sheriff of Los Angeles county by whom he is held under a writ of commitment issued by the superior court. The proceeding in which the writ of commitment was issued was one for contempt. On October 2, 1918, by judgment of the superior court, this petitioner was disbarred from practicing as an attorney in all the courts of the state. On October 21, 1918, an affidavit was presented to the superior court wherein the affiant set forth the substance of the disbarment proceeding and deposed further that petitioner, during the month of October, had as attorney commenced five suits in the justice's court of Los Angeles township, and had during the same month conducted two examinations of judgment debtors in the same court. With that affidavit as a foundation, the court proceeded to a hearing, and adjudged petitioner guilty of a contempt because it appeared that since the entry of judgment of disbarment petitioner had "been practicing in the justice courts." We wish particularly to point out that the accusing affidavit upon which the contempt proceedings were founded contained no statement charging that the petitioner had in any wise held himself out as an attorney at law or done any act, except to file suits in the justice's court, and there appear for the two examinations mentioned.

But one question is presented by counsel appearing in this proceeding; that being as to whether a judgment of disbarment, general in its terms, may operate to prevent the accused from appearing as attorney in a justice's court. Section 842 of the Code of Civil Procedure provides as follows:

> "Parties in justices' courts may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney."

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

It is, of course, at once conceded that had the petitioner here not pretended to act generally as an attorney at law, but only to appear in the justice's court under the permission given by the section just referred to, and had he been without license as an attorney, no ground would have been afforded for disbarment proceedings. Counsel for respondent, however, suggests that the judgment followed Code of Civil Procedure, § 299, and by its terms precluded petitioner (theretofore a licensed attorney) from practicing as attorney in all the courts of the state. The question is as to whether by the proceeding of disbarment provided in section 289 et seq., Code of Civil Procedure, it is intended that the court by its decree shall be authorized to do more than take away all of the privileges conferred upon the holder of a license to practice law. As we read the sections, they mean nothing more. Referring back to section 277, Code of Civil Procedure, we find that an applicant for admission to practice upon examination, or upon certificate from another state, when admission is allowed, is admitted as attorney and counselor "in all the courts of this state." Section 299, which has already been referred to, provides that the judgment of disbarment shall be that the accused "be precluded from practicing as such attorney or counselor in all the courts of this state," using the precise language which is found in section 277, ante, referring to the admission of applicants. Where the phrase is used in the latter connection, it naturally means that the applicant is admitted to practice in all the courts wherein a license is first required. Such certificate in no wise restricts or enlarges the right of a person to appear as attorney for another in a justice's court. If such is the case, we can find no room for plausible argument sustaining the contention that when judgment of disbarment is entered it does more than take away the rights granted by the order of admission to practice. Without doubt the Legislature would have the right to provide that any person who had been disbarred from the practice of law should be ineligible to appear in a justice's court to represent another, and we venture the suggestion that such legislation is both appropriate and desirable; and we do not intimate that a justice's court may not possess inherent power to refuse to allow a person to appear as attorney for a litigant where such person is known to be dishonest or of disreputable character. Counsel for respondent has cited a New Mexico decision which seems to sustain his view. State v. Marron, 22 N. M. 632, 167 Pac. 9. In so far as it does serve that purpose, we do not concur in its reason or logic. There is a dissenting opinion in the same case. On the other hand, we find in the case of Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418, expressions indicating a contrary view to that expressed by the two judges of the New Mexico court. We have taken this case as it is presented upon the one proposition argued by counsel and illustrated by the facts stated in the affidavit which formed the basis for the contempt proceeding. The case so made, in our opinion, must be resolved in favor of the petitioner.

It is ordered that petitioner be discharged from the custody of the sheriff.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

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36 Cal. App. 556

GRAVELLY FORD CANAL CO. v. POPE & TALBOT LAND CO. (Civ. 1802; Sac. 2741.)

(District Court of Appeal, Third District, California. March 21, 1918. On Rehearing in Supreme Court, in Bank, May 20, 1918.)

1. EMINENT DOMAIN ⟹13—PRIVATE USE.

The power of eminent domain cannot be used by a private person to promote private enterprises, no matter how necessary or advantageous it may be to their success, or however beneficial to the public, under Const. art. 1, § 14.

2. STATUTES ⟹181(1) — CONSTRUCTION — INTENT.

In interpreting a statute, the courts must, so far as possible, arrive at the legislative intent from the language itself.

3. EMINENT DOMAIN ⟹29 — IRRIGATION — "PUBLIC USE."

St. 1911, p. 1407, entitled, "An act regarding irrigation and declaring the same to be a public use," does not confer the right of eminent domain upon a corporation which desires to condemn property for an irrigation canal to be devoted to the irrigation of its lands and none other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use.]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by the Gravelly Ford Canal Company against the Pope & Talbot Land Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Dorsey and W. E. Cashman, both of San Francisco, for appellant.

Edward F. Treadwell, of San Francisco, for respondent.

CHIPMAN, P. J. Action to condemn a right of way for a canal. A general demurrer to the complaint was overruled and defendant answered; a jury was waived, the cause was tried by the court, and plaintiff had judgment, from which defendant appeals on the judgment roll alone.

It is alleged in the complaint that plaintiff is a corporation organized under the laws of this state and was incorporated "for the purpose of distributing, supplying, and delivering water for irrigation purposes, and for domestic use, to the stockholders of said corporation, and to the owners of its capital stock, and to that end to construct canals for the appropriation, diversion, and conveyance of water," etc.; that pursuant to said purposes and on May 23, 1912, said corporation "posted a notice of appropriation of 1,500 cubic feet of water of the San Joaquin river flowing per second by means of a ditch taking out of the north bank of the said San Joaquin river," etc., particularly describing the ditch to be 100 feet wide at the bottom and 125 feet wide at the top and 3½ feet in depth, over and across certain lands and among others three sections of land owned by defendant; that for said purpose "it is necessary that the said plaintiff acquire a right of way 200 feet wide along the line of said canal as above set forth;" that defendant's said land is "about midway between the termini of the said canal, and it is impossible to construct the same for the purposes for which it was intended without passing by, through, over, and upon the said lands"; "that the purpose of the said canal is to irrigate 17,000 acres of land, more or less, situate under the said canal and to the west thereof, and in the townships above referred to."

As showing the reasons and necessity for granting the relief prayed for it is alleged:

> "That the climate of the San Joaquin Valley in which the said land is situated is by nature arid, and the rainfall in said valley is extremely light and insufficient with which to raise and mature profitable crops without artificial irrigation; and said land is by nature arid and will produce little or no crops without artificial irrigation, and without irrigation it is of little value, but the said land is extremely fertile and productive, and can be tilled, plowed, cultivated, and planted to alfalfa, trees and vines, cereals and other crops, and can then become inhabited and become the dwelling place of a large number of people, and the value of the said land and the assessed value thereof would be greatly increased by the irrigation thereof, and the assessed valuation of the said land for the purposes of taxation would likewise be increased by the irrigation of the said land, and by reason of the irrigation thereof valuable improvements would be placed upon the said land, and, if the said land can be properly irrigated and proper works constructed for the irrigation thereof, the value thereof and the assessed value thereof will be greatly increased, and further valuable improvements can and will be placed upon said lands and valuable crops of alfalfa, trees, vines, cereals, and other crops can be planted and grown thereon, and the irrigation of said land is a public use and a public necessity, and is the public use for which plaintiff seeks to acquire the right of way described herein, and is the public use in behalf of which it is sought to construct, maintain, and operate the canal aforesaid. * * * That the use for which the said right of way is sought to be acquired is a public use within the meaning of an act entitled, 'An act regarding irrigation and declaring the same to be a public use,' approved May 1, 1911 (Statutes of 1911, p. 1407), and the said right of way is necessary to the said public use, and the said plaintiff is in charge of the public use for which the said property is sought to be acquired."

The prayer is that said right of way be condemned "for the public use aforesaid, and acquired by the said plaintiff in accordance with the provisions of title 7, part 3, of the Code of Civil Procedure."

The court made the following findings of fact:

> "(1) That each and every, all and singular the allegations of plaintiff's complaint are and each thereof is true. (2) That all of the capital stock of the said plaintiff is owned by Miller & Lux, Incorporated (a corporation), and all of the land situated under the flow of the said canal and intended to be irrigated therefrom is owned by the said Miller & Lux, Incorporated, and the plaintiff was created to irrigate the lands of said Miller & Lux, Incorporated, and none other. (3) That the water diverted by the said plaintiff is diverted from the San Joaquin river by means of a canal taking out at a point referred to in the complaint, and said plaintiff has never applied for or received from any official of the United States government any special permission or permit or authority to construct the said canal or to divert the water of the San Joaquin river into the same."

As conclusions of law, the court found "that plaintiff is entitled to acquire and condemn the property described in the complaint," subject to certain conditions not necessary to be stated, and entered judgment accordingly.

It is conceded that the condemnation sought is for the purpose of enabling Miller & Lux, a corporation, the owner of all the stock of plaintiff company, to irrigate its lands, "and none other." The question is simply this: Does the statute confer the right of eminent domain upon a person who desires to condemn property for irrigation and to be devoted to his private use only?

[1] From the first case down to the last found in the reported decisions of the Supreme Court and Appellate Courts of this state, it has uniformly been held that the power of eminent domain cannot be used by a private person to promote private enterprises, no matter how necessary or advantageous it may be to their success or however beneficial to the public. In Gilmer v. Lime Point, 18 Cal. 229, 251, the court said:

> "The phrase employed in our Constitution is: 'Nor shall private property be taken for public

use without just compensation.' The words 'public use' here mean a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals. * * * It may be a use in which but a small portion of the public will be directly benefited, as a street in a town, a bridge, or a railroad, necessarily local in its benefits and advantages, though it must be of such a character as that the general public may, if they choose, avail themselves of it."

"But," said the Supreme Court in Nickey v. Stearns Ranchos Co., 126 Cal. 150, 152, 58 Pac. 459, "in this state private property may not be taken or damaged for private use at all. It may be taken only for public use after just compensation made or paid. Const. art. 1, § 14." The court said in Amador Queen Mining Co. v. De Witt, 73 Cal. 482, 485, 15 Pac. 74, 75:

> "The plaintiff cannot have a right of way through defendant's mine condemned for its use in working its own mine. The mine of defendant is his private property, and it is clear that the plaintiff asks for the condemnation in order that it may appropriate a way through that property for its private use. This cannot be done."

Cases to like effect might be multiplied. We do not understand respondent to deny that the foregoing is the rule in this state. San Joaquin & K. R. Canal & Irr. Co. v. Stevinson, 164 Cal. 221, 128 Pac. 924, is cited by respondent to the point that, prior to the enactment of the statute of 1911, "one condemning for irrigation purposes was required to supply water to all who were capable of enjoying it." Respondent's contention is, as stated in its brief:

> "That it is in the power of the Legislature to declare irrigation to be a 'public use,' whether the irrigation be by the public generally or by an individual for his own private use, and in answer to appellant's second contention respondent will contend that the statute of May 1, 1911 (Stats. 1911, p. 1407; General Laws, p. 717), has made such a declaration and authorized condemnation for irrigation purposes, whether the public participate directly in the irrigation or not."

Appellant attacks the judgment on several grounds: First, if the act confers the power claimed for it, it is unconstitutional; second, that the act does not authorize condemnation for the use of an individual, but only for the use of the public; third, that plaintiff did not receive any permit from the United States government before making the appropriation of the water which is to be carried through the canal along the right of way condemned by plaintiff in this case. Inasmuch as the judgment in this case, as well as respondent's contention, rests wholly upon the act of 1911, and inasmuch as this is the first case arising under this statute which has been brought to the attention of a reviewing court, it is deemed proper to set forth the entire act. It is as follows:

> "An act regarding irrigation and declaring the same to be a public use. Approved May 1, 1911. The people of the state of California, represented in Senate and Assembly, do enact as follows:
>
> "Section 1. Irrigation in the state of California is hereby declared to be a public necessity and a public use, and the power of eminent domain may be exercised on behalf of such public use in accordance with the provisions of title VII, part III of the Code of Civil Procedure of the state of California; provided, that any person, firm or corporation, exercising the power of eminent domain and in control of water appropriated for sale, rental or distribution, shall not, by this act, be relieved from the duty of furnishing water to irrigate the lands over which any right of way is obtained by condemnation for irrigation purposes as required by an act entitled, 'An act to regulate and control the sale, rental and distribution of appropriated water in this state, other than in any city, city and county, or town therein and to secure the rights of way for the conveyance of such water to the places of use,' approved March 12, 1885, or any other law now in force in this state.
>
> "Sec. 2. This act shall not repeal or modify an act entitled, 'An act to regulate and control the sale, rental and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March 12, 1885, and other acts supplemental thereto and amendatory thereof, nor shall the same be construed to alter or change the law of the state of California as to the duty of any person, firm or corporation in charge of a public use to furnish water.
>
> "Sec. 3. This act shall be in force from and after its passage."

The statute referred to in the act (Stats. 1885, p. 95) declares in section 1 that—

> "The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this state by the several boards of supervisors thereof, in the manner prescribed in this act."

Subsequent sections provide the procedure by which the supervisors are given the power to fix the "rates at which any person, company, association, or corporation, having or to have appropriated water for sale, rental or distribution, in each of said counties, may and shall sell, rent, or distribute the same." Section 11 provides that—

> "Whenever any person, company, association, or corporation, shall have acquired the right to appropriated water, or shall have acquired the right to appropriate such water in this state, such person * * * may proceed to condemn the lands and premises necessary to such right of way, under the provisions of title seven, of part

> third, of the Code of Civil Procedure * * * and all the provisions of said Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this act."
>
> "While the courts have not been in agreement on the precise meaning of the term 'public use,' it has been held, without a single dissenting voice, that it does not lie in the power of a state to authorize the taking of the property of an individual without his consent for the private use of another, even on the payment of full compensation." 10 Ruling Case Law, p. 27.

If, therefore, property can be taken only for a public use, either by an individual or corporation, it becomes important to understand what is meant by the term "public use" and upon what condition water may be taken for a public use.

The courts are not at one as to what constitutes public use for which property may be taken. "One line of decisions holds that 'public use' means 'use by the public,' that is, public employment, and consequently that, to make a use public, a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken. The opposing view is that 'public use' means 'public advantage,' and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, contributes to the general welfare and prosperity of the whole community and, giving the Constitution a broad and comprehensive interpretation, constitutes a public use." 10 Ruling Case Law, pp. 24, 26.

There has grown up the further extreme view, grounded on statutory authority, which authorizes "takings by a private individual to enable him to cultivate his land or to carry on his business to better advantage, in a community so situated that public sentiment approves of such takings, either because they are sanctioned by ancient custom, or because the natural prosperity of the state would be seriously retarded if eminent domain could not be employed for such purposes." Id.

[2, 3] In interpreting the statute of 1911, we must, so far as possible, arrive at the legislative intent from the language itself. Considered in its most favorable light, the statute means just what would be meant had section 1238 of the Code of Civil Procedure been amended by adding "irrigation" to the many "public uses" therein enumerated, in behalf of which the right of eminent domain may be exercised. Why the object was not accomplished by a Code amendment instead of by a separate statute is not apparent, for numerous objects have been added to section 1238 since 1911. But, whatever the reason, the power of eminent domain may be exercised only as provided in title 7, part 3, of the Code of Civil Procedure, and may only be exercised in behalf of irrigation as a public use, for the statute so declared. Unless there is something in the act to indicate otherwise, we must presume that the Legislature used the terms "public use" in the act of 1911 in the sense it had used them in section 1238 of the Code of Civil Procedure, and as interpreted to mean as used in the Constitution. There can be no question as to the position of our Supreme Court upon this question. It has consistently held that "public use" means "use by the public," and that to make a use public a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken. Thayer v. California Development Co., 164 Cal. 117, 126, 128 Pac. 21, where the terms "public use" are defined and many cases cited. Gilmer v. Lime Point, supra.

In declaring in the act of 1911 that irrigation is a public use and that "the power of eminent domain may be exercised on behalf of such public use in accordance with the provisions of title 7, part 3 of the Code of Civil Procedure of the state of California," the Legislature did no more than it has done in making similar declaration as to the large number of other things by the 18 subdivisions of said section 1238. By this section, subdivision 3, canals for conducting or distributing water for various purposes, among them, distributing water for the use of towns, counties, and "the inhabitants thereof," are declared to be public uses and it was held in San Joaquin, etc., Irr. Co. v. Stevinson, supra, "not only that property may be condemned for the canals and conduits mentioned, but that * * * water may be condemned and taken for public use by any person or corporation proposing to apply it 'to the use of the inhabitants of any county.'" Unless the act of 1911 introduces a new rule, there would seem to be ample authority under section 1238 both for taking water for irrigation and for rights of way for ditches or canals to conduct such water. Respondent finds an argument in this fact in favor of its construction of the act of 1911, for the reason, as is contended, that—

> "This being the settled law at the time the statute was enacted, we must presume that the Legislature knew the law as it existed, and sought to make some change therein by statutory innovation. We are to understand, then, that the Legislature intended to change the rule," citing Reed v. Goldneck, 112 Mo. App. 310, 86 S. W. 1104.

We cannot agree with respondent that "a study of the statute will show that the Legislature intended to make a change in the existing law." If we may give any effect to the proviso to section 1 and to section 2, it seems to us such effect tends to refute respondent's construction of the statute, for section 2 expressly declares that the act is not to "be construed to alter or change the law of the state of California as to the duty of any person, firm or corporation in charge of a public use to furnish water." But apart from the proviso and section 2, we think the meaning of the provisions of section 1 immediately preceding the proviso is very plain, and is susceptible of but one construction, and that is, that irrigation is declared to be a public use in the sense that those terms have heretofore been employed, and that the power of eminent domain may be exercised on behalf of such public use in accordance with the Code provisions relating to the subject of eminent domain. The statute nowhere intimates that irrigation as a public use possesses or is given any quality different from any other public use, or that property may be taken for irrigation for the private use of the taker. We do not think, because the Legislature chose to make the declaration by a general statute rather than by an amendment to section 1238, that we are authorized for that reason alone to attribute an intention to the Legislature to give an entirely new meaning to the terms public use. It is not unusual for the Legislature to pass independent acts where the object could be and more properly should be accomplished by Code amendments. Irrigation is not of such state-wide necessity and importance as to make it propable that the Legislature contemplated in its behalf so radical a change in the general policy of the law of eminent domain. There are large portions of the state along the coast where the humidity is so great as to make irrigation wholly unnecessary; there are other extensive portions of the state where excellent crops are produced by the natural rainfall, as it is well known; still other regions are arid and irrigation is necessary to the production of crops. It seems to us that if the Legislature had intended in declaring irrigation to be a public use, that eminent domain may be exercised in its behalf, "whether," as respondent contends, "the irrigation be by the public generally or by an individual for his own private use," such an intention would have been clearly stated. In the absence of any such clearly shown intention, we prefer to believe that the Legislature intended that the terms public use should be given the same meaning as has been given them as found in the Constitution and statutes for over 50 years.

It is obvious that the question hinges on the meaning of the terms "public use." To sustain respondent's contention and to find support for the judgment, we must hold that these terms mean "public advantage" and not "use by the public"; our courts of review must about face and join with those courts that have held the terms to mean anything which tends to enlarge the resources, increase the industrial energies, and promote the production power of any considerable number of inhabitants of a section of the state, or which tends to the growth of towns and the creation of new resources for the employment of capital and labor, or contributes to the general welfare. In the absence of unequivocal statutory direction, we are unwilling to sanction a construction of the terms "public use," found in the act of 1911, which would be so radical a departure from the construction uniformly given them where elsewhere found in the Constitution and laws of the state.

Appellant contends that if the act of 1911 is susceptible of the construction given it by respondent, the act is in violation of section 14, article 1, of the Constitution, which provides that "private property shall not be taken or damaged for public use," etc. The view we entertain of the act makes it unnecessary to consider the question of its constitutionality.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

On Rehearing in Supreme Court.

PER CURIAM. In the petition for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District special complaint is made of that portion of the opinion which reads as follows:

> "Irrigation is not of such state-wide necessity and importance as to make it probable that the Legislature contemplated in its behalf so radical a change in the general policy of the law of eminent domain. There are large portions of the state along the coast where the humidity is so great as to make irrigation wholly unnecessary; there are other extensive portions of the state where excellent crops are produced by the natural rainfall, as it is well known; still other regions are arid and irrigation is necessary to the production of crops."

This portion of the opinion is not in any way essential to the decision, and in denying the application for a hearing in this court we deem it proper to say that we express no opinion thereon.

The application for a hearing in this court is denied.

36 Cal. App. 717

GRAVELLY FORD CANAL CO. v. POPE & TALBOT LAND CO. (Civ. 1801.)

(District Court of Appeal, Third District, California. April 9, 1918. Rehearing Denied by Supreme Court June 6, 1918.)

1. WATERS AND WATER COURSES 🔑157—PAROL LICENSE—DITCHES.

Where a person permits another to go upon his land, make valuable improvements, and expend money in the construction of irrigation ditches across it, he may be estopped to object to a further occupation of the land by the licensee.

2. APPEAL AND ERROR 🔑931(3)—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Where findings of fact and conclusions of law were waived, the appellate court must, upon material questions of fact as to which there is any substantial evidence in support of the judgment, assume that the court properly found such facts in favor of the judgment, but judgment will not be allowed to stand if the evidence was insufficient to support findings essential to sustain it.

3. WATERS AND WATER COURSES 🔑157—PAROL LICENSE—IRRIGATION CANAL.

Facts *held* to show that landowner consented to construction of irrigation canal over his land, and that the only matter to be determined was the compensation to be paid, and that an agreement as to what the compensation should be was not a condition precedent for the right to enter into possession of the strip occupied.

4. LICENSES 🔑43—LAND—DEFINITION.

A "license" is a personal, revocable, and unassignable privilege conferred, either by writing or by parol, to do one or more acts on land without possessing any interest therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, License.]

5. LICENSES 🔑46—LAND—CREATION—IMPLICATION.

A license may be implied from the acts of the parties, from their relations, and from custom, and where the owner of land, with full knowledge of the facts, tacitly permits another to repeatedly do acts upon the land, a license may be implied from failure to object.

6. LICENSES 🔑58(1)—LAND—REVOCATION.

A license by deed or parol under the well-settled rule of the common law is revocable at pleasure, unless under certain circumstances, among them that it is executed or expenditures have been made by licensee on strength of license, it would be inequitable to permit a revocation.

7. EQUITY 🔑67—LACHES.

Courts of equity will discourage laches and delay in the enforcement of rights, and the general rule is that nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence.

8. EQUITY 🔑71(4)—LACHES.

While mere lapse of time may not constitute laches, lying by and acquiescence are important factors in determining whether there has been such laches as to constitute a bar to relief in equity.

9. WATERS AND WATER COURSES 🔑157—PAROL LICENSE—REVOCATION.

Where an owner knew for several years that another person planned to construct an irrigation canal across his land, and entered into negotiations as to compensation, and the other party expended large sums of money in constructing the canal up to and over the land, the landowner was estopped to object to a further use; his only remedy being at law for damages.

10. WATERS AND WATER COURSES 🔑157—LICENSE—CONSTRUCTION OF CANAL.

In an action involving the right of an appropriator of water to maintain an irrigation ditch constructed over the land of another, the question being whether the latter had consented to its construction and was estopped to object thereto, it was immaterial that the taking of the water would interfere with the use of previous appropriators.

Appeal from Superior Court, Madera County; Wm. M. Conley, Judge.

Action by the Gravelly Ford Canal Company, a corporation, against the Pope & Talbot Land Company, a corporation. Judgment for defendant, and plaintiff appeals. Reversed.

Rehearing denied; Angellotti, C. J., and Sloss and Wilbur, JJ., dissenting.

Edward F. Treadwell, of San Francisco, for appellant.

J. W. Dorsey and W. E. Cashman, both of San Francisco, for respondent.

CHIPMAN, P. J. This is an appeal from the final judgment of the superior court of Madera county, in favor of defendant and against plaintiff, and granting a permanent injunction. The parties to the action are the same as in No. 1802, recently decided by this court (178 Pac. 150), wherein plaintiff sought to condemn a right of way over defendant's land under the act of 1911 (Stats. 1911, p. 1407). In that case the lower court sustained plaintiff's right to condemn. Upon review we were constrained to reverse the judgment. The purpose for which plaintiff was organized and the necessity for a right of way over defendant's land were fully set forth in that action and need not be here repeated. It is probable that the learned trial judge, who held plaintiff entitled to condemn a right of way under the act of 1911, granted the injunction prayed for by defendant in the present action on its cross-complaint for the reason that plaintiff should be restricted to its right to condemn. On the other hand, plaintiff, believing it had the right to proceed with the work of constructing its canal, did not rely alone upon its action to condemn, but went forward with its work on the assumption that defendant had consented thereto. Being interrupted in the work by defendant, plaintiff sought to enjoin defendant from interference therewith. Defendant answered and filed a cross-complaint seeking to enjoin plaintiff from proceeding with said work. At the hearing the court granted the injunction prayed for by defendant.

In its complaint, plaintiff alleged, among other facts, the following: That plaintiff is a mutual water company, organized for the purpose of supplying water to its stockholders; that it posted and recorded notice of appropriation of the waters of the San Joaquin river in May, 1912, and surveyed the line of its canal from the San Joaquin river to Fresno river; that a right of way 200 feet wide is necessary; that plaintiff immediately began the construction of the canal and expended over $48,000 in the construction thereof; that, as surveyed, it runs through three sections of defendant's land and describes its location through those sections. Paragraph 8 of the complaint is as follows:

"That during all of the times herein mentioned the said defendant well knew of the plans and surveys of the said plaintiff, and during the year 1912 the said plaintiff in the construction of the said canal entered into and upon the said lands of the said defendant and laid out and surveyed the said canal through the said lands, and in that year commenced the construction of said canal through the said lands, and from time to time has since continued work upon the said canal through the lands of the defendant aforesaid, and has partially constructed the said canal through the said lands for a distance of approximately three miles in length, and has expended on the portion of said canal passing through the defendant's land upwards of three thousand dollars, and the said plaintiff so entered into and upon the said lands and did the work with the knowledge, consent, and acquiescence of the said defendant, and the said defendant at all times knew that the said plaintiff was constructing the said canal on the said lands of defendant, and was spending the money aforesaid, and the said plaintiff is still in possession of said strip of land through the said lands of defendant aforesaid, and is now actually engaged in completing the construction of the said canal through the same."

It is also alleged that defendant's said land is situated midway between the termini of the canal and that the canal is designed to irrigate 17,000 acres of land. Paragraph 12 is as follows:

"That ever since the said plaintiff surveyed the said canal through the said land of defendant, and ever since the said plaintiff commenced the construction of the said canal through the said land of defendant, the said plaintiff and the said defendant Pope & Talbot Land Company have been engaged in negotiations looking to the fixing of the damages which would be caused to the said defendant and its said lands by the occupation of the said right of way in the construction and operation of said canal, and looking to the fixing of the amount to be paid the said defendant therefor, and at all times the said defendant permitted the said plaintiff to continue to construct the said canal through the said land relying upon the representations of the said defendant that the said matters would be amicably adjusted and agreed to, and at all times the said plaintiff in constructing the said canal through the said lands relied upon the consent of the said defendant that it might enter upon said land and construct the said canal, and relied upon the representations of the said defendant that said matters of damages and compensation would be amicably settled and adjusted between them, and also, on the faith of the license so granted by the said defendant to said plaintiff to enter upon the said land and construct said canal, the said plaintiff also constructed other portions of the said canal both north and south of the lands of the said defendant, and which without the said canal and right of way through the said land of defendants would be useless and of no value, and during all of said time the said defendant had full knowledge of all of the things aforesaid and never at any time until the month of December, 1916, in any way objected to the occupation of the said right of way or to the construction of the said canal through the said land."

Paragraph 14 is as follows:

"That the said plaintiff has at all times been and still is ready, able, and willing to pay the said defendant just compensation for the right of way sought to be acquired through its lands for the canal aforesaid, and all damages which will be caused to the said defendant and its said land by the construction, maintenance, and operation of the said canal under and upon the same, and said plaintiff hereby offers and agrees to pay the same, but the said defendant now refuses to fix or agree upon the amount of the said compensation or damages or either thereof, and notwithstanding the willingness of the said plaintiff to pay such compensation and damages the said defendant now does and ever since the month of December, 1916, has refused to recognize the right of the said plaintiff to continue in the occupation of the said right of way or to continue in the construction and completion of the said canal aforesaid through the lands of said defendant."

It is further alleged that, owing to the topography of the country, the canal is located at the only practicable place; that defendant is the owner of the land subject to plaintiff's right to occupy the canal across the same; that plaintiff is in actual possession of the land, and defendant is estopped from interfering therewith. The prayer is that defendant be enjoined from interfering with the continued occupation of the canal and for damages.

A demurrer to the complaint was overruled, and defendant answered in effect denying substantially all the allegations of the complaint. The answer also sets up certain affirmative defenses; that the entire natural flow of the San Joaquin river has been and must be continued to be used by prior appropriators and the use of water through said canal would result in depriving other and richer land of water; that Miller & Lux (incorporated) is the sole owner of the capital stock of plaintiff to whom alone defendant has power to distribute water; that there is no appropriable water at the intake of said canal; that plaintiff does not intend and has no power to put said canal to a public use.

Defendant alleges in its cross-complaint certain facts, stated as follows in defendant's brief:

> "That the defendant is the owner of 20 sections of land in Madera county; that from time to time during November and December of 1916 and 1917, a large force of men with teams and machinery forcibly broke into parts of said land and took up and removed soil therefrom in the construction of the canal; that said entry and work was without any authority or right whatever from the defendant and contrary to its wishes and against and in contempt of its repeated protests; that the location of the line of said canal and construction thereof, so far as it has progressed, practically bisects the said 20 sections belonging to the defendant and prevents the natural surface water flowing from the higher to the lower portions thereof, and the levee constructed along the east bank will back up surface waters and thereby cover large areas of the defendant's ground, drown and destroy the natural grass and herbage and the crops of grain annually produced thereon, and will saturate and water-log the soil and bring to the surface the alkali in the low places and depressions thereof and prevent the growth of any vegetation; that said canal will be impassable for man, beast, or machinery, will require the construction and maintenance of numerous and expensive bridges, and will essentially interfere with the use and enjoyment of the defendant's land and prevent its beneficial use; that plaintiff claims an adverse interest in the defendant's land which is without any right; that plaintiff has not any estate, right, title, or interest whatever in the defendant's lands; that defendant prays, among other things, for a permanent injunction."

To this cross-complaint plaintiff answered, alleging that it entered into the lands with the knowledge and consent and acquiescence of the defendant; incorporated the allegations of its complaint; pleaded the defense of laches and delay; and alleged that it is ready, able, and willing to pay the value of the right of way; and prayed for the relief sought in the complaint.

[1] We think the complaint may be considered as relying upon estoppel, on which, as appellant claims, it is primarily based and that the estoppel arises out of a parol license. It has been held by some courts that where a person permits another to go upon his land, makes valuable improvements, expends money in the construction of ditches or canals, no estoppel arises because the licensee is charged with the knowledge of the licensor's ownership of the land and of the rule of law that the licensor may at any time object to a further occupation of the land by the licensee. Such, however, is not the law in this state.

As the true rule in such cases is matter of contention in the present case, we feel justified in quoting at some length from the decision in Stoner v. Zucker, 148 Cal. 516, 518, 83 Pac. 808, 809 (113 Am. St. Rep. 301, 7 Ann. Cas. 704), which was the case of a parol license to construct a water ditch. Mr. Justice Henshaw, with his usual clearness, stated the views of the court:

> "Appellant contends that a parol license to do an act upon the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable at the option of the licensor, so that no further acts may be justified under it, and this, although the intention was to confer a continuing right, and money has been expended by the licensor upon the faith of the license; and that such a license cannot be changed into an equitable right on the ground of equitable estoppel. To the support of this proposition is offered authority of great weight and of the highest respectability. The argument in brief is that a license in its very nature is a revocable permission; that whoever accepts that permission does it with knowledge that the permission may be revoked at any time; that the rule cannot be changed, therefore, because the licensee has foolishly or improvidently expended money in the hope of a continuance of a license, upon the permanent continuance of which he has no right in law or in equity to rely; that to convert such a parol license into a grant or easement under the doctrine of estoppel is destructive of the statute of frauds, which was meant to lay down an inflexible rule; and, finally, that there is no room or play for the operation of the doctrine of estoppel, since the licensor has in no way deceived the licensee by revocation, has put no fraud upon him, and has merely asserted a right which has been absolutely reserved to him by the very terms of his permission. No one has stated this argument more clearly and cogently than Judge Cooley, who, holding to this construction of the law, has expressed it in his work on Torts. Cooley on Torts (2d Ed.) 364. But that the same eminent jurist recognized the injustice and the hardship which follow such a conclusion is plainly to be seen from his opinion in Maxwell v. Bay City Bridge Co., 41 Mich. 453 (2 N. W. 639), where, discussing this subject, he says: 'But the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements, is so serious that it seems a reproach to the law that it should fail to provide some adequate protection against it. Some of the courts have been disposed to enforce the license as a parol contract which has been performed on one side.' Indeed, the learned jurist with equal accuracy might have stated that the majority of courts have so decided in accordance with the leading case of Rerick v. Kern, 14 Serg. & R. [Pa.] 267 (16 Am. Dec. 497). That case was carefully considered, and it was held that it would be to countenance a fraud upon

the part of the licensor if he were allowed, after expenditure of money by the licensee upon the faith of the license, to cut short by revocation the natural term of its continuance and existence, and that, under the doctrine of estoppel, the licensor would not be allowed to do this. The decision was that the licensor would be held to have conveyed an easement commensurate in its extent and duration with the right to be enjoyed."

In the case of Miller & Lux v. Kern County Land Co., 154 Cal. 785, 99 Pac. 179, the court said:

> "The principal contention upon appeal is that this court should recede from the view which it adopted and expressed in Stoner v. Zucker, 148 Cal. 516 (113 Am. St. Rep. 301 [7 Ann. Cas. 704], 83 Pac. 808), and should adopt the contrary view, that a parol license, regardless of its nature, is always revocable at the will of the licensor. This question was duly considered in Stoner v. Zucker, 148 Cal. 516 [83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704], the conflict of authority was recognized, and the conclusion there expressed deliberately adopted. We perceive no reason for receding from that conclusion."

The Stoner Case was distinguished in Davis v. Martin, 157 Cal. 657, 661, 108 Pac. 866, and in Broads v. Mead, 159 Cal. 767, 116 Pac. 46, Ann. Cas. 1912C, 1125, upon the facts; but the rule laid down in the Stoner Case was in no degree impaired.

We are therefore chiefly concerned with the question whether or not the facts in the present case bring it within the rule enunciated in Stoner v. Zucker, supra. Most of the evidence is found in a somewhat extended correspondence conducted by J. Leroy Nickel, president of Miller & Lux, incorporated, who also testified as a witness for plaintiff, and by W. H. Talbot, president of Pope & Talbot Company, defendant. Mr. Talbot did not testify.

Certain facts may be stated as shown by the evidence without contradiction. Miller & Lux, Inc., owned a large body of land situated between the San Joaquin river and Fresno river, and east of what is known as the Aliso Canal, and extending from the intake of the canal in question at the San Joaquin river northerly about 15 miles to the Fresno river; defendant also owned a large body of land, three sections of which, to wit, sections 9, 21, and 22, township 12 south, range 16 east, are about midway between the termini of said canal. That in surveying the line of said canal it was found unavoidably necessary to pass over parts of these three sections of land in order to furnish water to the Miller & Lux lands lying north of defendant's land. The canal was designated to irrigate about 17,000 acres of the Miller & Lux land which had theretofore been unirrigated. Plaintiff corporation was organized in May, 1912, and all of its stock was owned by Miller & Lux. In that month plaintiff made its appropriation of the water of the San Joaquin river, the object being to carry out the canal enterprise and convey said water for the irrigation of the lands of Miller & Lux and not as a public service corporation. Construction work was done on the canal by Miller & Lux in the spring of 1912 before plaintiff was incorporated, but thereafter the work was prosecuted by plaintiff under an agreement with Miller & Lux. More or less work was done in 1912 for the entire length of the canal, including construction work through defendant's said sections of land. Miller & Lux was in possession of two of defendant's said three sections of land and other of its land as lessee. There was construction work done on the canal in 1912 from its intake for its entire length to Fresno river, through defendant's land as well as through land of Miller & Lux. Mr. Nickel testified:

> "In that year I took up with the representatives of Pope & Talbot Company the matter of their granting a right of way for a canal through those sections of land (9, 21, 22), and from that time until shortly before the commencement of this action (complaint was filed January 9, 1917), these negotiations continued with that company. I, myself, carried on personally the greater part of those negotiations. The greater part of those negotiations were by written correspondence passing between myself and the representatives of Pope & Talbot Land Company. * * * Whatever I did in this matter, I did on behalf of the two corporations I have mentioned." (Miller & Lux, Inc., and plaintiff.)

The witness then produced and there was admitted a number of letters constituting the written correspondence between the parties concerned. It becomes necessary to show the material portions of this correspondence.

The letters are between Miller & Lux, Inc., and the defendant and embrace a period commencing March 29, 1912, and ending December 22, 1916. In the first letter, March 29, 1912, Miller & Lux informs defendant that it has made a survey for a canal from Gravelly Ford to the Fresno river running through certain lands of the defendant, and stating:

> "We desire to purchase from you for this right of way a strip 200 feet wide. This apparently wide strip is necessary for the reason of the large capacity of the canal and its shallow depth necessary on account of the hardpan through a great portion of the country south of your lands. We wish to commence construction at each end of the proposed canal in a few days and sincerely hope we may be able to obtain from you the desired right of way. Kindly let us hear from you stating the price you will charge us for the land required."

March 30, 1912, defendant replied:

> "Before going further into this matter, we would thank you to send us a blue print or at least a rough drawing showing just how this canal is to run through our property. Upon receipt of such a sketch, we shall be glad to take the matter up and advise you further."

On April 1, 1912, Miller & Lux acknowledges receipt of the last above letter and states that a map of the survey is being prepared and the blueprint will be forwarded when completed. April 16, 1912, Miller & Lux writes defendant referring to the letter of March 29th, in which it had made application for a right of way for a canal through defendant's lands and describes the course of the proposed line of the canal. April 18, 1912, defendant replies that, while it can follow the right of way roughly from the description given, it would like to have a blueprint showing the exact course of the right of way "after which we shall then be glad to take the matter up further with you." April 22, 1912, Miller & Lux writes defendant stating that, in compliance with its letter of April 18th, it inclosed two plats showing the course of the right of way through defendant's lands and stating that the engineer has now decided that the strip 200 feet wide would be sufficient. May 4th defendant replies, stating, among other things:

"* * * In this connection now have to suggest that you advise us just what you desire in the premises, stating definitely what concessions and reservations for use of water, etc., will be granted to the owners of adjacent property. If you will present these matters definitely and in detail, we shall be glad to take the matter up with the owners and advise you as to their conclusions."

Miller & Lux replied on May 6, 1912, stating:

"Our Mr. Nickel, who has this matter in charge, is in the San Joaquin Valley at present, and your letter will receive attention on his return to the office next week."

On May 13, 1912, Miller & Lux replied to defendant's letter of May 4th:

"In regard to the proposed right of way for a canal through your land and Madera county, our proposition is to purchase outright a strip of land of the width specified, paying you the full value for the same. In regard to any arrangement for the sale of water to you, or any concession for the use of water in exchange for the right of way, such act would give the canal the character of a public service corporation and would thus render entirely undesirable the building of the canal. We should be glad, however, if you so desire, to have you join with us in the expense of constructing this entire canal and assume equal responsibility on an acreage basis of the cost of the project. You would thus share in the use of water such percentage as your land would bear to ours. We have a large force of men, teams, etc., engaged upon this work and it is desirable that we have an understanding as early as practicable, as the construction will soon be up to your land."

On May 17, 1912, Miller & Lux wrote to defendant, referring to its letter of May 13th, and stating:

"If you prefer it, we should be willing to exchange land with you, granting an acreage elsewhere equal to the proposed right of way, provided it be of similar quality and so forth. This has occurred to us as being possibly more acceptible to you than either of the other propositions, and if so, we shall be glad to take it up with you for detailed consideration any time."

On May 24, 1912, Miller & Lux again wrote to defendant, in which letter it states:

That it has just received a letter from Mr. Clyne, who has charge of the construction of the canal, stating that the information which it requested of him for defendant's benefit "is not as explicit as we would like to submit. According to Mr. Clyne's idea, it is difficult, if not impossible, to estimate the cost of constructing this canal by reason of the unknown expense involved in removing the hardpan. Until the surface soil be removed, and the hardpan encountered as the canal construction proceeds, the quantity of hardpan to be removed is entirely indefinite. However, it is safe to say the entire cost of the canal and structures will not be less than $100,000, and not more than $125,000. Our proposition is if you should wish to join us in this enterprise that the entire cost of construction and future maintenance be borne pro rata according to the quantity of land owned by this corporation and yourselves under the flow of the canal susceptible of irrigation. * * * There are some phases connected with this enterprise which you should, perhaps, understand more fully before making up your mind finally as to whether you wish to embark with us upon this project. We are almost sure to meet with expensive litigation, lasting in all probability through many years, and you will, of course be expected to bear your proper proportion of the same. It will also be necessary that a very careful agreement be drawn by which any rights that would accrue to your land would be made subordinate to all of our prior rights, which will involve our entire irrigation system, aside from this Gravelly Ford Canal. If you would like to go into this matter more fully we should be glad to have Mr. Talbot call and see us at his very earliest convenience."

May 25, 1912, defendant answered the last above letter, stating:

"Our Mr. W. H. Talbot will endeavor to arrange to see your Mr. Nickel some time Monday, which we trust will be satisfactory."

June 18, 1912, Miller & Lux wrote to defendant stating that Mr. Ogle, division superintendent of Miller & Lux, had suggested a basis for an exchange of land that he thought would be mutually beneficial to the parties concerned, and stating that it would be glad to take the matter up on a basis of offering an exchange of lands of equal value:

"We beg leave to suggest that if the exchange seems desirable to you that you appoint a representative to meet a representative appointed by us to agree upon the quality and value of the lands to be exchanged and in case these representatives fail to agree, that they be authorized to call upon a third person to conclude an agreement. This proposition is not submitted in lieu of our previous proposition to have you join with us in the construction of the proposed canal, and should you, upon reflection, prefer to join us in the building of the canal with a view to irrigate the lands you own under the canal, we shall be pleased to carry out that arrangement."

June 20, 1912, defendant acknowledges the receipt of the last above letter with reference to an exchange of land, stating:

"* * * after we have had an opportunity of presenting this suggestion to our superintendent, we will again communicate with you."

July 22, 1912, defendant wrote to Miller & Lux referring to the suggestion that an exchange of lands might be effected, quoting from a letter written by defendant's superintendent in which he states that he has been over parts of the lands proposed for an exchange and that for satisfactory examination of the relative values it would facilitate his labors if he were furnished a plat "showing the acreage lying on the east side of the canal of the various sections of their land through which the canal passes." July 25, 1912, Miller & Lux replied, stating that it had prepared a plat showing its lands east of the canal as requested, and on August 31, 1912, Miller & Lux submitted a proposition definitely describing its lands which it proposed to exchange for definitely described lands belonging to defendant and suggested that each party appoint an appraiser to appraise the lands and if they could not agree, to appoint a third, and that the decision of a majority of the appraisers be binding, and in the case the lands of defendant should be more valuable than those of Miller & Lux, that it pay the difference in cash. "If this general idea is satisfactory to you, kindly let us know and we will draw a formal agreement." September 3, 1912, defendant acknowledged the receipt of the last above letter, stating that it desired a blueprint diagram showing the location of the proposed canal which it had not yet received and that it wanted this map to forward to its superintendent to aid him in picking out the land to be received in exchange for its land, and stating:

"* * * While we have not had a chance to look over the sections mentioned in your letter, at the same time we would be glad to have this map to refer to and would thank you to send it to us at your earliest convenience."

September 5, 1912, defendant wrote Miller & Lux, acknowledging receipt of the plat of the lands proposed for exchange, and stating that it would send the map to its superintendent. October 8, 1912, defendant wrote Miller & Lux:

"Further referring to proposed exchange of lands in Madera county in order to permit of the construction of your canal, would state that we have been in communication with our superintendent, and after going thoroughly over this matter, it has been suggested that we exchange on the basis of descriptions as follows: [Then follows a description of the sections proposed for exchange.] An exchange as above outlined would block out our holdings and would at the same time enable you to proceed with the construction of the canal as now surveyed. By this exchange, we would be transferring to you ten full sections and that portion of section 22 lying west of the east bank of the canal, while you would be transferring to us fifteen full sections. We consider this a fair and equitable basis of exchange for the reason that the land which we propose to transfer to you lies west of the canal and would, therefore, lie under the flow of the Gravelly Ford Canal and in consequence thereof would be greatly enhanced in value. * * * If an arrangement along these lines meets with your approval, we shall be glad to take the matter up further with you and conclude the final arrangements."

On the same date October 8, 1912, Miller & Lux acknowledged receipt of the above letter, stating:

"The proposed exchange of land does not appeal to us at all. This proposition for an exchange of land emanated from you and not from us. We supposed and understood that your object in wishing to exchange land was to consolidate your holdings, and we never for a moment contemplated an exchange on any other basis than an equivalent in acreage, with such adjustment for any difference in the value of the land as the appraisers might find to exist."

October 22, 1912, Miller & Lux wrote to defendant:

"Since apparently there seems to be no practicable basis for an exchange of land as contemplated, we should be pleased to take up with you the matter of a right of way through your lands for our Gravelly Ford Canal. At your convenience we should like to hear from you on this subject."

October 25, 1912, defendant acknowledged the receipt of the last above letter, saying:

"We have no suggestions to offer other than those already submitted. At the inception of the negotiations, we requested you to indicate what concessions in the way of water rights, etc., you would be willing to grant in return for right of way through our property, and upon your refusal to consider any such arrangement, we have endeavored to come to an understanding on the basis of an exchange of certain lands, which has likewise been rejected on your part. We have endeavored to suggest a means of coming together, but as our proposals have not received favorable consideration, we shall now be glad to have you submit some plan that might be mutually acceptable. In conclusion we wish to add, however, that we shall expect something in exchange for this right of way which shall be commensurate with the value of the privilege which you are seeking."

October 26, 1912, Miller & Lux replied to the above letter stating, among other things:

"Permit us to say the last paragraph in your letter would seem to imply that we are expected to recognize in adjusting the value for the land conveyed for the right of way the same principle, which you suggested in regard to the exchange of land, viz., that the value of the land that you may convey to us is not to be determined upon the intrinsic value of the land, but upon its enhancement in value by reason of the application of water upon the land. We do not think that this is a tenable position on your part. On the contrary, we think the large expenditure of money involved in the construction of the canal, the risk and expense incurred in connection with the litigation that is likely to ensue, together with the expense of operating the irrigation system is a return which should legitimately accrue to the owners of the irrigation system. At least we have never heard of any different principle that was recognized in this state."

Attention is then called to the act of 1911, considered in the condemnation case heretofore decided by this court and referred to above, and the writer states that—

> Under this law "an owner of land shall receive compensation for the value of the land so condemned without regard to any possible enhancement in the value of the lands upon which the water may be applied. We are quite willing to pay you for this land all that any court or jury would award, and we cannot imagine that on giving the matter proper consideration you would think of demanding any more than this. We hope you will not embarrass us by declining to negotiate with us on the basis of the value of the land, and thereby delay the operation of our irrigation system. If you prefer to accept land, in lieu of cash, for the acreage required for the right of way, we are quite willing to convey to you lands of equal value for the acreage you may convey to us. We hope we shall hear from you again on this subject at your earliest convenience."

At this point the correspondence seems to have broken off; at any rate, no letters appear again until October 27, 1915, and is resumed by letter of Miller & Lux to defendant of that date, stating:

> "In accordance with our conversation of last Monday, we submit herewith two propositions covering the proposed exchange of lands in Madera county."

The first of these propositions related to the Aliso Canal project, and the second with regard to an exchange of lands as had been previously contemplated. October 28, 1915, defendant replied expressing disappointment at the offer contained in the letter of October 27th, and stating that it had notified its superintendent, Mr. Straube, "to proceed at once with the erection of the necessary buildings for the new ranches which will be placed under cultivation this coming season." November 3, 1915, Miller & Lux wrote the defendant as follows:

> "Referring to the matter of the right of way for our Ford Canal concerning which it is understood the matter is to be considered by you at an early date, I wish to suggest that, in view of the fact that this canal runs through only three sections of your land, it may be desirable that an exchange be made for these three sections, and thus avoid the necessity of surveying a right of way through your land, and thus dividing the sections."

November 6, 1915, defendant wrote Miller & Lux with reference to the renewal of the lease of the Madera county lands, stating:

> "We now inclose herewith original and duplicate which we would thank you to sign, returning one copy for our files."

November 9, 1915, Miller & Lux wrote defendant acknowledging receipt of defendant's letter of November 6th, and stating:

> "We understood clearly your position, in regard to the matter of exchanging lands, when we wrote you on the 3d inst. We thought possibly, however, that you might prefer to have the land you farm intact, rather than have the Ford Canal pass through it, and we had this in mind when we suggested that possibly there may be three sections of our land which you would prefer, rather than retain the three sections you now own through which the canal passes. However, since this does not appeal to you, we have nothing further to suggest. Please allow us to add: In regard to the apparent irreconcilable differences, which precludes an exchange of land, while we are not able to appreciate the consistency of your position that the payment by us of what it will cost to build the levees is unsatisfactory to you, for the reason you feel that you are entitled to share, in some manner, in the benefits that would accrue to us by obtaining additional acreage under our canal, we should not be unwilling to meet your views at least to some extent, in addition to the payment of the cost of the levees, if the benefits you seem to think we would obtain were material and important. The fact is, however, that the benefits are almost entirely imaginary, for the reason we already own more land under the canal than we are able to irrigate, or probably ever shall be. If the capacity of the canal were sufficiently large, and the quantity of water available ample for irrigating all of the lands we now own under the Ford Canal, plus the land you also own under the canal, we could, no doubt, afford to pay you a considerable sum, as a bonus, in addition to an exchange of land of equal value, but since these conditions do not exist, there is no basis whatever for our meeting your views. We trust you will be able to take up the matter soon as to the basis on which you prefer to consider the right of way, either to sell us the necessary strip through the three sections referred to, or that we convey an acreage of equal quantity and value for your land embraced in the right of way."

Correspondence broke off again and was not resumed until October 31, 1916, by letter of defendant to Miller & Lux in which it stated:

> "We were very much surprised to be advised by our superintendent that you have again resumed work on the Ford Canal through lands of the Pope & Talbot Land Co. in sections 21 and 22, township 12, south, range 16 east, and

we are quite sure that this action has been taken without your knowledge, for when this question was up for consideration on a previous occasion, we were assured that no further steps would be taken on your part before first again taking the matter up with us and an understanding having been reached between us."

November 1st Miller & Lux acknowledged the receipt of this letter and stated that it would have attention on the return of Mr. Nickel to its office. November 6, 1916, defendant wrote Miller & Lux calling attention to a recent visit by Miller & Lux to defendant during which the question of the right of a private corporation to condemn a right of way for irrigation, presumably under the act of 1911, and stating:

> "This information will greatly facilitate matters and probably save time in reaching a conclusion."

Subsequent letters relate chiefly to this subject and to the opinions of attorneys for both parties. On November 29, 1916, defendant wrote, among other things:

> "We have no desire or wish to hinder you unnecessarily in your construction work, but we must ask for a reasonable time in which to investigate the matter before we can permit any further work on our lands."

Finally, on December 20, 1916, defendant wrote to Miller & Lux, stating:

> "We have, as previously advised, instructed our superintendent to prevent any further construction work on our lands, and to resist any such effort to the fullest extent. We cannot permit the canal to be completed with the idea of having our rights determined at a later date, but shall on the other hand expect work to be suspended until a court ruling may be had under condemnation proceedings, which we are willing that you commence in order to determine your right to condemn a right of way over our property."

The action, No. 1802, heretofore referred to, followed as also this action.

As shown by the letters introduced, there was a break in the written correspondence from October 26, 1912, to October 27, 1915; but it appeared from the testimony that work on the canal continued after 1912 without interruption or objection by defendant. Mr. Nickel testified:

> "We continued working on this canal and the portions of it that go through the Pope & Talbot land up to the time the temporary injunction was issued in this case. (The temporary injunction was granted May 8, 1917.) The canal was completed up to the Pope & Talbot land at that time. It was completed sufficiently to carry water beyond that from there to the Fresno river. We had our men there on the ground working on this particular part on the Pope & Talbot land trying to complete it. Although construction work was done all the way through in 1912 on the entire canal, including the Pope & Talbot land, it was not completed. It was not down clear to the depth we expected to go."

Other witnesses who knew of the work and assisted in it testified to like effect and there was no controverting testimony. Mr. Nickel testified:

> "At the beginning of the correspondence with Pope & Talbot we were the lessee of some sections of their land. (Including among them two of the three sections involved.) I am quite positive that we never went on the Pope & Talbot land until we had taken up negotiations with Mr. Talbot. I do remember very distinctly before we ever did a stroke of work on their land I had discussed that with Mr. Talbot. When I mentioned the fact of our project to them and discussed the subject by correspondence or orally, they did not oppose it. * * * I know that Mr. Talbot knew when the work was done and I explained it to him."

He testified that his company had expended $80,000 on the work and it appeared that $3,000 of this had been expended on defendant's land.

Witness Bader, Miller & Lux's foreman of the division including this canal, took charge in February, 1914. He testified they irrigated in that year 800 acres of barley and some grass and a much larger acreage in 1915 and 1916 and put in some alfalfa; that two sections of land north of the defendant's land have been checked and prepared for irrigation besides two or three more roughly checked. He testified, as did other witnesses, that the flow of water comes occasionally in December and January, but that "the dependable flow comes in May, June, and July, and at times in April." He testified further:

> "In 1915 we had a whole month of water filling that canal in January and we had six weeks of it later constantly. * * * We had water also in 1915 from May 4th up to July 20th, * * * and some going by. It wasted on a waste gate. If it had not been for that waste gate, it would have gone through to Fresno river. In 1916 we had water until July beginning in the latter part of April. * * * In 1912 they worked on this canal about three months; in 1913, 1914, and 1915, about the same. This year we worked more."

Defendant introduced two witnesses. Clement H. Miller, a civil engineer, testified to certain facts in relation to the seasonal flow of water through the San Joaquin river and to the number of second feet diverted by various canals and pumps which he stated he had "gathered from state and government publications on the subject and statistics gathered by various commissions of the state of California and from personal observations and calculations as an engineer." He described the land lying west of the canal as what is known as hardpan land "impregnated with alkali to a greater or less extent" and not desirable as irrigable land and "especially as better land can be acquired in the immediate vicinity." He testified:

"This canal, as I view it, is intended, and is only useful to wash out alkali by flooding and turning the water impregnated with alkali into the Fresno river or Aliso Canal." He expressed the opinion that this canal "is constructed and designed to carry extreme flood waters in large volumes for a few days only"; that "this canal if complete will back water over lands belonging to the defendant lying east of the canal, and will also flood lands belonging to the defendant lying west of the canal, by seepage. The extent of this overflow and seepage cannot be determined at this time." He stated that "there is not sufficient water in the San Joaquin river to supply all of the water needed by the canals taking water out of the river, to irrigate the lands lying under them, and there is not a dependable flow available for the Gravelly Ford Canal under present conditions. To divert water into this canal, is to deprive other existing canals of water needed to irrigate much better land."

Witness J. C. Straube, superintendent of defendant company for many years, testified that he was familiar with the Gravelly Ford Canal. He testified:

"It is surveyed across the lands of Pope & Talbot Land Company. It has never been completed across these lands. No water has ever flowed through it across these lands. Some work was done on sections 21, 22, and 9, township 12 south, range 16 east, in 1912, but the work has not been completed. The canal will back floodwaters over lands lying east of it, and water will seep through the west bank on lands belonging to Pope & Talbot Land Company lying west of the canal."

We have endeavored to state all the evidence bearing upon the issues, perhaps more fully than it need to have been.

[2, 3] Findings of fact and conclusions of law were waived. We are without aid as to the view taken by the trial court upon the issues of fact presented in the record. We must, upon material questions of fact as to which there is any substantial evidence in support of the judgment assume that the court properly found in defendant's favor. If, however, there was no evidence, or if the evidence was insufficient in support of an implied finding essential to sustain the judgment, or where the uncontroverted evidence justified such a finding in favor of plaintiff instead of defendant's favor, the judgment cannot stand. Thus, as we view the case, the vital facts upon which plaintiff relies are found set forth in paragraphs 8, 12 and 14 of the complaint, quoted above. The evidence, in our opinion, and without substantial conflict, fully supports the averments in said paragraphs. It seems to us that the correspondence by letter between the parties considered together with the uncontroverted testimony leads to no other reasonable conclusion than that this canal project and the purpose for which the canal was to be constructed were fully understood by defendant and that the construction was entered upon and prosecuted with reasonable diligence for nearly four years with defendant's knowledge, consent, and acquiescence and with the understanding that the only matter to be determined was the compensation to be paid or given defendant by Miller & Lux for the right of way, and that as to this the parties anticipated no difficulty in reaching an agreement and did not make the consummation of such agreement a condition precedent to plaintiff's right to enter into possession of defendant's land, complete the canal, and operate it for the purposes for which it was designed.

The questions, to our minds, are simply questions of law, namely: Do the facts and circumstances bring the case within the rule laid down in Stoner v. Zucker, supra, and did not the conduct of defendant amount to an executed parol license, and is not defendant estopped from interfering with the continued possession by plaintiff and is not defendant limited to an action for compensation. A closely allied question, also, is: Should defendant be given equitable relief in view of its laches in asserting its rights?

[4-6] "A 'license' is defined as a personal, revocable, and unassignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein." 17 R. C. L. 584. A license may be implied from the acts of the parties, from their relations, and from custom, and where the owner of land, with full knowledge of the facts, tacitly permits another to repeatedly do acts upon the land, the license may be implied from failure to object. 25 Cyc. 642. The essential of a license that it be assented to may be shown by any acts which tend to show assent. 17 R. C. L. 572. And the creation of a license privilege may be evidenced by acquiescence in its exercise. Id. A license by deed or parol, under the well-settled rule of the common law, is revocable at pleasure, unless under certain circumstances, among them, that it is executed and also unless, by reason of expenditures made by the licensee on the strength of the license. It would otherwise be inequitable to permit the licensor to effect a revocation. In such case the license is irrevocable. Id. 576, 578; Stoner v. Zucker, supra; Miller & Lux v. Kern County Land Co., supra.

[7, 8] It is a familiar doctrine of laches, apart from any question of statutory limitation, that courts of equity will discourage laches and delay in the enforcement of rights, and the general rule is that nothing can call forth the court of chancery into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. 10 R. C. L. 395. While mere lapse of time may not constitute laches, lying by and acquiescence are important factors in determining whether there has

been such laches as to constitute a bar to relief in equity. Id. 397.

[9] With these principles before us to what conclusion do the facts lead us in the present case? Before any work was done on the canal, defendant was notified of the project contemplated by plaintiff. (We refer to Miller & Lux and plaintiff interchangeably as the same person, for the evidence so warrants.) Defendant was informed that a right of way was desired over its land for the purpose of enabling Miller & Lux to irrigate its land without which privilege the object of the enterprise could not be effected; making no objection to plaintiff's surveying the route for the canal, or of entering upon the work of construction in March, 1912, and with knowledge that work had begun, defendant commenced negotiations looking only as expressed in one of its letters, to "something in exchange for this right of way which shall be commensurate with the value of the privilege you are seeking." For nearly four years these negotiations continued without result, Miller & Lux in the meantime spending large sums of money, and at no time did defendant object to plaintiff's going on with the work as originally contemplated and as defendant knew it was being done, including work of excavation on defendant's land during the year 1912 and subsequent years. Defendant had a right of action the moment plaintiff entered upon defendant's land in 1912 to construct the canal, if not sooner. As early as May 13, 1912, Miller & Lux wrote defendant, saying:

> "We have a large force of men, teams, etc., engaged upon this work and it is desirable that we have an understanding as early as practicable, as the construction will soon be up to your land."

It seems to us that, if defendant was not called upon at an earlier period to do so, it should at this time have made it clear that before extending the canal over its land the question of compensation must be settled. If defendant regarded plaintiff's operations as an unwarranted trespass upon its rights and without its consent, in fairness to plaintiff, defendant should have warned plaintiff to desist from encroaching upon its land pending settlement of the question of compensation. Defendant was informed, early in the correspondence, that the project would entail an expenditure of $100,000. It stood by and saw $80,000 of this sum expended and then for the first time made known its opposition. It seems to us that every principle of equity forbids the court of chancery to aid defendant and that the injunction granted at defendant's request is not supported by the evidence. Its remedy is at law for damages.

[10] Some testimony was introduced by defendant tending to show that the taking of water from the San Joaquin river would interfere with its use by previous appropriators and it could be used on much better land than that proposed to be irrigated by Miller & Lux, and that the dependable water of that river was already fully appropriated; also, that in operating the canal defendant would be damaged by overflow and seepage of water onto defendant's land. We have not considered these phases of the case, as we regard them as immaterial.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

36 Cal. App. 817

GRAVELLY FORD CANAL CO. v. POPE & TALBOT LAND CO. (Civ. 1800.)

(District Court of Appeal, Third District, California. April 9, 1918. Rehearing Denied by Supreme Court June 6, 1918.)

Appeal from Superior Court, Madera County; Wm. M. Conley, Judge.

Action by the Gravelly Ford Canal Company against the Pope & Talbot Land Company. Judgment for defendant, and plaintiff appeals. Reversed.

Rehearing denied; Angellotti, C. J., and Sloss and Wilbur, JJ., dissenting.

Edward F. Treadwell, of San Francisco, for appellant.

J. W. Dorsey and W. E. Cashman, both of San Francisco, for respondent.

CHIPMAN, P. J. This is an action in which a temporary injunction was granted in the same case as No. 1801 (178 Pac. 155), in which latter a permanent injunction was granted. Apparently the matter was heard upon the same record in both cases, except certain maps are found in number 1800 not attached to the record in 1801.

We have considered the questions involved in dealing with the permanent injunction in No. 1801, which would seem to make it unnecessary to consider at any length the questions involved in No. 1800, for they are practically the same in both cases.

On the authority of the case No. 1801, this day decided, the judgment is reversed.

We concur: HART, J.; BURNETT, J.

39 Cal. App. 97

LAWLOR et al. v. SOUTHERN PAC. CO.

(Civ. 2590.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1918.)

1. EMINENT DOMAIN 🔑85 — DAMAGES — EASEMENTS.

Damages may be recovered for a railroad's interference with an easement of right of way whereby property has been depreciated in value.

2. EMINENT DOMAIN 🔑307(3) — REMEDIES OF OWNER—INSTRUCTIONS.

In action for damages for impairment of plaintiffs' right of way by reason of construction and operation of spur track, *held*, that defendant's rights as owner of the fee in the right of way were properly placed before the jury.

3. EMINENT DOMAIN 🔑307(2) — QUESTION FOR JURY.

In action for damages for impairment of plaintiffs' right of way by construction and operation of a railroad spur track, whether such track was so operated as to materially interfere with plaintiffs' right of passage was for the jury.

4. EMINENT DOMAIN 🔑298—EVIDENCE ADMISSIBLE—DAMAGES.

In action for damages for impairment of plaintiffs' right of way by construction and operation of a railroad, evidence of cars left standing on the tracks as an obstruction to plaintiffs' right of passage, the number of cars operated daily, and the increased danger to life and limb which attended the exercise of plaintiffs' right of passage, was properly admitted.

5. EMINENT DOMAIN 🔑303—DAMAGES.

In action for damages for impairment of plaintiffs' right of way by construction and operation of a railroad, the measure of damages is the difference between the value of plaintiffs' property before the construction and operation of the railroad and its inherent value thereafter.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by J. B. Lawlor and another against the Southern Pacific Company, a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Louis Oneal, Wm. F. James, and James P. Sex, all of San Jose, for appellant.

E. M. Rea, of San Jose, for respondents.

LENNON, P. J. This is an appeal from a judgment rendered in favor of plaintiffs for $3,000.

Plaintiffs are, and were during May, 1915, and for a number of years prior thereto had been, the owners of the lot of land described in the complaint. It has no frontage on any public highway. The only means of ingress and exit to or from the property is over a right of way. This right of way is situate on the westerly side of the land of defendant which lies immediately to the east of the land of plaintiffs. The right of way is about 21 feet wide and extends all along the westerly line of defendant's land, which is 268 feet long. The fee of the land subject to the easement of the right of way was and is in the defendant. Immediately east of the land of plaintiffs lies the railroad of defendant, situated on land owned by the defendant. On May, 1915, defendant laid a spur track from said railroad along the right of way of plaintiffs. Said spur track was wholly on the lands of defendant. The plaintiffs complained that their right of way had been seriously impaired by reason of the construction and operation of the spur track, and that their adjoining property had been damaged by such impairment of the right of way.

[1] We will not attempt to answer all the arguments in appellant's brief which are directed against numerous supposititous theories which it suggests of plaintiffs' case. The law is settled that damages may be recovered for an interference with an easement of right of way whereby property of plaintiffs has been depreciated in value. Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; Eachus v. L. A. Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

There is ample evidence in the record to sustain a finding of such interference by the jury.

[2] Appellant states in its brief that the plaintiffs and the court undertook to try the action upon the basis that the defendant had no right to enter upon the right of way and that any entry thereon would be an infringement of the easement, and it is argued that the instructions to the jury should have contained a statement that there must have been a "material" interference or a "substantial" impairment of the right of way before the plaintiffs could recover. This point is made in a number of ways by the appellant. We see no force in this objection to the instructions. On the contrary, the court instructed the jury that—

> The railroad company "had the right to lay a track along said strip of land or otherwise use the same unless the laying of said track on, or otherwise using said strip of land, would destroy or impair its use for passage and repassage in the plaintiffs."

The court also instructed the jury:

> "That the plaintiffs have not, nor did they have, an exclusive right of passage over said strip of land, but the defendant has and at all times had as much right to pass over the strip of land in question as had the plaintiffs."

In the light of these and similar instructions, it would seem that the objections of defendant that its rights as owner of the fee were not properly placed before the jury are without merit.

[3, 4] We do not see any merit in appellant's contention that merely the laying of the tracks and not the operation of the trains thereon should have been considered by the jury in assessing damages. The injury complained of was the impairment of plaintiffs' right of way by the construction and operation of a railroad. The laying of the track was but a part of this enterprise. The case of McDougald v. S. P. R. R. Co., 162 Cal. 1, 120 Pac. 766, holds that damages in such a case as this is the difference between the value of the land as it was just before the defendant took possession and its value immediately after the works of the defendant were completed and put in operation. It would be strange indeed if only the laying of the tracks was to be considered and the operation of the trains thereon—which is the real source of the impairment of the right of way—and the consequent injury to plaintiffs was to be ignored. This is not, as contended by appellant, a denial of its right of passage over its own land. Such right must be exercised so as not to obstruct the right of the plaintiffs. Galletly v. Bockius, 1 Cal. App. 724, 82 Pac. 1109; Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569. Whether or not the spur track of defendant was so operated at to materially interfere with the right of passage in the plaintiffs was a matter for the jury under proper instructions, after having before it all the facts relating to the extent of defendant's interference with said right of way. Therefore evidence of cars left standing on the tracks as an obstruction to plaintiffs' right of passage, the number of cars operated daily (during the operation of which there was evidence that plaintiffs' passage to and from their property was impossible) and the increased danger to life and limb which attended the exercise of plaintiffs' right of passage, and similar matters—was properly admitted.

[5] The case of Williams v. Southern Pacific R. R. Co., 150 Cal. 624, 89 Pac. 599, reviews quite extensively the authorities on the subject, and decides that the construction of a railroad is an act permanent in its nature, and that, where injury is done thereby, all damages, past and prospective, are recoverable in one action. See, also, McDougald v. S. P. R. R. Co., supra. The measure of damages is the difference between the value of plaintiffs' property before the construction and operation of the railroad and its inherent value thereafter. Eachus v. L. A., etc., Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

If there were any errors committed by the trial court in the admission of evidence regarding noise, etc., upon the question of the amount of the damages (which we do not decide) we think such errors were not prejudicial because the matter is fully and carefully covered in a number of the instructions, which lay down in detail the law governing the elements of damage to be considered, as stated in the case of Eachus v. L. A., etc., Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

The case of St. L. & K. C. R. R. Co. v. Donovan, 149 Mo. 93, 50 S. W. 286, is in point on this question, and holds that, when evidence of such matters has been erroneously admitted in a case similar to the present one, such error is not prejudicial to the defendant when the court instructs the jury correctly as to the true measure of damages in clear and unmistakable terms. We are of the opinion that this has been done in the instructions given in the case at bar.

The other points made by appellant we think are without merit.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

39 Cal. App. 71

LANGAN v. MARIPOSA COMMERCIAL & MINING CO. (Civ. 2459.)

(District Court of Appeal, First District, California. Dec. 5, 1918. Rehearing Denied by Supreme Court Feb. 3, 1919.)

1. VENDOR AND PURCHASER 🔑344—OFFER TO PERFORM.

In action for damages from seller's breach, it must be shown that purchaser made a good-faith offer to perform, and was able to perform according to offer, under Civ. Code, §§ 1493, 1495.

2. TRIAL 🔑165—MOTION FOR NONSUIT.

On motion for nonsuit evidence must be viewed most favorably to plaintiff.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by G. W. Langan against the Mariposa Commercial & Mining Company, a corporation. From a judgment entered pursuant to an order granting defendant's motion for a nonsuit, plaintiff appeals. Affirmed.

Langan & Mendenhall and Chapman & Trefethen, all of Oakland, and R. H. Countryman, of San Francisco, for appellant.

Chas. W. Slack and Curtis H. Lindley, both of San Francisco, for respondent.

BEASLY, Judge pro tem. This is an appeal by plaintiff from a judgment entered pursuant to an order granting defendant's motion for a nonsuit. Among the grounds of the motion was that of failure to show either a sufficient offer to perform the contract which was the basis of the action, or readiness or ability to perform the conditions thereof. The contract declared upon related to the purchase by William H. Cook and S. Webber Parker, through their agent, Gen. William H. H. Hart, of certain property of the defendant known as the "Mariposa grant" and situated in Mariposa county, Cal. The proposed deal fell through, and Cook and Webber assigned their rights under the contract to the plaintiff, Langan, who began this action for damages for breach of the contract.

The main reliance of the plaintiff was upon an allegation that, Cook and Parker having performed all the conditions of the contract binding upon them, the defendant repudiated the contract and refused to perform. The record is voluminous, the evidence consisting of innumerable letters, lengthy documents, and considerable oral testimony. Much space is devoted in the briefs to arguments upon nice questions of technical pleading, mainly directed to a variance which defendant's counsel insists existed between the third amended complaint, on which the case was tried, and the proofs offered at the trial.

While we have not before us the reasons of the trial court for granting the nonsuit, it seems to us that the order was based upon very simple questions of law and fact which must, on account of the condition of the record and the impossibility of rehearsing all the evidence, be rather briefly stated here.

On the 26th day of February, 1913, Gen. Hart wrote the defendant a letter requesting the terms of sale of the Mariposa grant. George E. Webber, president of the defendant corporation, replied on February 27, 1913, offering on behalf of the company to sell the property for $400,000, $5,000 of which was to be paid on the 15th day of March, 1913, in cash, and $95,000 additional on June 15, 1913, also in money, and the balance of the purchase price of $300,000 was to be paid in three equal annual payments commencing June 15, 1914. Among the other conditions of the offer to sell included in this letter were the following:

> "It is further understood that the purchasers are to give to the company any protection which may be suggested by Mr. Henney Jennings or Judge Curtis H. Lindley, counsel for the company, covering the period of the option and the completion of the payments. In the event of your deciding to exercise your option, a definite agreement under the general terms outlined in this letter will be entered into between the contracting parties."

It may be said in passing that the property was mining property, and that Judge Lindley was the expert mining lawyer for the company. On March 12, 1913, the time to make the initial $5,000 payment was extended to the 31st day of March, 1913, and on the last-named date the $5,000 was paid and in the correspondence accompanying the payment it was suggested that a formal contract of purchase would be drafted with the approval of Mr. Jennings and Judge Lindley during the 90 days' option period, which would, as provided in this correspondence, expire on the 15th day of June, 1913. In the letters which passed at this time between the parties it was provided that the remaining $95,000 of he $100,000 cash payment should be paid o or before June 15, 1913. On May 7, 1913, a tentative agreement was delivered to Gen. Hart from Judge Lindley's office, and in this agreement various safeguards were thrown about the mining property, which formed apparently the valuable portion of the subject-matter of the transaction. Accompanying this tentative agreement was an extension of the time within which to make the $95,000 payment to July 15, 1913. On June 5, 1913, Gen. Hart wrote Judge Lindley, directing him to prepare the contract and papers in accordance with the latter's letter of May 29th. On June 9, 1913, Judge Lindley wrote Gen. Hart, inclosing a final draft of the agreement option, as it was called, with a note and mortgage attached thereto, and the request that Gen. Hart examine these and let Judge Lindley know at his earliest convenience that they were in due form. The receipt of this letter and the inclosed documents was acknowledged on June 9, 1913, by Gen. Hart in writing. No criticism of the papers and no objection to any of the terms thereof was made until July 5, 1913, when Gen. Hart wrote Judge Lindley acknowledging the receipt of the proposed final draft of the agreement. It will be noted that the time for the performance of the agreement was to expire less than a week later, namely, on the 15th day of July. There was some oral testimony to the effect that Gen. Hart had previously expressed dissatisfaction with these papers in a cursory conversation, but the correspondence between Judge Lindley and Gen. Hart is so clear upon this subject that only one finding is possible, namely, that no objection had been made until that contained in the letter from Gen. Hart to Judge Lindley, posted on July 5th. In this letter of July 5th Gen. Hart asked for an extension of time upon the contract, and on July 8th Judge Lindley replied to the criticism to the effect that the papers were drawn in conformity with the agreement between himself and Gen. Hart and in accordance with the correspondence of the parties and declined to recommend any extension of time. On July 8th Gen. Hart again wrote Judge Lindley asking for further time.

The vital events in the case occurred on July 15th. On that day Cook and Hart visited the office of the defendant company. Without reciting the testimony of the various parties, it is clear beyond controversy, in spite of some oral evidence to the contrary, that their sole object in making this call was to procure an extension of time; and it is also clear from the testimony of Cook himself that neither Cook nor Parker was either ready or able to pay the $95,000, and thus perform the conditions of the contract. Much discussion is found in the briefs as to whether the agreement contained in the various letters and papers that passed between the parties was an option to purchase or a contract to purchase. Whether the agreement is called the one or the other, the time limit therein for performance was the 15th day of July. From the evidence in this case, no bona fide offer of performance was made on that day, or, in fact, at any time, by Cook and Parker, or by any one on their behalf. They did not have the $95,000, as is clear from the testimony of Cook himself, the only testimony on that subject in the record.

[1, 2] After an examination of the bulky volume of evidence, we are forced to the conclusion that the trial court could have reached no other conclusion in this case than this, namely: That there was no offer to perform on the part of Cook and Parker; that they did not have the money with which to perform, and that if, as some of the oral evidence in the case indicates, they did offer verbally to perform this contract, the offer was not made in good faith. We are not overlooking the fact that this was a motion for nonsuit, nor the rule governing such motions to the effect that the testimony must be viewed most favorably for the plaintiff. But in our estimate of this evidence, even taking the most charitable view possible in favor of plaintiff, it shows conclusively that the only real object of Hart and Cook in their visit to the office of the defendant company on the 15th day of July was to obtain an extension of time, that they were not prepared in any way to conclude the deal by paying the $95,000, and that they had no expectation of doing so. This being so, the motion for nonsuit was properly granted; for an offer of performance must be made in good faith and in such manner as is most likely under the circumstances to benefit the creditor (Civ. Code, § 1493; Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001), and under section 1495 of the Civil Code, an offer to perform, whether made in writing or orally, is of no effect if the person making it is not at the time able to perform according to the offer. So that, conceding that the oral evidence of some of the witnesses was to the effect that there was an offer to perform—directly contradicted by Cook, the only principal who testified on the subject or who was present at the interview—still, under the rules of law above stated, it appearing that Cook and Parker were not able to perform, and it also appearing clearly from the evidence that the offer, if made, was not made in good faith, the ruling of the trial court on the motion for nonsuit must be sustained.

The plaintiff also complains of numerous rulings made during the trial excluding evidence offered by him. So far as we are able to discern, none of this evidence could possibly have changed the decision of the court on the motion for nonsuit.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

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39 Cal. App. 78

PEOPLE v. ELGAR. (Cr. 625.)

(District Court of Appeal, Second District, Division 1, California. Dec. 7, 1918.)

1. Criminal Law 🔑613—Trial—Continuance to Obtain Deposition.

In prosecution for rape on child of 13, it was within discretion of trial court to order continuance for more than 15 days to enable prosecution to procure deposition of child's grandmother as to her age; defendant having objected to child's testimony, and having had excluded testimony of child's mother.

2. Criminal Law 🔑1163(1)—Appeal—Burden to Show Prejudice.

On his appeal from conviction of rape, burden rests with defendant to show he was prejudiced by action of trial court in ordering continuance of more than 15 days to procure deposition, which action was within court's discretion.

3. Criminal Law 🔑421(3)—Hearsay—Age.

In prosecution for rape on child of 13, prosecutrix could testify as to her age.

4. Criminal Law 🔑796 — Instruction — Punishment.

In prosecution for rape on child of 13, in absence of proof on which it could have been properly found she was between 16 and 18, it was not incumbent on court to give instruction embodying provisions of Pen. Code, § 264, giving jury right to fix punishment of one convicted of rape on child under 18 but over 16.

5. Criminal Law 🔑1173(2)—Harmless Error—Refusal of Instruction.

In prosecution for rape on child of 13, failure to instruct jury that it had right to take into consideration appearance of child in determining her age *held* harmless to defendant, if erroneous; there being nothing in record as to appearance of child.

6. Criminal Law 🔑358 — Evidence—Alibi —Immateriality.

In prosecution for rape, defendant, attempting to prove alibi by showing he was at work in field when prosecutrix testified offense was committed, testimony by workman employed in field *held* properly stricken, its only value being to show defendant was in field at time enabling him to go to scene of offense by time prosecutrix testified it was committed.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Jim Elgar was convicted of rape, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

See, also, 171 Pac. 697.

S. M. Johnstone and A. P. Nelson, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape, the prosecutrix being a child of the alleged age of 13 years. The appeal is taken from the judgment of imprisonment and also from the order denying a motion for a new trial.

Defendant was the stepfather of the girl. By the testimony of the latter it appeared that defendant had, in May, 1917, forcibly seized the prosecutrix and accomplished the act complained of, the time being about 7:30 o'clock in the evening and the place a barn on the premises occupied by defendant, to which barn the prosecutrix had gone to give food to a cow kept there. A few days later, according to the statements of the same witness, the act was repeated in the house, and repeated again at a later date. Defendant testified, denying the charge made by the child in toto, and offered evidence for the purpose of showing that at the time when it was claimed by the girl the act was committed he was at work more than a mile away, irrigating a field of beets. The prosecuting officer asked the prosecutrix, while on the witness stand and at the opening of the trial, how old she was. An objection was interposed, the ground stated being, "The proper foundation has not been laid." At this point the prosecutor desisted from further attempt to make proof of the age of the girl by testimony from her own mouth, but called her mother to the witness stand. It was shown that this witness was married to the defendant, and she was not allowed to testify, upon appropriate objection being made. The district attorney then stated that he would be obliged to prove the age of the girl by the testimony of her grandmother, who was then ill, and who resided some 18 miles away. He presented an affidavit, and the court continued the trial from that day, being the 13th of June, 1918, to July 5th. Upon reassembling on the date last mentioned, a deposition which had been taken was presented, and the reading of it was objected to on the part of the defendant. Thereupon, after some discussion between court and counsel, the prosecuting officer stated that he might secure the attendance of the witness in person by using an ambulance or some such means of conveyance, and her attendance was secured the same day. This witness testified that she knew the date of birth of the prosecutrix and that the latter was born in Mexico on the last day of January, 1904. Cross-examined as to her recollection of other matters and things, many of them of intimate personal nature, the witness was unable to give definite answers. However, she did not vary from her first statement that the prosecutrix was born on the day which she had already mentioned.

[1-3] The defendant had objected to any continuance being granted at the time the district attorney interrupted the trial with his request for time to take the deposition of the grandmother, and he now assigns the action of the court in making that order as prejudicial error. It was perhaps unusual, after the trial had commenced, to order a continuance for more than 15 days for the reason appearing here, but the matter of ordering such continuance was within the discretion of the trial judge, and upon this appeal the burden rests with the defendant to show that he was prejudiced by the action so taken. It nowhere appears in the record as to how or in what manner the action of the court did result to his detriment or tended to prevent his having a full and fair trial of the issues. It is not claimed that by reason of the continuance the defendant was deprived of the presence of any witness or that any condition supervened which operated to his prejudice. The district attorney was acting upon a mistaken view of the law when he assumed that he would not be permitted to prove the age of the prosecutrix by her own testimony. It is well established in this state, as well as in other jurisdictions, and is a settled rule of evidence, that a person may testify as to his or her age. People v. Ratz, 115 Cal. 132, 46 Pac. 915; Commonwealth v. Phillips, 162 Mass. 504, 39 N. E. 109.

[4, 5] Another complaint of the defendant is that the court refused to give an instruction embodying the provisions of section 264, Penal Code, which gives the jury the right to fix the punishment of a person convicted of rape upon a child under the age of 18 years, when it appears that such child is over the age of 16 years. The offered instruction was as follows:

> "You are instructed that the prosecution must prove the age of the prosecutrix to be under that of 18 years by evidence satisfactory to your minds and beyond a reasonable doubt. If you believe that the prosecutrix is under the age of 18 years after considering all of the testimony introduced in the case on that question, including the appearance of the prosecutrix herself, her development, her intelligence, and her general appearance, and from the same evidence you believe her to be over the age of 16 years, if you find the defendant guilty, then it

is your province to advise the court in your verdict as to the place where the defendant must be confined during the term of his imprisonment; and, if you find the prosecutrix to be over the age of 16 years, then in your verdict you shall state whether the punishment shall be by imprisonment in the county jail or the state prison."

Before discussing the argument presented to this point it may be further stated that the defendant offered no testimony in contradiction of that given by the grandmother of the girl as to the age of the latter, and nothing appears in the entire record from which we can gain any idea as to the weight or physical development of the child—in short, nothing which would suggest that in appearance she seemed to be of any greater age than that represented by the grandmother. Under such a state of the record it is correct, we think, to say that there was no conflict of testimony as to the child's age. Hence, it appears that there was no proof upon which the jury could properly have found that the child was between the ages of 16 and 18 years. It was therefore not incumbent upon the court to call to the minds of the jurors the provisions of section 264, Penal Code. But, insists the appellant, the jury should have been advised that it had the right to take into consideration the appearance of the child, and that such view would furnish proper evidence upon which to warrant the jury in concluding that the age of the prosecutrix was greater than that stated by the grandmother. That it may be proper for the jury to take into consideration the appearance of a child in connection with testimony to determine her age has been held in People v. Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069, Commonwealth v. Hollis, 170 Mass. 433, 49 N. E. 632, Commonwealth v. Phillips, supra, and other cases. There is some contrary authority, although the question seems not to have been directly ruled upon in this state. The text-writers on Evidence, Greenleaf and Wigmore, both admit the rule to be in general as appellant contends for. Conceding that an instruction, advising the jury of its right to take into consideration the appearance of a child in determining its age, correctly states the law, before this appellant can claim that he has been prejudiced by the refusal to give such an instruction we must be able to see that, to some extent at least, the physical appearance of the child would tend to contradict the positive evidence shown in this record as to her age. We have before stated that there is nothing in the entire record which in any way tends to enlighten us as to how this girl appeared, whether she appeared well developed or immaturely developed; whether she was large or small, or any evidence tending to show when she had first approached the state of womanhood. Defendant at one point in his testimony referred to her as this "little girl," which, if we deem the statement descriptive of her appearance, indicates nothing inconsistent with the testimony of the grandmother.

[6] The court struck out the testimony given by one of the workmen who was employed in irrigating the same field as was the defendant. This witness stated that he was on the day shift and defendant on the night shift; that he met the defendant at the field on the evening of the day in question, but that he (the witness) left the place at 6 or 6:30 o'clock, as his day's work was done. There was no error in striking out this testimony. The hour given by the prosecutrix as that when the rape was committed was 7:30 o'clock; the field in question was located a mile or a mile and a half away from the barn where the rape was alleged to have taken place. There was no contention nor showing that the defendant could not easily have returned to his home and to the barn after this witness left the field. The only value the testimony could have, then, was to show that the defendant was at the field on the night in question between 6 and 6:30 o'clock, and as to that the prosecution made no contrary claim. The prosecutrix herself had stated that her stepfather on the night in question was engaged in irrigating.

No error is presented by appellant showing that he has been prejudiced in his right to a fair trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

39 Cal. App. 151

HOLIDAY et al. v. TOLOSANO et al.
(Civ. 2589.)

(District Court of Appeal, First District, Division 1, California. Dec. 12, 1918. Rehearing Denied by Supreme Court Feb. 10, 1919.)

Exchange of Property ⚷8(4) — Fraud — Sufficiency of Evidence.

In an action for cancellation and rescission, evidence *held* to sustain a finding that a contract for the exchange of real property was procured by fraud, in that defendant made promises which he neither performed nor intended at the time of his undertaking to perform.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Maude L. Holiday and N. V. Holiday against James Tolosano and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Everts & Ewing and W. E. Simpson, both of Fresno, for appellants.

Vincent Surr, of San Francisco, and Harry M. McKee, of Fresno, for respondents.

BEASLY, Judge pro tem. This is an appeal by defendants from a judgment against them in an action for the cancellation and rescission of a contract for the exchange of real property.

The single and simple question involved in the appeal is as to whether or not the findings in favor of plaintiffs are sustained by the evidence. We think this question must be answered in the affirmative. The plaintiffs transferred certain real property to the defendants in exchange for an option to purchase certain other real property upon given terms, and in their complaint they allege, and the court found, that the execution of the deed by them was procured by the fraud of the defendants in that the defendant James Tolosano, in consideration for the conveyance of plaintiffs' property made certain promises which he neither performed nor intended at the time of his undertaking to perform.

Briefly the facts are that in the month of December, 1913, plaintiff Maude L. Holiday was the owner of nine lots in a suburb of Fresno. With the little home which she had built upon one of the lots the property was worth about $2,500, and she and her husband, a car conductor, were living thereon. At the date mentioned she advertised the property for sale or exchange. The defendant James Tolosano, a real estate manipulator, answered the advertisement shortly after January 1, 1914. About a year prior to that date Tolosano, by an instrument in writing, had acquired of one Ripperdan, an option to buy a ranch of 20 acres in Madera county, about 40 miles from Fresno. The value of this ranch was $4,000, and Ripperdan was willing, in consideration of 6 per cent. per annum upon that sum, paid to him annually, to hold his sale price at that figure. In effect, his charge was $240 per annum for binding himself to sell at $4,000, and the option was good for 10 years, providing the annual option money was punctually paid. All that had been paid under this agreement was $240 to cover the year ending on February 8, 1914. When the parties to this action met in the first week of January, 1914, there remained a period of approximately 5 weeks yet to run of the first year's option, which portion of the option, at the annual rate of payment therefor, would be worth less than $25.

According to the testimony of Mrs. Holiday, and of another witness, Mrs. Lukens, Tolosano stated to the plaintiffs, when negotiating the proposed exchange, that he had contracted to pay Ripperdan $4,000 for the ranch; that he had put upon the place a $1,000 pumping plant, had erected thereon a barn at an expense of $250, and had also expended $300 in leveling part of the land and seeding it to alfalfa. To induce the plaintiffs to make the exchange, it also appears, from the evidence introduced by them, that Tolosano promised to deliver to them a span of horses, harness, a wagon, mower, and other personal property, and also to pay the $240 falling due on the option to purchase the ranch on February 8, 1914. None of this personal property was delivered, nor was the $240 paid, though urgently and repeatedly demanded. The result was that this amount, required to keep alive the option, not having been paid when due, nor within an extension of time therefor, the option was canceled. It also turned out that the improvements which, according to his representations, Tolosano had made upon the ranch, were not made by him, but were in existence at the time he procured the option from Ripperdan, and therefore represented nothing of value added to the place. Notwithstanding that Tolosano represented that he was unable to pay the $240 to Ripperdan when it became due, when called as a witness by plaintiff at the trial he testified that at that time he was worth $20,000 to $25,000.

It is no doubt settled law that the mere failure to perform a contract which was made in good faith is not fraud. Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162.

> "In the absence of confidential relations between the parties, the mere making of a promise, which the promisor afterwards fails or refuses to perform, is not actionable fraud, unless the promise was made without the intention of performing it. Civ. Code, § 1572, provides that a promise, made without any intention of performing it, in order to induce another to enter into a contract, constitutes actionable fraud." Rheingans v. Smith, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140.

It is also true that there is no direct evidence in the record before us that at the time of making the contract here involved there was any preconceived secret intention on the part of Tolosano not to perform it; but in this connection the record, in our opinion, discloses sufficient evidence from which it may be justly inferred that at the time of entering into the contract Tolosano had in fact no intention of performing his obligations thereunder.

> "What a person's intent in such a matter may be is often a difficult thing to determine. It usually must be ascertained from his future conduct and speech, and the fact as to such intent is one peculiarly to be deduced by process of reasoning from the facts in evidence by the trial judge." Tench v. McMeekan, 17 Cal. App. 20, 118 Pac. 478.
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> "In cases of fraud, subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. Fraud being proven, in reference to the transaction under question, the criminal intent is necessarily a matter of inference for the jury. The dealing with prop-

erty today by the vendor, as his property, is evidence to show the fraud committed in a sale a month ago. The subsequent acts are illustrative of the intent and character of the first." Butler v. Collins, 12 Cal. 458. See, also, Dowd v. Tucker, 41 Conn. 204; Maxson v. Llewelyn, 122 Cal. 198, 54 Pac. 732.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

(39 Cal. App. 149)

HUDSON v. POLICE COURT OF CITY OF OAKLAND et al. (Civ. 2578.)

(District Court of Appeal, First District, Division 1, California. Dec. 12, 1918.)

BAIL 🔑73—DEPOSIT IN LIEU—RIGHT TO RETURN.

Construing together the sections of Pen. Code, pt. 2, tit. 10, c. 1, arts. 5, 6 (sections 1295–1302), *held* that an attorney who deposited his money as bail for appearance of his client did all that was required for return thereof, so that it could not be subjected to payment of her fine, he at time of trial, both before and after she pleaded guilty, offering to surrender her and demanding return of money.

Petition by Oscar Hudson for writ of review to the Police Court of the City of Oakland, County of Alameda, and Mortimer Smith, Judge thereof, for annulment of a part of a judgment. Part of judgment annulled.

Oscar Hudson, of San Francisco, in pro. per.

Ezra Decoto, Dist. Atty., and Walter J. Burpee, Asst. Dist. Atty., both of Oakland, for respondents.

PER CURIAM. The petitioner, Oscar Hudson, asks this court to annul a portion of the judgment of the police court in the city of Oakland whereby a fine imposed upon one Lucy Alexander after a judgment of conviction of a misdemeanor was taken out of bail money deposited by petitioner for the appearance of the said Lucy Alexander for trial in said police court.

The undisputed facts seem to be that Lucy Alexander was charged with a misdemeanor, and upon her appearance, Hudson, her attorney, deposited $200 of his own funds with the court as bail for her appearance. Upon the day set for trial, petitioner appeared with the said Lucy Alexander and offered to surrender her, and demanded of the court the return of his money. The court refused to accept her surrender, and refused to return the bail money to Hudson. The defendant thereupon pleaded guilty, and the court in judgment imposed a fine of $100 upon her, with the alternative of paying the fine or serving in the city prison of the city of Oakland until the fine was satisfied in the proportion of one day's imprisonment for every $2 of the fine, and further, in the judgment provided that the fine be collected out of the $200 cash bail. The petitioner herein then and there offered to surrender the defendant into custody, as the record shows, and again demanded his money. The court "denied his motion" and ordered that so much of the bail as was necessary be applied by the bailiff to the payment of the fine, and "that the balance of the bail be exonerated."

We are asked to annul the part of the judgment which ordered the bail money subjected to the payment of the fine. Articles 5 and 6 of chapter 1 of title 10, pt. 2, of the Penal Code provide for bail and for the exoneration of bail, but do not seem to exactly cover cases in which bail money is deposited by any person other than the defendant. But construing all the sections of these articles together, we think that the petitioner, Hudson, did all that was required of him in order to entitle him to a return of his money, and that that part of the judgment of the judge of the police court which we are asked to annul was beyond its jurisdiction, and it is therefore ordered that it be annulled as prayed in the petition.

(39 Cal. App. 96)

STOTT et al. v. JOHNSON et al. (Civ. 2595.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1918.)

APPEAL AND ERROR 🔑1011(1) — REVIEW — FINDINGS ON CONFLICTING EVIDENCE.

Where only specifications of error are that certain of findings are not supported by sufficient evidence, and evidence on such questions was conflicting, judgment will be affirmed.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by J. M. Stott and others against W. W. Johnson and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Thos. R. White, of San Francisco, for appellants.

F. R. Wall, of San Francisco, for respondents.

BEASLY, Judge pro tem. This action was brought to recover the sum of $5,250, claimed to be due plaintiffs under an agreement of sale of certain mining property.

The parties to the action were general partners operating a gold mining dredge near the city of Nome, in Alaska. Plaintiffs owned a three-fourths interest in the partnership, and defendants entered into an agreement of purchase with plaintiffs whereby they undertook to acquire such interest. Plaintiffs by this action sued to enforce payment under the terms of the agreement. As a defense to the action defendants pleaded that the agreement sued upon had been rescinded by them because of misrepresentations of certain facts willfully and fraudulently made by plaintiffs. These alleged misrepresentations consisted of: (1) That there were good values in the ground ahead of the dredge and to be worked by it that would make the dredging profitable; and (2) that one of the sellers owned a lease on valuable ground ahead of the dredge and to be worked by it. The trial court rendered judgment for plaintiffs, and the defendants appeal.

The only specifications of error are that certain of the findings are not supported by sufficient evidence. There is no merit in the appeal. The evidence upon the questions presented was conflicting, but it is ample to support the findings of the trial court. The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

179 Cal. 533

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVINSON. (Sac. 2866.)

(Supreme Court of California. Jan. 2, 1919. Rehearing Denied Jan. 30, 1919.)

1. VENUE 🔑72—CHANGE OF—PROCEEDINGS—CONCLUSIVENESS OF AFFIDAVITS.

On motion for change of venue on ground of local prejudice, the number of affiants or of affidavits is not the determining factor or the proper measure of the rights of the parties.

2. APPEAL AND ERROR 🔑965—CHANGE OF VENUE—REVIEW—DISCRETION.

On motion for change of venue on ground of prejudice in action three times tried in county, discretion of court as to change, where such judge had presided at the former trials and was not shown to be prejudiced, will not be disturbed on appeal.

3. VENUE 🔑74—CHANGE OF—PREJUDICE—ABUSE OF DISCRETION.

Change of place of trial of action to condemn water for irrigation purposes to adjacent county, whose county seat was farther removed and less accessible than that of other adjacent counties, *held* not an abuse of discretion.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against James J. Stevinson, a corporation. From an order granting plaintiff's motion for change of place of trial, defendant appeals. Order affirmed.

James F. Peck, of San Francisco, for appellant.

Edward F. Treadwell, of San Francisco, Frank H. Short, of Fresno, and Ostrander, Tuttle, Griffin & Shaffer, of Merced, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order granting the plaintiff's motion for a change of place of trial of this action from the county of Merced, upon the ground that the said plaintiff could not have a fair and impartial trial in said county of Merced. The plaintiff's notice of said motion stated that—

> "Said motion will be made upon the records, papers, and files in the above-entitled action and upon the affidavit of J. F. Clyne, which is attached to this notice."

The defendant, in resisting said motion, presented and filed 22 counter affidavits. In granting said motion the court made the following order:

> "For reasons given in the opinion of the court filed herein this day, motion of plaintiff for change of venue is granted and action is transferred to the county of Mariposa, state of California."

The bill of exceptions prepared and settled for the purpose of an appeal from said order contains the plaintiff's said notice of motion for change of place of trial, the affidavit of J. F. Clyne attached thereto, the counter affidavits presented and filed by the defendant at the hearing upon said motion and in opposition thereto, the statement that "at said hearing, after the introduction of said affidavits, the motion of plaintiff was argued and thereafter submitted to the court, and the court on the 10th day of January, 1917, made the following order." Then followed the order of the court above quoted, after which was the statement:

> "That said order was made during the absence of the plaintiff and its attorneys from the court, and the defendant excepts thereto: That no other or further proceedings were had upon said motion."

It was stipulated by counsel for the respective parties that "the foregoing bill of exceptions is correct and may be settled." This bill of exceptions, accompanied by the notice of appeal, constitutes the transcript on appeal herein.

The first contention of the appellant to be noticed upon the consideration of this appeal is its claim that this court, in the determination of its merits, is confined to the affidavits filed by the respective parties and presented upon the hearing on said motion; the basis of the appellant's contention in this regard being that the bill of exceptions shows that the only evidence introduced before the court upon the hearing of said motion was that of said affidavits and affirmatively states "that no other or further proceedings were had upon said motion." In answer to this contention the respondent insists that in its notice of said motion it was stated that the same would be made "upon all the records, papers and files in the above-entitled action," and that it was not necessary upon the hearing of said motion to introduce before the trial court said papers, records, and files in said action, for the reason that the trial court took judicial notice of its own papers, records, and files, and hence that the introduction of these in evidence would have been an idle and unnecessary formality. The difficulty presented to this court in attempting to determine this initial inquiry in the case is twofold, arising first out of the meagerness of the record before us, by reason of the entire absence therefrom of the pleadings, and, also, of any and all proceedings preceding the making of the motion for change of place of trial, except as glimpses of these pleadings and proceedings may be afforded us in the contents of the affidavits filed in support and resistance of said motion; and, arising second, out of the fact that whatever judicial notice the trial court may have been entitled to take, and may have taken, of its own "records, papers, and files" on the hearing of said motion, this court has no "records, papers, and files" in this action other than those embraced in the transcript on appeal herein. In the endeavor to resolve this difficulty, we have given the most careful consideration to the contents of the affidavits presented by the respective parties to said motion, and, having done this, we have arrived at the conclusion that there is sufficient stated therein to render it unnecessary to determine whether or not the trial court took judicial notice of its papers, records, and files, in arriving at the conclusion which it reached upon the merits of said motion.

From those portions of the affidavit of J. F. Clyne presented in support of said motion which are introduced, we learn that this action was commenced during the year 1910 and was brought on to trial for the first time in the month of December of that year; that the action was one brought to condemn the use of a certain portion of the waters of the San Joaquin river for the use and benefit of the plaintiff in connection with its irrigation system, extending over a vast area, and supplying water to a large number of people owning and cultivating lands on the west side of the said San Joaquin river; that the defendant corporation was engaged in conducting an irrigation system on the east side of the San Joaquin river, using for that purpose a large amount of the water of said river. Its chief defenses to the action were that the proposed use for which the plaintiff intended to divert said water was not a public use, for the reason that a very large proportion of the stock of said plaintiff was owned and held by Miller & Lux, a private corporation, and that said water so sought to be diverted was intended to be used almost wholly upon the lands of the latter; and also that the appropriation of the amount of the waters of said river sought to be diverted by said plaintiff would so far deplete the water thereof available to and being used by the said defendant for the irrigation of lands upon the east side of said river as to greatly damage and decrease in value the holdings of the said defendant and of its water users upon the said east side of said river. Upon the first trial of said action, which lasted several days, the court, in the early part of January, 1911, granted a nonsuit upon the ground, apparently, that the plaintiff had not sufficiently proven that the water proposed to be taken was to be diverted to a public use. A second trial of the action was had in the month of May, 1913, when the cause was submitted to a jury, which rendered a verdict to the effect that the said property sought to be condemned was not necessary for a public use. This verdict was subsequently set aside by the trial judge as being contrary to the evidence, which ruling was sustained by the appellate court, whereupon the case was brought on to trial for a third time in the month of October, 1915, whereupon the jury returned a verdict assessing damages against the plaintiff in the sum of $425,000. This verdict was subsequently set aside by the trial judge as excessive and unsupported by the evidence, which order was later affirmed by the appellate court upon appeal. The same judge presided at these several trials who heard and granted the motion for a change of venue, from which the present appeal has been taken. So much for the affidavit of J. F. Clyne, presented in support of the motion for a change of place of trial, which stands uncontradicted in the record before us. In the remaining portions of the affidavit of said J. F. Clyne, which is contradicted by the counter affidavits offered on behalf of the defendant upon said motion, it is set forth, with a considerable amount of circumstance and detail, that a strong and widespread sentiment of prejudice exists among the people living and owning lands in said Merced county upon the east side of the said San Joaquin river against the said plaintiff and against its proposed condemnation and diversion of any greater portion of the waters of said river than it is now diverting, for the irrigation of lands upon the west side of said river; that, as to the people within said county, living and owning lands upon the west side of said river, they are practically all disqualified from sitting as jurors upon the trial of this cause by the fact that they are already water users under the plaintiff's present irrigation system upon that side of the river, and for this reason upon the three former trials of this action none of the residents of said Merced county upon the west side of said river were able to qualify as jurors upon said trials; that the said sentiment of prejudice on the part of the residents and possible jurors upon the east side of said river has been both stimulated by and reflected in the comments of several of the newspapers of said county, which have from time to time since the inception of said action, and particularly at and during the times of the several trials thereof, published articles highly prejudicial to the plaintiff's case and highly favorable to the cause and claims of the defendant. The affidavit of said J. F. Clyne further sets forth that the state of public sentiment among the people of Merced county on both sides of the said San Joaquin river extends, not only throughout said Merced county, but extends also to and throughout the counties of Stanislaus on the north, and of Madera and Fresno on the south of said county of Merced, and that for that reason neither of said adjacent counties are available for the trial of this action. These latter portions of the affidavits of said J. F. Clyne are strongly and also with much circumstance and detail contradicted by the various affiants who have signed and verified the counter showing made by said defendant upon the hearing on said motion.

[1, 2] If numbers of affiants or of affidavits were the determining factors in questions of this character, the defendant herein would have been entitled to prevail upon said motion; but as this is not the rule, or proper measure of the rights of the respective parties, the utmost that can be said is this, that the affidavit of said J. F. Clyne, had its statements been unopposed or uncontradicted, would clearly have been sufficient to have sustained the order of the trial court granting a change of place of trial in the present case; and that the counter affidavits offered on behalf of the defendant created merely a conflict of evidence upon the subject; and that, this being so, the trial judge who had been in touch with this cause from its inception, and who had presided over the three former trials thereof and who was himself a resident of the community, the sentiment of whose people, available as jurors, were challenged by the affidavits on the one side or the other of this controversy, was in a better position to rightly weigh and justly resolve this conflict in said evidence than the judges of an appellate tribunal could possibly be; and hence that the conclusion of the said trial judge thereon should not be disturbed upon appeal, particularly in the entire absence of any claim on the part of the appellant that his discretion so to decide has been abused through the presence and exercise of personal bias or prejudice on his part. There is no such contention here.

[3] As to the final contention of the appellant to the effect that the trial court was in error in transferring said cause to the county of Mariposa for trial, it may be briefly stated that section 398 of the Code of Civil Procedure, which deals with the place of such transfers, permits the court to send the cause for trial "to the nearest or most accessible county where a like prejudice did not exist." The county of Mariposa is one of the counties adjacent to the county of Merced. Its county seat is about 45 miles from the county seat of Merced county and is somewhat less accessible, as well as somewhat farther away, than are the county seats of Stanislaus county on the north and of Madera county on the south of Merced county. On the other hand, the county of Mariposa is topographically unsuited to the development of extension systems of irrigation, and hence its residents who might be called upon to do jury duty are not affected by those problems and prejudices which arise and persist where large corporations operate in the control of waters and the extension of irrigation systems with frequently conflicting interests and claims. On the other hand, the counties of Fresno, Madera, Merced, and Stanislaus occupy a region as to all its parts identically affected by the development and operation of vast irrigation systems and interests, drawing their water supply in the main from the same source of supply and extending their activities over the lands of these several counties whose respective division boundaries are as to these irrigation systems and projects, mere arbitrary lines. These facts would be potential in determining the question as to where the trial of the instant action should be had, unaffected by the state of prejudice which would, in the opinion of the lower court, have attended its trial in the county of Merced. Under these circumstances, we are unable to say that the said court abused its discretion in the transfer of this cause for trial to the county of Mariposa.

Order affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; VICTOR E. SHAW, Judge pro tem.

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179 Cal. 595

In re MORHOFF'S GUARDIANSHIP.
(S. F. 8781.)

(Supreme Court of California. Jan. 24, 1919.)

1. GUARDIAN AND WARD ⚿18—PROCEEDING TO SET ASIDE — FATHER'S SANCTION — EVIDENCE.

On motion by father of minor to set aside order appointing aunt guardian of minor's person and estate, court *held* justified, under the circumstances, in believing that father, by letter to uncle, who formally consented to guardianship, intended to sanction the guardianship.

2. GUARDIAN AND WARD ⚿13(3)—PROCEEDINGS FOR APPOINTMENT—NOTICE TO FATHER.

Father was not entitled to formal notice of proceeding for appointment of general guardian of minor daughter; such notice not being jurisdictional prerequisite to court's action, under Code Civ. Proc. § 1747.

3. PARENT AND CHILD 🔑2(3)—CUSTODY OF CHILD BY GRANDMOTHER—FATHER'S RIGHT TO CUSTODY.

That father, upon mother's death, left one year old daughter in custody of the daughter's grandmother, would not detract from father's right subsequently to take daughter into his care and custody, if he were a proper person for such parental control.

4. GUARDIAN AND WARD 🔑18 — APPOINTMENT—PROCEEDINGS TO SET ASIDE—MOTION BY FATHER.

Where mother died, leaving one year old daughter, who with father's consent was cared for by grandmother, who died seven years later, leaving the daughter part of her estate, letters of guardianship of daughter's person and estate, granted an aunt after formal consent of uncle, to whom father had written, showing intention to sanction such guardianship, will not be revoked upon father's motion, where father was sailor, absent much of the time, and had remarried.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the guardianship of the person and estate of Elenora Morhoff, a minor. From an order denying a motion by William C. Morhoff, father of the minor, to set aside an order appointing Julia Farrell guardian of the minor's person and estate, William C. Morhoff appeals. Affirmed.

H. M. Anthony, of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

MELVIN, J. William C. Morhoff, father of a minor child, Elenora Morhoff, appeals from an order denying his motion to set aside an order previously made appointing Julia Farrell, an aunt of said Elenora, guardian of the minor's person and estate. The grounds of the motion were lack of necessity for a guardian, fraud in procuring the appointment of Mrs. Farrell, that the father was entitled to be heard on the necessity for the appointment of a guardian, and that the order was taken through the mistake, inadvertence, surprise, and excusable neglect of the father. The facts, in brief, are as follows:

Appellant is in the United States navy. He and Nora H. Brosnan intermarried in 1905. To them two children were born—one a boy, since deceased; and other, the daughter, Elenora. Mrs. Morhoff was in ill health, and lived at the home of her mother in San Francisco, where her little girl was born in 1908. Mr. Morhoff was absent much of the time in pursuit of his calling. Mrs. Morhoff died in 1909, and thereafter the child lived with the grandmother, Mrs. Brosnan. This was with the father's full consent. Mrs. Brosnan died in the final week of 1916, leaving property, to one-third of which the little girl Elenora is entitled as an heir at law. Subsequently Julia Farrell, the child's aunt, applied for letters of guardianship, averring in her petition among other things, that Mr. Morhoff was a resident of Portland, Or., and that he had acquiesced in the appointment of Mrs. Farrell as guardian of said minor. Cornelius Brosnan, an uncle of the minor, residing in San Francisco, formally consented to the appointment of the petitioner.

At the hearing of this petition, and the later proceeding upon motion to set aside the order appointing a guardian, there was exhibited a letter written by Mr. Morhoff from Portland, Or., to Mr. Brosnan in San Francisco, expressing the writer's gratitude to his brother-in-law and sister-in-law for their wishes in reference to the division of their mother's property with their niece, and containing the following language:

> "Now Con in regards to a Guardian being appointed to look after Elenora's share whatever it may be either you or Julia is satisfactory to me. Let me suggest that as neither Julia or you has had much experience in money matters that you will both confer with John in whom I have absolute confidence and who could put the money out to the best advantage. You will find me always ready and willing to sign anything you may both wish as I am for all of your good and don't want a cent."

An order appointing Mrs. Farrell guardian of the child's person and estate was made February 5, 1917, and on the 20th of the same month the guardian's attorneys wrote to Mr. Morhoff, at their client's request, acquainting him with the details of the order appointing the guardian. In the month of May following he made the unsuccessful motion resulting in the order which is the basis of this appeal.

[1] It is now argued that the letter, from which we have quoted above, was only a consent to the appointment of a guardian of the estate of the minor; but there was testimony from John Farrell that the communication was written as a result of an understanding between him and Mr. Morhoff that "there would have to be a guardian appointed over Elenora to look after her and her interests." We think that, under all the circumstances, the court was justified in believing that the writer intended to give his sanction to a general guardianship of his child's aunt over the little girl.

[2] It is argued that Mr. Morhoff was en-

titled to formal notice of the proceeding for appointment of a general guardian. The statute does not contemplate such notice as a jurisdictional prerequisite to the court's action. Section 1747, Code Civ. Proc.

[3] William Morhoff had married a second time, in 1911, and has resided with his wife at Portland, Or., for some years. From the time of her birth to the death of her grandmother he had consented to Elenora's residence with Mrs. Brosnan. He had contributed some amounts to her support, and testified that he was always ready and willing to give more, but was told by her grandmother and other members of the family that they needed no help in the care of the child. Of course, the mere fact that he left the little girl in the custody of her grandparent would not detract from his right subsequently to take her into his care and custody, if he were a proper person for such parental control. He insists that he is qualified in every way to perform his duties as a parent, and that, in the absence of a showing of abandonment of his daughter, or that he is otherwise an improper person to have custody of her, the court abused its discretion in refusing to set aside the order appointing Mrs. Farrell, citing, in this behalf, such cases as Guardianship of Moore, 176 Pac. 461, Guardianship of Wise, 177 Pac. 277, and the authorities upon which those decisions rest. Those cases differed radically in their facts from the matter at bar. In none of them had there been express consent to the guardianship.

[4] Under the circumstances revealed by this record, we do not believe that the court committed any abuse of discretion in refusing to revoke or set aside the order appointing Mrs. Farrell guardian of the person and estate of her minor niece.

The order is affirmed.

We concur: LENNON, J; WILBUR, J.

179 Cal. 592

STEVENS et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 5746.)

(Supreme Court of California. Jan. 22, 1919.)

MASTER AND SERVANT ⚷375(1)—WORKMEN'S COMPENSATION—SUFFICIENCY OF EVIDENCE—DEATH DURING PERFORMANCE OF DUTY.

In proceedings under the Workmen's Compensation Act for compensation for the death of a café waiter, shot while approaching scuffle between another waiter and armed customer, the fact that it was waiter's duty to keep order *held* sufficient to sustain award.

In Bank.

Proceeding under the Workmen's Compensation Act by Merle Lindlaw, for herself and as guardian ad litem and trustee of John Robert Lindlaw, for compensation for the death of John Robert Lindlaw, opposed by C. A. Stevens and another, as employers, and the Ætna Life Insurance Company, a corporation, as insurer. Award for petitioners by the Industrial Accident Commission, and employers and insurer bring certiorari to annul the award. Award affirmed.

E. L. Stockwell, of San Francisco, Leland Mann, of Los Angeles, and Redman & Alexander, of San Francisco, for petitioners.

Christopher M. Bradley, of San Francisco, for respondents.

LENNON, J. The petitioner herein, the Ætna Life Insurance Company, seeks, as the insurer of certain café owners against liability under the Workmen's Compensation Act (St. 1913, p. 279) to annul by certiorari an award made by the Industrial Accident Commission in the sum of $5,000 to Merle Lindlaw for herself as the widow of John R. Lindlaw and as guardian ad litem and trustee of her infant son, John Robert Lindlaw. The writ is prayed for on the ground that the evidence does not justify the findings of fact or the order of award.

Substantially stated, the facts are these: John R. Lindlaw was employed as a waiter in a café at Venice, Cal. On a September afternoon in 1917, one E. E. Rice, accompanied by his wife, entered the café. He was joined some little while later by his son. After the party had been served, Rice got into an altercation with one Sullivan, a waiter attending an adjoining table, during the course of which he threatened picturesquely to make Sullivan "jump over the housetops," and drew a revolver. Sullivan grappled with Rice, as did the latter's son and one Ealand, another waiter, called by Sullivan to help disarm Rice. Lindlaw, serving other tables in the café, started for the scene at this juncture, calling "Come on, Brown," to yet another waiter. As Lindlaw approached the scuffle the revolver, still in Rice's hand, was discharged, the bullet striking Lindlaw and killing him. Brown, following Lindlaw, caught him as he fell.

The paramount point presented for review is whether or not Lindlaw, in starting for the scene of altercation, was performing a duty incident to his employment as a waiter in the café. In a word, if it was incumbent on Lindlaw as a part of his duties as a waiter in the café to help keep order and suppress commotion, then he was killed in the performance of his duties and the award must stand; and it needed only to be shown that the hazard was one to which deceased was exposed by his employment to warrant the award. Western Indemnity Co. v. Pillsbury et al., 170 Cal. 686, 151 Pac. 398. On this point the evidence seems crystal clear. One of the owners of the café testified that it was a part of the duties of waiters in his employ to assist in keeping order, to quell disturbances, and eject unruly persons. It was also admitted to be a fact in the case that the employés in the café had instructions to keep order. The waiter Brown testified, in effect, that relative to an altercation arising in the café it was as much the duty of the waiters as any other part of their waiters' business to go there and try to stop it as quickly as possible. Considered in connection with the testimony of the witness McFadden, identified with café life for a period of 25 years, to the effect that the café in question was what is known as a cabaret house, "catering to a class of people that are subject more or less to brawls and things of that kind that will cause trouble, and especially where there is dancing," and that this particular café was "a type of house that would be in trouble quicker than any average house at the beach," it follows that the employer's business in the instant case was such as to expose his employés to the danger of bodily injury ensuing upon altercations by disorderly patrons. What Lindlaw's intentions were as he started towards the altercation must, of course, remain unknown; but it is obvious he was not intending to start the fight, since it was already started, and it is reasonable to assume, therefore, that he was intending only to assist in stopping it, and that, as an employé of the café, it was his duty to assist in stopping it, seems from the uncontradicted evidence to admit of little doubt and less speculation.

Petitioners' citations relied on in support of the petition for the writ are not sufficiently analogous in point of principle or of fact to warrant discussion, nor do they at all cover and control the situation presented here, namely, one in which an attendant is charged as part of his duties to quell or assist in quelling disturbances and to eject disorderly persons in a cabaret house where alcoholic liquors are sold, and is injured in the course of a brawl started by a disorderly patron.

It follows, from what has been said, that it does not appear as a matter of law that there was not sufficient evidence to warrant and sustain the award.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.; SHAW, J.

(39 Cal. App. 177)

JOHNSON v. ALEXANDER. (Civ. 2621.)

(District Court of Appeal, First District, Division 1, California. Dec. 13, 1918.)

1. Marriage 🔑58(1)—Annulment—"Age of Legal Consent."

"Age of legal consent" within Civ. Code, § 82, subd. 1, authorizing annulment of marriage, where the party seeking it was at the time of marriage under the age of legal consent, and consent of parent or guardian was not given, is the age at which, under section 56, one is capable of consenting to and consummating marriage (in case of a female, 15 years), and not the age (in case of female, 18 years) below which it is unlawful under section 69, for the clerk to issue a marriage license without the consent of parent or guardian.

2. Marriage 🔑58(1)—Validity—License—Wrongful Issuance.

A marriage, solemnized under a license issued contrary to Civ. Code, § 69, providing that the clerk must not issue without consent of parent or guardian of a party under age, is not, on that account, void or voidable.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Alva Johnson, by her guardian ad litem, Jennie Carroll, against Manuel Alexander. From an adverse judgment, plaintiff appeals. Affirmed.

Ernest Klette, of Fresno, for appellant.
C. K. Bonestell, of Fresno, for respondent.

LENNON, P. J. This is an appeal from an order sustaining a demurrer to the complaint. The complaint states that the plaintiff and the defendant were married on the 23d day of March, 1917; that, at the time of the marriage, the plaintiff was of the age of 15 years, and had not previously been married; that said marriage was not consented to in writing or otherwise, or at all, by the parents or guardians of said plaintiff; that Jennie Carroll was, at the time of said marriage, the legal guardian of plaintiff, and still is said legal guardian, duly appointed and qualified, and has likewise been appointed guardian ad litem for the purpose of prosecuting this suit for the annulment of said marriage.

A demurrer to the complaint was sustained on the ground that said complaint did not state facts sufficient to constitute a cause of action.

The only question presented involves a construction of section 82 of the Civil Code. This section provides that a marriage may be annulled for a number of specified causes, existing at the time of the marriage. The cause relied upon by plaintiff is:

"That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her. * * *"

[1] The precise question presented is whether the term "age of legal consent," as used in the above section, refers to the age of 15 years specified in section 56, Civil Code, as the age at which females, not otherwise disqualified, are capable of consenting to and consummating marriage, or whether it refers to the age of 18 years, specified in section 69, Civil Code. The last-mentioned section provides that:

> "If the male is under the age of twenty-one years or the female is under the age of eighteen years, and such person has not been previously married, no license must be issued by the county clerk unless the consent in writing of the parents of the person under age, or one of such parents, or of his or her guardian, is presented to him, duly verified by such parents, or parent, or guardian; and such consent must be filed by the clerk, and he must state such facts in the license."

It will be noted that section 56, Civil Code, specifies 15 years as the age at which females are capable of "consenting to" and consummating marriage. Section 82, Civil Code, provides for an annulment in cases where a party was "under the age of legal consent." It seems from the language of these two sections to be clear that an annulment would be possible under subdivision 1 of section 82, Civil Code, only when the party seeking it was under the age of 15 years at the time of the marriage and the consent of her parents or guardian had not been previously obtained.

[2] By section 69, Civil Code, the duty of the county clerk is clearly defined, but we are of the opinion that, if he fails in this, either willfully or through mistake, and issues the license to a female under the age of 18 years without the consent of parent or guardian, and the marriage is afterward solemnized, such marriage is not void or voidable because of the failure of the clerk to perform his duty as prescribed.

After a careful search of the authorities, we are unable to find any decisions in which the precise question presented here is directly involved; but there are intimations in several decisions in this state which tend to sustain our view. In addition to these intimations, we quote from the language of the decision in the case of Hunter v. Milan, 5 Cal. Unrep. Cas. 107, 41 Pac. 332:

> "By the marriage act of 1850 [making fourteen years the age of consent], any person joining in marriage any male under the act of twenty-one years, or female under the age of eighteen years, without the consent of the parent or guardian of such minor, was deemed guilty of a misdemeanor and subject to a fine, * * * but the marriage was not void, or even voidable, except in cases where the female was under the age of fourteen."

Moreover, while the question to be directly decided here may not have been in issue, and therefore not necessary to a decision in the case of the Matter of the Guardianship of Ambrose, 170 Cal. 160, 149 Pac. 43, the sections of the Code involved here were there considered and by the court construed to mean that it is only when the marriage is contracted by a minor who is incapable of consenting thereto by reason of being under the age of consent provided and designated in section 56 of the Civil Code, and the consent of his or her parents or guardian has not been secured, that the marriage may be annulled under the provisions of subdivision 1 of section 82 of the Civil Code.

We, therefore, conclude that the demurrer was properly sustained, and the judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

39 Cal. App. 128

PEOPLE v. SCOTT. (Cr. 616.)

(District Court of Appeal, Second District, Division 1, California. Dec. 11, 1918. Rehearing Denied by Supreme Court Feb. 6, 1919.)

1. COURTS ⚷92—OPINIONS—DICTUM.

In habeas corpus proceedings, where main question presented was constitutionality of indeterminate sentence law (Pen. Code, § 1168) as to petitioner, who had committed crime prior to enactment and had been given indeterminate sentence, court's decision, after holding that such law was unconstitutional as to petitioner, that petitioner might be remanded to lower court for resentence, was not mere dictum, though not fully discussed, being question upon which it was necessary for court to pass.

2. CRIMINAL LAW ⚷913(4), 993—INDETERMINATE SENTENCE — RESENTENCE — NEW TRIAL.

Defendant, who was given indeterminate sentence for crime committed prior to enactment of Pen. Code, § 1168, providing for indeterminate sentences, upon being returned to court for valid sentence, under section 1493, more than 115 days after date of verdict, was not entitled to new trial under sections 1191, 1202, and resentence pronounced was valid.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

William A. C. Scott was convicted of rape, and, having been given void sentence, was brought before court for resentence. From an order denying a motion for a new trial at time of resentence, and from judgment of resentence, he appeals. Affirmed.

E. L. Johnson, of San Diego, for appellant.
U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of rape, committed on or about the 28th day of June, 1917, upon a female whose age was more than 18 years. According to section 264, Pen. Code, that crime is punishable by imprisonment in the state prison not more than 50 years. According to a statute which became effective on the 27th day of July, 1917, the Penal Code was amended by adding thereto a new section, numbered 1168, wherein it is provided that—

> "Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law, * * * shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment."

It was further provided that the period of such confinement shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted. Pursuant to the verdict rendered against the defendant in this case, the superior court, on the 18th day of September, 1917, ordered and adjudged that the defendant be punished "by imprisonment in the state prison of the state of California." Thereafter, by order of court made on the 10th day of May, 1918, the defendant was returned to the superior court of San Diego county, "to be sentenced upon said conviction according to the law of said state existing at the time of the commission of said offense, to wit, on or about the 28th day of June, 1917, and prior to the taking effect of said indeterminate sentence law." Defendant having been brought before the court on the 13th day of May, 1918, for sentence, the defendant moved for a new trial solely upon the ground that the sentence is not pronounced within the time limited by section 1202 of the Penal Code. The court denied that motion and pronounced judgment upon the defendant that he be punished by imprisonment in the state prison of the state of California at San Quentin for the term of 10 years. The defendant appeals from the judgment so rendered on the 13th day of May, 1918, and from the order denying his said motion for a new trial.

In Ex parte Lee, 171 Pac. 958, a habeas corpus proceeding, it appeared that the petitioner was being held in imprisonment under an indeterminate sentence for a crime committed on the 16th day of May, 1917. The Supreme Court held that section 1168 of the Penal Code was unconstitutional and ex post facto as to the petitioner, whose offense was committed before the enactment of that law; nevertheless the court refused to discharge the petitioner from custody, and directed that he be delivered to the sheriff of the county of Mendocino, to whose custody he was thereby remanded for judgment by the superior court of that county upon the conviction. In making that order the court said:

> "Having been tried and found guilty of the crime of manslaughter, as appears from the return to the writ, the petitioner is not entitled to an absolute discharge, but must be returned to the superior court of Mendocino county for sentence. Section 1493, Pen. Code. Section 1202, Pen. Code, providing that a new trial should be granted unless judgment is pronounced within the time limited in section 1191, Pen. Code, has no application to a case of this kind, in which a sentence has been imposed."

Section 1191, Pen. Code, establishes certain limitations upon the time for pronouncing judgment. Those limitations do not in any case permit the court to pronounce judgment at a time more than one hundred fifteen days from the date of the verdict. Section 1202 of the Penal Code provides that if the judgment be not rendered or pronounced within the time permitted by section 1191, "then the defendant shall be entitled to a new trial."

In Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718, the Supreme Court construed sections 1191 and 1202 as mandatory in their terms, and held that where sentence is not pronounced in a criminal case within the time prescribed by section 1191, and the defendant applies for a new trial on that ground, it is the imperative legal duty of the trial court to grant the application. Nevertheless, the same court, as we have seen, held in Ex parte Lee that the rule "has no application to a case of this kind in which a sentence has been imposed." See, also, Matter of the Application of Germino for a Writ of Habeas Corpus, 176 Pac. 701, being a decision rendered by the Third appellate district on October 24, 1918; People v. Booth, 174 Pac. 685; People v. Mendosa, 173 Pac. 998.

[1, 2] The contentions of appellant are that for the reason stated in his motion he was entitled to a new trial; that as soon as the defendant's imprisonment in the state prison began under the first sentence the power of the court to pronounce judgment against him was exhausted and its jurisdiction to recall, annul or change its judgment was at an end. Although these matters were not fully discussed in Ex parte Lee, supra, we do not agree with the claim that the court's decision thereon was mere dictum. Having reached its conclusion upon the main

question presented in that case, it was necessary for the court to determine whether the petitioner was entitled to discharge from custody, or whether, on the other hand, he might be remanded to the lower court for resentence.

In accordance with the law, as declared in that decision, the judgment appealed from in this case is affirmed, and the order denying defendant's motion for a new trial is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

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39 Cal. App. 184

FRESNO IRRIGATED FARMS CO. v. CANUPIS et al. (Civ. 2602.)

(District Court of Appeal, First District, Division 1, California. Dec. 14, 1918.)

1. Vendor and Purchaser ⚷335—Forfeiture of Purchase-Money Installments.

When time is made of the essence of contract of sale of land, upon breach of condition, such as failure to make a payment, the purchaser, at vendor's option, forfeits all right in and to the contract, also all payments made, without affirmative action by vendor.

2. Quieting Title ⚷14—Contract of Sale—Termination—Remedies of Vendor.

When time is made of the essence of contract of sale of land, on breach by purchaser, no affirmative action is necessary on the part of vendor before bringing action to quiet title for purpose of establishing judicially that purchaser has forfeited his rights to contract.

3. Vendor and Purchaser ⚷299(2)—Contract of Sale—Termination—Remedy of Vendor.

When time is made of essence of contract of sale of land, on breach by purchaser, no affirmative action is necessary on part of vendor before bringing action of ejectment for purpose of establishing judicially that purchaser has forfeited his rights to contract.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Fresno Irrigated Farms Company against Stavros Canupis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. K. Bonestell, of Fresno, for appellants.
L. L. Cory, of Fresno, for respondent.

PER CURIAM. This is an appeal by defendants from a judgment in favor of the plaintiff in an action to quiet title.

On July 10, 1912, an agreement was entered into between the plaintiff and defendants for the purchase and sale of certain real property in Fresno county, for the sum of $3,000 payable in installments. By the express terms of the contract time was made of the essence thereof. This suit was brought for the purpose of quieting the title to the land in question against any claim of the defendants. They answered, setting up the contract, upon which they were in arrears, as a defense to the action. The case came on for trial, and upon the evidence and stipulation of counsel as to certain facts a judgment was awarded in favor of plaintiff, from which the defendants prosecute this appeal.

The only question raised thereby is whether or not an action to quiet title was proper under the circumstances of the case. It is the contention of the appellants that there was no evidence of the breach other than failure to pay an overdue installment, and that under the circumstances the plaintiff should have resorted either to an action to rescind, or should have notified the defendants in advance that the contract was terminated before an action to quiet title could be initiated.

As we view it, this is no longer an open question in this state. The authorities establish a contrary doctrine. The action was commenced on May 24, 1916. It is shown by the statement introduced in evidence that a large sum of money was due upon the contract at the time of the initiation of the action, also that the defendants had been in arrears in their payments for over two years prior to that time. As we have said, it is provided in the contract that time is of the essence thereof, and that in the event the defendants failed to comply therewith the plaintiff should have the right to terminate the contract, and should also have the right to enter upon the property and take immediate possession thereof, and in the event of any such failure the defendants were to surrender to the plaintiff the land and premises without delay or hindrance. At the time of the trial it was admitted by the defendants that no payments other than those referred to in the statement above mentioned had been made, at which time it was also stipulated between the attorneys as follows:

> "That the defendants, at the time of the commencement of the action, were in default in making the payments specified in the contract and had not complied therewith, and that there was only one question to be determined by the court herein, i. e., whether the plaintiff could bring this suit to quiet title without taking some affirmative action to forfeit the contract because of the default of the purchasers, and that the case was to be submitted to the court for decision upon that one question alone."

In the case of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R.

A. 199, 69 Am. St. Rep. 17, this court had occasion to consider and definitely settle the respective rights and liabilities of a vendor and vendee upon contracts similar to the one in question. A very late case, which seems identical in principle with the case at bar, is that of Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 Pac. 420. In that case, as here, the plaintiff sued to quiet title to certain property. The defendant answered, as here, setting up certain contracts for the purchase and sale of the property, upon which they were in default. The Supreme Court, in discussing this case says:

> "We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief. * * * Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited 'by the parties of the second part' (Slye and Condon) an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in Glock v. Howard & Wilson Colony Co., 123 Cal. 1–16 (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713): 'In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result.'"

See, also, Newhall Land & Farming Co. v. Burns, 31 Cal. App. 549, 161 Pac. 14; Champion G. Min. Co. v. Champion Mines, 164 Cal. 213, 128 Pac. 315; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363; Hay v. Casey, 30 Cal. App. 570, 159 Pac. 726, 728; Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007.

[1-3] From these decisions it would seem to be settled that when time is made of the essence of such a contract that provision will be enforced, both in law and in equity, unless waived expressly or by the conduct of the vendor; that upon a breach of any of the conditions, such as failure to make a payment, the vendee, at the option of the vendor, forfeits all right in and to the contract, also to all payments made, and that no affirmative action is necessary on the part of the vendor; that, without notice, an appropriate suit may be commenced by the vendor, either to quiet title or in ejectment, for the purpose of establishing judicially that the vendee has forfeited his rights to the contract, and no longer has any interest in and to the property described therein.

The judgment is affirmed.

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39 Cal. App. 83

CRANE et al. v. REYNOLDS. (Civ. 2598.)

(District Court of Appeal, First District, Division 1, California. Dec. 7, 1918.)

APPEAL AND ERROR ⟹1010(1)—FINDINGS — EFFECT.

Defenses to an action on a note based on hypotheses contrary to the findings of the trial court which were supported by sufficient evidence are not available on appeal.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by A. T. Crane and another against W. D. Reynolds. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. F. Cowan, of Santa Rosa, for appellant.
Rolfe L. Thompson, of Santa Rosa, for respondents.

LENNON, P. J. Action by plaintiffs on a promissory note given by defendant in payment of his proportionate indebtedness upon certain notes paid by plaintiffs and of which the plaintiffs and defendant were common guarantors. Plaintiffs had judgment as prayed, and defendant appeals.

The appellant in his brief states that his defense to the action was based upon eight grounds, setting them forth; but the only propositions argued by him are three in number, and we will take them up in their order.

[1] The first is that the respondents were stockholders in a corporation, which, according to the contention of the appellant, was the principal debtor upon the notes of which respondents and appellant were guarantors, and that consequently they were primarily liable as such stockholders for a certain proportion of the indebtedness represented by the notes. A complete answer to this contention is found in the finding of the trial court, made upon sufficient evidence, that the corporation was not the principal debtor upon said notes and was not interested therein.

Appellant's second proposition is that the respondents failed to use ordinary diligence in compelling the stockholders of the corporation to contribute, and in compelling the principals to pay the notes, at a time when the corporation and stockholders were solvent, which failure would in equity release the appellant from his liability to contribute to the payment of the indebtedness jointly guaranteed. Even if this proposition were sound as a matter of law—and from the record the contrary appears to us to be the case—it, like the first, is made untenable by the court's finding that the corporation was not a party to or interested in the indebtedness before mentioned.

Appellant's final contention is that the respondents received a part of the money for which the notes jointly guaranteed were giv-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

en, and concealed this fact from the appellant, for which reason equity will not compel a contribution from him as cosurety. This again is met by the finding of the trial court that such was not the fact; that while part of the money procured upon said notes was used to purchase from the respondents their holdings of stock in the corporation, this fact was known to the appellant at the time of the transaction, and that such use of the money by the borrower did not make of the loan one for the benefit of the respondents.

The appeal is entirely devoid of merit.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

FISCHER v. LUKENS et al. (Civ. 2583.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1918.)

1. Appeal and Error 🔑1217—Determination—Remittitur.

The jurisdiction of the appellate court ceases the moment remittitur goes down, and execution which was stayed pending appeal may be issued, regardless of the filing of the same, for the jurisdiction of the trial court had again attached.

2. Evidence 🔑83(6)—Presumption—Official Acts—Determination—Remittitur.

As Code Civ. Proc. § 958, does not call for a separate file mark on a remittitur, *held*, where a remittitur was sent down after disposition of an appeal on the taking of which execution was stayed, it will be presumed that the clerk of the trial court in accordance with statute entered a minute of the judgment of the appellate court, etc., and so execution was properly issued, though the remittitur was not filed until thereafter under an order nunc pro tunc.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Zavier Fischer against E. G. Lukens and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellants.

Stanley Moore, of San Francisco, and Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

STURTEVANT, Judge pro tem. This is an action to quiet title. The plaintiff had judgment in the trial court. Pacific Investments, Incorporated (a corporation), one of the defendants, has appealed and has brought up all of the evidence in a bill of exceptions. The evidence of the parties consists of written instruments. No witness was called by either party. Both parties claim to deraign title from Western Fuse & Explosives Company. On December 22, 1904, the plaintiff obtained a judgment against the Western Fuse & Explosives Company and later took out execution and caused the property involved in this action to be sold at execution sale. The plaintiff purchased at the sale, and if his purchase vested in him a legal title the judgment of the trial court should be affirmed. The appellant attacks the execution sale on the ground that at the time the clerk of the trial court issued the writ the jurisdiction of the trial court had been divested by virtue of an appeal duly perfected. Code Civ. Proc. § 946; Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211.

[1, 2] The facts regarding that appeal and pertinent to this appeal are few. They are all admitted. The first appeal was taken regularly and the execution was duly stayed. Later that appeal was disposed of and a remittitur was sent down. The remittitur was dated May 9, 1910. It was filed September 13, 1916, nunc pro tunc, May 11, 1910, pursuant to an order of the trial court made on that date. The record is silent as to when, if at all, the clerk of the trial court did "attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry." The writ of execution was taken out August 1, 1913, and the sale was had September 8, 1913. As the record contains no evidence to the contrary, we must presume that the clerk of the Supreme Court promptly transmitted the remittitur after its issuance; that it was duly received; that the clerk of the trial court duly received it, and thereafter that he did promptly "attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket, against the original entry." Code Civ. Proc. § 958; sec. 1963, subs. 15, 20, and 24. These matters fill all of the calls of the statute. It will be noted that the statute does not call for a separate filing mark on the remittitur. Code Civ. Proc. § 958. When the provisions of the last-mentioned section have been complied with, it is clear that jurisdiction revests in the trial court. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816. There is not, however, any express statement on that subject in our statutes. But there is settled authority to the effect that all jurisdiction of the appellate court is divested on the instant the remittitur goes down. Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710; Adams v. Dohrmann, 63 Cal. 417; Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816. But it needs no citation of authority to the effect that jurisdiction of a pending case rests in some court. In this case the jurisdiction of the Supreme Court

and the jurisdiction of the superior court, only, are involved. It being settled by the above authorities that the jurisdiction of the Supreme Court ceased when the remittitur issued, it seems clear that instantly the jurisdiction of the superior court attached. It follows that the attack on the title of the respondent is without merit.

As no other error is alleged, the judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

39 Cal. App. 131

FRATESSA v. MORRISSEY et al.
(Civ. 2584.)

(District Court of Appeal, First District, Division 1, California. Dec. 11, 1918. Rehearing Denied Jan. 10, 1919.)

CORPORATIONS ⚷619—FORFEITURE OF FRANCHISE—TRUSTEE DIRECTORS—COMPENSATION.

Where a corporation lost its charter for failure to pay license taxes, and all the stock was transferred to plaintiff, *held* that director trustees, if entitled to compensation for winding up the corporate affairs, were not entitled to compensation where they rendered no services.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Paul F. Fratessa against W. H. Morrissey and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. H. Morrissey, of San Francisco, for appellants.

J. J. West and Paul F. Fratessa, both of San Francisco, for respondent.

BEASLY, Judge pro tem. This action was brought to restrain defendants, who claimed to be director trustees of a defunct corporation, from selling certain real estate for the purpose of winding up the corporation's affairs.

From the facts it appears that the Anvil Land & Stock Company, a domestic corporation, forfeited its charter for failure to pay its annual license tax. At the time of the forfeiture the corporation's assets consisted of three parcels of land situated in San Francisco of the value of $3,500, and one parcel in the state of Oregon. The corporation was not indebted in any sum, and the defendants herein were its directors in office and its only stockholders at the time of the forfeiture of its charter. Subsequent to this forfeiture the defendants conveyed on the corporate shares to one Harvey F. Turner, who thereafter conveyed the same to the plaintiff. After having disposed of all their interest in the corporation defendants signified their intention as director trustees of selling the four parcels of land for the purpose of winding up the corporation's affairs. Plaintiff thereupon filed his complaint reciting the above-mentioned matters, and claiming that there was no necessity for the sale. In his complaint plaintiff alleged an offer to pay any reasonable expense for settling the corporation's affairs, and for distributing and conveying the assets of the corporation to him as owner of all the shares of the capital stock of the corporation. He alleged further that the defendants demanded the unreasonable sum of $350 for their compenstion as trustees to make such distribution to plaintiff, and threatened a sale of the real property to pay themselves such sum. The complaint prayed for a judgment restraining the defendants from selling the lands, and for an order directing a conveyance of the same to plaintiff.

Defendants answered, a temporary restraining order was made, trial was had, and the cause was submitted for decision. Pending the decision an act enabling defunct corporations to have their charters restored was passed by the Legislature; the corporation was rehabilitated, though not by defendants; shares of stock were transferred by plaintiff to other persons; the stockholders of the revived corporation held a meeting and removed defendants from office as directors, and elected others in their stead. Thereafter the corporation through its new directors sold the four parcels of land to plaintiff.

The action brought by plaintiff was then dismissed with the trial court's approval, but on defendant's motion this dismissal was vacated. Thereafter plaintiff filed a supplemental complaint, setting up the rehabilitation of the corporation and its subsequent acts, and further recited that defendants as director trustees were proceeding to sell the lands above mentioned, and alleged that such sale would cloud plaintiff's title. The supplemental complaint prayed for a perpetual injunction restraining defendants from selling the land. In defendants' answer to both complaints it is alleged that the defendants agreed among themselves that defendant Morrissey, who is an attorney at law, should be paid $100 to bring "court proceedings" to settle the affairs of the corporation, and that no distribution of the assets would be made until said sum was paid. Their total claim amounts to the sum of $562 for their services and for costs incurred in attempting to collect the same.

Upon the conclusion of the trial judgment was given enjoining defendants from selling or attempting to sell any of said parcels of land. From this judgment defendants appeal.

The trial court found that, after plaintiff's grantor had acquired all the shares of stock of the corporation, he had tendered to defendants for their execution a drafted instrument of conveyance in proper form to convey and distribute the real property to the owner of all the capital stock of the corporation, and that at such time said owner had tendered to each of the defendants the sum of $5 to defray expenses in executing the instrument of conveyance, but that defendants had refused to make the conveyance. It further found that defendants did nothing toward settling or winding up the affairs of the corporation, nor did they make any outlay on behalf of the company, and that they had no lien or interest or any claim upon the property sought to be sold. The evidence supports these findings.

Defendants' claim is based upon the asserted right of director trustees to compensation for winding up the affairs of defunct corporations. Admitting such right to exist, the record discloses that they rendered no services, and whatever expenditures they may have made in pursuing a claim initiated by themselves and to which they were not entitled must be borne by themselves. Under these circumstances plaintiff was entitled to the relief granted.

Judgment affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

39 Cal. App. 94

MILLS v. GEO. A. MOORE & CO. (Civ. 2341.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1918.)

1. **Principal and Agent** ⚷89(5)—**Contracts—Pleading.**

A complaint, alleging that plaintiff was engaged by defendant as its exclusive agent to sell bags, that the parties modified the agreement, and that defendant promised to pay plaintiff commissions on sales made by the extra salesmen, is sufficient to show consideration for the agreement and bring plaintiff within Civ. Code, § 1605.

2. **Contracts** ⚷346(10)—**Proof—Variance.**

Where plaintiff alleged his contract according to its legal effect, and, when called as witness, stated the terms of the contract much more in detail than he had stated it in his complaint, but did not state it differently in any respect, there was no fatal variance.

3. **Contracts** ⚷346(11)—**Plea of Performance—Proof.**

While a plea of performance is not sustained by proof that performance was excused, that rule is not available where plaintiff's evidence showed full performance but defendant's evidence showed it was excused.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by E. T. B. Mills against George A. Moore & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 29 Cal. App. 405, 155 Pac. 823.

Denman & Arnold, of San Francisco, for appellant.

Samuel T. Bush, of San Francisco, for respondent.

STURTEVANT, Judge pro tem. This is an action based on an oral contract to recover certain commissions. The plaintiff had judgment in the trial court, and the defendant appealed under section 953a of the Code of Civil Procedure.

[1] The plaintiff alleged that he had been employed by the defendant as its exclusive agent to sell bags; that thereafter the defendant and the plaintiff agreed to modify that contract; that by the modification the plaintiff promised the defendant that the defendant might employ other agents to sell bags, and the defendant promised to pay the plaintiff a commission on the sales made by those extra salesmen. These were complete allegations on the subject of consideration, and brought the plaintiff fairly within the provisions of section 1605, Civil Code and the consideration was sufficiently pleaded to withdraw the case from the doctrine stated in Acheson v. Western Union Telegraph Co., 96 Cal. 641, 31 Pac. 583.

[2] The defendant earnestly contends that there was a fatal variance, and presents the point by calling attention to the ruling of the trial court denying its motion for a nonsuit, and, later, its refusal to give certain instructions requested by defendant. We think this contention is not well founded. The plaintiff alleged his contract according to its legal effect. When called as a witness, he stated the terms of the contract much more in detail than he had stated it in his complaint, but in no respect did he state it differently. These facts do not show a fatal variance. Bowers' California Dredging Co. v. San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475; Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 73 Pac. 966.

[3] The contract, it is admitted, contained a covenant that the plaintiff would keep the defendant advised as to the features of the market. The defendant attempted to prove that the plaintiff did not do so, but was excused therefrom. The defendant then invokes the rule that a plea of performance is not sustained by proof of excuse from performance. Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834. That rule is well settled, but the defendant has not brought itself within

that rule. Throughout a long examination the plaintiff, who was the only witness on the subject, consistently claimed that he had performed his contract, and at no time did he admit nonperformance and claim excuse.

The record shows no error, and the judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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39 Cal. App. 187

SOTO v. SPRING VALLEY WATER CO.

(Civ. 2553.)

(District Court of Appeal, First District, Division 1, California. Dec. 14, 1918. Rehearing Denied by Supreme Court Feb. 10, 1919.)

1. MASTER AND SERVANT 🔑265(5)—INJURIES TO SERVANT—PRESUMPTION OF NEGLIGENCE.

In an action for the death of a servant killed when a scraper operated by a cable connected with an engine broke a timbered structure under which the servant was working, *held* that the circumstances were sufficient to warrant a finding of negligence under the doctrine of res ipsa loquitur.

2. MASTER AND SERVANT 🔑264(5)—INJURIES TO SERVANT—PRESUMPTION OF NEGLIGENCE.

In an action for the death of a servant killed under circumstances raising an inference of negligence, *held* that the doctrine of res ipsa loquitur may be relied on though the complaint alleged negligence in the operation of machinery, etc.

3. MASTER AND SERVANT 🔑265(2)—INJURIES TO SERVANT—BURDEN OF PROOF.

In an action for the death of a servant killed when scraper operated by a cable connected with an engine came in contact with the structure under which the servant was working, an instruction that plaintiff is not required to show any specific act of negligence, but only that the accident was one which would not have happened, had due care been used, etc., *held* correct.

4. TRIAL 🔑251(8)—INSTRUCTIONS.

In an action for the death of a servant, where the doctrine of res ipsa loquitur was relied on, an instruction that when a thing which causes injury is under the control of defendant and the accident is one not ordinarily happening if due care is used, etc., *held* correct, and not open to objection as being abstract.

5. MASTER AND SERVANT 🔑291(9)—INJURIES TO SERVANT—INSTRUCTIONS.

In an action for the death of a servant, where the doctrine of res ipsa loquitur was applicable to the facts, an instruction that the burden of proving negligence was on plaintiff *held* properly refused, where the instruction went further and would have led the jury to believe that negligence could not be inferred from the happening of the accident.

6. APPEAL AND ERROR 🔑1050(4)—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The admission without proper foundation of testimony as to an inspection of the place of the accident several days thereafter *held* harmless, in view of testimony of witness.

7. DEATH 🔑72—ACTIONS—EVIDENCE.

In a death action, where the trial proceeded on the theory that it fell within Civ. Code, § 1970, and the Roseberry Act, which was in force at the time of the accident, *held* that it was not improper for plaintiff, who was the mother of deceased, to testify he was her sole support, for under the Code she could only recover if dependent on deceased.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Tovina Soto against the Spring Valley Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gillett & Cutler, of San Francisco, for appellant.

Louis Oneal, of San Jose, and Geo. K. Ford, of San Francisco, for respondent.

BEASLY, Judge pro tem. Herbert Soto, son of the plaintiff, Tovina Soto, was killed while in the employ of defendant, and his mother had judgment in this action for damages for his death. Defendant appeals from this judgment.

One eyewitness furnished all of plaintiff's evidence of the tragedy, and, taken with the admissions of the pleadings and certain formal evidence of two relatives of the deceased, this testimony supplies all the facts before the court in the case, no evidence being offered for the defendant.

The facts are as follows: On the 2d day of November, 1913, and for a long time prior thereto, the defendant was engaged in the construction of a dam in the Calaveras Valley in Santa Clara county, and in connection with the work operated a stationary steam engine which rotated a drum, on which ran a wire cable. This cable was attached to a metal scoop, or scraper, which it pulled back and forth over a gravel pit to the top of a sieve, or screen, supported by timbers. On the last-named date, the defendant was employed moving rock under this structure. Velasquez, the only eyewitness, testified that he was driving a team of mules at about 8 o'clock in the evening, and had reached a switch of the track on which the scraper operated, but he did not see the scraper at the time, but heard a noise and went over to the structure under which the deceased was working. He found the scraper attached to the cable which pulled it. It had not stopped at the point where it usually dumped the gravel, but had gone beyond that point, and, coming in contact with the structure which the witness called the "square," as he said, "it busted the square," which fell, crushing the deceased under the timbers. It will thus be seen that the engine and the scraper, which were operated by the defendant company, were, for some unexplained reason, so operated in an unusual manner that instead of dumping where it should have dumped, the scraper crashed into the structure of timbers, under which the deceased was working, and wrecked it.

[1] Appellant insists that this does not show negligence on the part of the defendant, but that negligence must be specifically shown, that is to say, that it must be shown that the scraper was negligently operated by some specific evidence of the carelessness of the person operating it, or by some evidence of defective machinery, before the judgment can be had against the defendant.

With this we cannot agree, as we agree with the respondent that this is a case to which the maxim res ipsa loquitur applies. That maxim, translated, means simply that the thing or affair speaks for itself, and, as applied to cases of alleged negligence, the rule is that when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674.

No reasonable inference seems possible, except that this apparatus, had it been properly operated, would have been safe, and that its improper operation was due to the negligence of somebody or to some defect in the machinery, undisclosed to and undiscoverable by the deceased, and known, if known to anybody, to the defendant's employés.

[2] Defendant claims, however, that as the complaint alleged specifically negligence in the operation of this machinery, and defects in the strength of the timbers, that the plaintiff cannot invoke the doctrine of the maxim, and further contends that the evidence showed the specific cause of the accident, and that therefore the maxim may not be invoked, and certain authorities are cited which are claimed to support this contention. We think, however, that this question is foreclosed in this state by the doctrine of the case of Lippert v. Pacific Sugar Corporation, 33 Cal. App. 198, 164 Pac. 810. It may be added that in this case the real moving cause of this accident is not shown. It is true that it appears that the scraper, for some reason, was dragged too far by the cable, thus wrecking the timbers, but this is only the result of some other cause, which must have been the underlying reason for the accident. This underlying cause is not proven, but it does seem to us that nothing could be clearer than that somebody's carelessness must have caused it.

[3] Complaint is made by the appellant of an instruction to the jury, a portion of which is as follows:

> "Plaintiff is not required to show particularly what the specific act of negligence was which produced the accident, but is only required to show that the accident is one which would not ordinarily occur had due care been employed. The burden then shifts to the defendant to show its freedom from negligence."

The instruction is copied from language used by the court in the case of Faras v. Lower California Co., 27 Cal. App. 695, 151 Pac. 35, and while the facts of that case are not exactly the same as those before the court in this case, we think the instruction correctly states the law applicable to the facts here.

[4] Another instruction of which defendant complains is as follows:

> "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The language is the language of the case of O'Connor v. Mennie, 169 Cal. 223, 146 Pac. 674, and is quoted as an abstract proposition from Shearman & Redfield on Negligence. It is contended that it does not apply to this case, but it seems to us to be exceedingly apt in its application to the facts in evidence here.

[5] Defendant asked certain instructions, which the court refused. They are all to the effect that the burden of proof was upon the plaintiff to prove negligence, which is correct so far as it goes, but they all went a little further than this, and the court, had it given them, would have led the jury to think that the facts proven were not, even in the absence of explanation, sufficient to support a verdict. They were therefore properly refused, for their effect was to say that the maxim res ipsa loquitur did not apply.

[6] Several errors of law are called to the court's attention. They will be briefly noticed. Velasquez was asked about a visit to the scene of the accident with a brother of deceased, which occurred three or four days after the accident happened. Objection was made to this evidence on the ground that no foundation had been laid for it. The testimony elicited by the question was harmless, even if it was inadmissible. He testified that he was not able to identify the timbers which he found on this visit, and when asked whether the timbers were new or old, he said he did not know, that they were very black but were not painted.

[7] Another error, which appellant claims the court committed, was in permitting the mother of the deceased, who was the plaintiff in the action, to testify that her deceased son was the only support she had. From the pleadings in the case, and the instructions offered by the parties, it seems clear that the trial proceeded from the beginning upon the theory that it fell within the scope of section 1970, Civil Code, and of sections 1 and 2 of the Roseberry Act (St. 1911, p. 796), which was in force at the time of the accident. The mother could only have recovered under section 1970 of the Civil Code as it stood at that time, if she was dependent upon the deceased for her support. Taylor v. Albion Lumber Co., 168 Pac. 348, L. R. A. 1918B, 185; Gonsalves v. Petaluma & Santa Rosa Ry. Co., 173 Cal. 264, 159 Pac. 724; Balaklala Consol. Copper Co. v. Reardon, 220 Fed. 584, 136 C. C. A. 186.

It seems to us that there is no error in this record sufficient to warrant a reversal of the case.

Judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

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39 Cal. App. 174

RUSSELL v. RUSSELL et ux. (Civ. 2615.)

(District Court of Appeal, First District, Division 1, California. Dec. 13, 1918.)

1. Good Will 🔑6(1) — Executory Contracts—Title—Bill of Sale.

An executory contract of a sale of an undertaking business vested no title in buyers, and, upon its cancellation, a bill of sale from buyers to seller, although in terms transferring all of buyers' "right, title and interest" in the business, "together with the good will thereof," conveyed nothing, and hence did not operate as an engagement, implied from transfer of the good will, not to set up an opposing business in the town.

2. Good Will 🔑5—Conveyances.

The good will of a business is inseparable from the ownership thereof, and cannot be conveyed to one party while the business to which it attaches is owned by another.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by S. S. Russell against A. M. Russell and wife. From a judgment for plaintiff, the defendants appeal. Reversed.

C. M. Crawford and Ben C. Jones, both of Lakeport, for appellants.

H. V. Keeling, of Lakeport, and Robert Duncan, of Ukiah, for respondent.

LENNON, P. J. This is an appeal from a judgment for the plaintiff. The action was instituted to recover from defendant the sum of $5,000 damages, and to obtain an injunction restraining the defendants from carrying on the business of undertakers in the town of Lakeport, Cal. Judgment was entered in favor of plaintiff for damages in the sum of $1,000, and also granting the injunction prayed for.

The facts, briefly stated, are as follows:

The plaintiff is the father of the defendant, A. M. Russell, and the two defendants are husband and wife. In the year 1913, the plaintiff purchased an established undertaking business, and the stock thereof, and employed the defendants, who are experienced undertakers, to operate and conduct the said business for him. At this time it appears that plaintiff orally gave the defendants the right to purchase the said business upon terms agreed upon between them. This arrangement continued until the 23d of April, 1914, when the parties entered into a written executory contract of purchase and sale of the said business. Under this executory contract, the defendants were put into possession of the business. The agreement provided that, after all payments therein provided for had been made by the defendants to the plaintiff, the plaintiff would execute to the defendants a bill of sale of the said business. In case of default in payments, the plaintiff reserved the right to terminate the contract of sale.

The defendants continued to conduct the business, under the terms of this executory contract of sale, up until March 29, 1916, when, owing to differences between the parties, and to the fact that nothing whatever had been paid by defendants upon the principal amount due under the agreement, the parties to the agreement canceled the same by mutual consent, and the said business, with all its incidents, was surrendered to the plaintiff. The cancellation of the executory contract was effected by indorsement in writing thereon. At the same time the defendants executed a bill of sale of the said business, purporting to sell, assign, and transfer unto the plaintiff "all our right, title and interest in and to the undertaking business heretofore and now carried on by us * * * together with all stock and tools of every description pertaining to said business, the good will thereof, books of account, burial records, wagons and harness, and all else whatsoever belonging or pertaining to said business, including all accounts due and owing to said business at this date." The consideration named in this document was that the plaintiff would assume and pay certain enumerated outstanding accounts payable.

Shortly after the above settlement between the parties, defendants opened up in the town of Lakeport, under a new and distinctive name from that formerly used in the old business, a new undertaking business, and continued to conduct the same until enjoined by the judgment of the superior court herein.

The plaintiff contends that by the bill of sale, quoted in part above, the defendants sold to him the good will of the business, and by such sale they are precluded from setting up an opposing business in the same town.

[1] The original executory contract of sale certainly vested no title to the business in the defendants. Its cancellation, after defendants' default in payments, was a right which the plaintiff had under the very terms of the agreement. The purported bill of sale given at the same time by the defendants to the plaintiff certainly conveyed nothing, because the defendants had nothing to convey. It purported to convey all defendants' right, title, and interest in the business and good will thereof. But such right, title, and interest amounted to nothing whatever, because no title had been vested in the defendants by the executory contract. Their only right thereunder was a right to a conveyance after the completion of all the payments. No payments having been made, they had no rights whatever, and if there was any question about this matter, it was settled by the cancellation of the executory contract by mutual consent, which expressly released both parties from any obligations under that agreement. If, therefore, the plaintiff, under said purported bill of sale, agreed to assume any bills for which he was not previously liable, he did so without consideration.

[2] The plaintiff contends that the defendants conveyed to the plaintiff, by this purported bill of sale the good will of the business. We think the good will of a business is something inseparable from the ownership thereof. The good will of a business cannot be conveyed by one party, while the business to which it attaches is owned by another party. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879. The defendants did convey all their right, title, and interest in the good will of the business to the plaintiff, but their conveyance amounted to nothing, as they had no title whatever to the business. It cannot therefore be argued that the defendants impliedly agreed not to engage in a similar business in Lakeport. They were under no obligation to refrain from engaging in such business before entering into the executory contract of purchase and sale. The entire transaction presents nothing more than a possession under an executory contract, a breach of the contract, and a return of the property to the seller. Certainly the defendants have not lost their right to engage in business by reason of such a transaction.

The facts may present a case of hardship upon the plaintiff, but we think he was bound to protect himself against the failure of the defendants to keep their contract. Since he merely provided that, in case of default, the business should be returned to him and the contract canceled, the courts cannot give him an additional remedy because of an incidental loss which he seems not to have taken into consideration when he made his contract.

The judgment is reversed.

We concur: BEASLY, Judge pro tem., STURTEVANT, Judge pro tem.

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39 Cal. App. 111

WHITAKER et al. v. REGENTS OF THE UNIVERSITY OF CALIFORNIA.
(Civ. 1883.)

(District Court of Appeal, Third District, California. Dec. 11, 1918.)

1. DEEDS 🔑155—FORFEITURE CLAUSE—CONSTRUING AGAINST GRANTOR.

A forfeiture is not favored, and will be strictly construed against grantor with a view of preserving estate granted, in view of Civ. Code, § 1442, requiring strict construction against party for whose benefit it is created.

2. DEEDS 🔑168—EVIDENCE OF FORFEITURE—SUFFICIENCY.

Evidence of violation of conditions working a forfeiture must be clear and satisfactory to justify the court in decreeing a reversion of the conveyance, in view of Civ. Code, § 1442, requiring strict construction of forfeiture against party for whose benefit it was created.

3. COLLEGES AND UNIVERSITIES 🔑6(4)—DEEDS—DELAY IN PERFORMING CONDITIONS.

Delay in carrying out provision of deed given to regents of the University of California, requiring lands deeded to be used for forestry investigation and research, *held* not unreasonable so as to work a forfeiture.

4. COLLEGES AND UNIVERSITIES 🔑6(4)—TIME FOR PERFORMANCE OF CONDITIONS—PRESUMPTION.

Where grantor prescribed no time for beginning the work of forestry investigation and research, it must be assumed that he contemplated that time would be required to accomplish purpose that he had in view in deeding lands to regents of the University of California for the purpose of forestry investigation and research.

5. COLLEGES AND UNIVERSITIES 🔑6(4)—COMPLIANCE WITH CONDITIONS—REASONABLE TIME.

In the absence of any specifications in deed, granting lands to the regents of the University of California to be used for forestry investigation and research, as to time when work should begin, a reasonable time would be allowed therefor.

6. EVIDENCE 🔑98—FAILURE TO OFFER EVIDENCE IN SUPPORT OF AN ISSUE.

Plaintiffs having the burden of showing violation of condition in deed working forfeiture of estate, finding in reference thereto was properly in favor of defendant, where plaintiffs offered no evidence on the subject, in view of Code Civ. Proc. § 1981, as to evidence being produced by party holding the affirmative of an issue.

7. COLLEGES AND UNIVERSITIES 🔑6(4) — BREACH OF CONDITION IN DEED—EVIDENCE —"USE."

Facts *held* insufficient to show that land granted to the regents of the University of California for forestry investigation and research had been "used for a stock range" in violation of condition in deed, the verb "to use" meaning to employ; to put to a purpose; to avail oneself of.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Use.]

8. COLLEGES AND UNIVERSITIES 🔑6(4) — BREACH OF CONDITIONS IN DEED—EVIDENCE.

That defendant, regents of the University of California, to which plaintiff granted lands to be used for forestry investigation and research, had no knowledge of cattle straying upon the lands, and that no damage was caused by such cattle, should be considered in determining whether there had been a breach of covenant forbidding use of lands for a stock range.

9. COLLEGES AND UNIVERSITIES 🔑6(4)—COMPLIANCE WITH CONDITION IN DEED—EVIDENCE.

Facts *held* to show sufficient compliance with condition in deed to regents of University of California that "these lands and premises shall be known and called Whitaker's Forest."

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Edward Whitaker and others against the Regents of the University of California. Judgment for defendant and plaintiffs appeal. Affirmed.

J. C. Needham, of Modesto, and Joel W. West, of San Diego, for appellants.

Lamberson, Burke & Lamberson, of Visalia, for respondent.

BURNETT, J. On July 26, 1910, one Horace Whitaker executed a deed without money consideration to respondent herein of 320 acres of forest land in Tulare county. The granting part was in the usual form of a deed absolute, but it was followed by this language:

> "This deed is expressly made subject to the following reservation hereinafter set forth, and upon the failure of said party to do and perform and carry out the purposes and intents for which the real property herein described is conveyed or in case of any violation of the reservations herein made, said property herein shall immediately revert to said party of the first part, his heirs, executors, administrators or assigns. Reservations: 1. Said party of the second part shall have and hold said lands and premises in its present condition for forestry investigation and research connected with that branch of instruction as taught in the University of California, and that it be preserved and continued as a park and pleasure resort for the people of the state of California. 2. That no whisky or other intoxicating liquors shall ever be sold or dispensed on said premises. 3. That said land and premises shall be used as a public park for campers and that no charge shall be made or collected from any person who uses the same for camping purposes, but regulations may be made governing persons while camped on said premises. 4. That said land shall not be used for a stock range, but campers may keep thereon the necessary stock for their camping purposes. 5. That no Sequoia or Redwood trees growing or that may grow on said premises shall be felled or cut down. 6. That said party reserves the right as long as he shall live, to cut, use and remove from said premises any and all dead or fallen timber. 7. These lands and premises shall be known as and called 'Whitaker's Forest.'"

Horace Whitaker died a few months after the execution of the deed and this action was brought by his heirs at law to enforce a forfeiture of the conveyance and to obtain a decree of reversion of title to them. The complaint was in three counts, the first of which alleged the failure of the grantee to comply with the conditions of the deed; the second charged statutory fraud in that defendant accepted the deed without any intention to perform the conditions therein, and upon the false representations that it would perform said conditions; the third charged the grantor with mental incompetency at the time of the execution of the deed, but this last count was abandoned at the trial.

It is not disputed that the deed constituted a conditional conveyance, and that the estate was subject to forfeiture for failure to comply with the conditions or "reservations" as they are denominated in the instrument.

[1, 2] It may be further observed that a forfeiture is not favored, that such conditions are strictly construed against the grantor with a view of preserving the estate granted, and that the evidence of violation of the conditions must be clear and satisfactory to justify a court in decreeing a reversion of the conveyance. Section 1442, Civ. Code; Randol v. Scott, 110 Cal. 590, 42 Pac. 976; Behlow v. S. P. R. R. Co., 130 Cal. 16, 62 Pac. 295; Reclamation District v. Von Loben Sels, 145 Cal. 181, 78 Pac. 638.

No doubt the lower court was familiar with these precepts of the law, and it is at least debatable whether their proper application would not have demanded a judgment for the defendant if the case had rested entirely upon the evidence offered for plaintiff. In view of the whole record, however, we are satisfied that no legal ground exists for our interference with the conclusion of the trial judge.

[3-5] We cannot say that there was any failure to devote the land to the purpose of forestry investigation and research. There was some delay in carrying out this provi-

sion of the deed. The delay, however, was not unreasonable. It must be presumed that the grantor contemplated that time would be required for preparation to accomplish the purpose that he had in view, since he prescribed no limit for the beginning of the work. It is manifest that he left this matter to the wise discretion of the university authorities, and they seem to have acted in good faith in their efforts to execute the trust. When the deed was made there was no department of forestry connected with the university and instruction in that branch was not given. At the first meeting of the regents for planning and providing for the next year's activities, after the delivery of the deed, an appropriation of $6,500 was made for such department, and this authorized the president of the university to establish it. He promptly began a search for a suitable man to take charge of the forestry department. He did not succeed until December, 1913, when Prof. Walter Mulford of Cornell University was appointed. The latter, however, could not leave his work at Cornell until August, 1914. But before his appointment he had visited California on the invitation of the university authorities, and the advantages of Whitaker's Forest for forestry investigation and research were pointed out to him by Mr. Henderson, secretary for the regents, as a special reason why he should take charge of the work. We need not detail the various steps taken. It is sufficient to say that the department was established under the direction of Prof. Mulford, who was assisted by several other professors. The land was visited and examined, plans for investigation and research were adopted, scientific instruments and equipment were purchased, and allowance in the university budget for forestry was made for the years 1911–1912, 1913–1914, 1914–1915, and 1915–1916. It is true that the actual work of forestry investigation and research was not begun until after this suit was brought, but the preparation had to be made, and it cannot be said that any one was to blame for the delay, or that said delay is a sufficient reason for forfeiture of the estate. In the absence of any specification in the deed as to the time when work should be begun, a reasonable time would be allowed, and it cannot be held that this principle was disregarded. Brown v. State, 5 Colo. 496; Lawrey v. Hanna, 59 Or. 60, 115 Pac. 975; 2 Washburn, Real Property, 11.

[6] There is no claim of any violation of the second condition in relation to intoxicating liquors, nor is there a particle of evidence that effect was not given to the third provision in reference to the use of the land as a public park for campers. Since no evidence was offered on this subject, the burden being upon appellants, the finding in reference thereto was properly in favor of respondent. Section 1981, Code Civ. Proc.; Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

[7] One of the main points urged by appellants is that there was a violation of the fourth condition as to the cattle range. The only evidence offered as to this contention is found in the testimony of three or four witnesses who pastured their cattle in the United States Forest Reserve surrounding the land in question and who declared that at various times they had seen a few head of them on the Whitaker property, but there is nothing to show that any one ever turned his cattle on the premises or that respondent permitted or even knew or heard of cattle thus straying on the land. The evidence falls entirely short of proving that the land has been "used for a stock range." As respondent points out, the verb "to use" means to employ; to put to a purpose; to employ for the attainment of some purpose or end; to avail one's self of. 39 Cyc. 846.

It seems quite unreasonable to contend that the unauthorized entry of a few cattle at various times on the land in question would constitute the employment or use of such land for a stock range. Indeed, the language of the condition implies the voluntary act of the grantee in devoting the land to the purpose of a stock range. Nothing of the kind is disclosed by the evidence. Uncertain and inadequate as was the testimony for plaintiffs, its significance was impaired by the testimony of Prof. Walter Mulford, head of the department of forestry of the University of California, who testified that he made an examination of the land in June, 1915, and he saw no cattle there, and no evidence of any damage that would be caused if cattle ranged the property. The only signs of cattle, he said, were along the public road running through the land.

[8] The circumstance that defendant had no knowledge of the cattle straying upon the land, and that no damage was caused thereby, should be considered in determining whether said covenant was violated. Indian Orchard Canal Co. v. Sikes, 8 Gray (Mass.) 562; Collins Manufacturing Co. v. Marcy, 25 Conn. 242; Barrie v. Smith, 47 Mich. 130, 10 N. W. 168.

The grantor, of course, might have required the land to be inclosed so as to exclude estrays, but he did not see fit to do so, and we are not to accord to the condition a narrower meaning than the language plainly imports.

In the preliminary correspondence between the parties the grantor intimated that this condition would be more exacting, but we are to determine his intention solely by the language of the deed, since it is complete in itself and does not admit of extraneous evidence.

[9] The only other condition of which violation is claimed is the last: "These lands and premises shall be known and called Whitaker's Forest." It is apparent that this requirement is very general in its terms. There was no attempt made to specify by whom and to what extent the land was to be so known and called. No explicit duty was thereby cast upon respondent, nor was it pointed out how the memorial of the name was to be created or preserved. The donor's desire to have his generosity fittingly recognized was not unnatural, and his pardonable ambition for this sort of posthumous fame should not go unrewarded; but, since he was silent as to what should be done by the grantee to accomplish this purpose, it must be assumed that he intended to leave to its discretion the particular method or means of satisfying this condition. It might have been well if the regents had passed a resolution reciting that the premises should be known as and called Whitaker's Forest, and if they had caused a suitable sign designating the land by that name to be placed at the entrance of the forest. But we cannot hold that this was required. They adopted a formal order and spread the same upon their minutes, accepting the conveyance subject to the conditions. They gave notice to the world of the gift by publication in the University Chronicle, the official news bulletin of the university. The article was headed in capital letters, "Whitaker's Forest," and the deed was published in full. In making his first biennial report to the Governor after the gift was made, the president of the university specifically referred to the land as Whitaker's Forest, and the deed was set forth in full with the statement that the gift was subject to the conditions therein named. It may be added that there is no evidence that it has been known as or called by any other name, and to hold with appellant that something else should have been done by the regents to advertise the gift would be to read into the condition something that is not found therein. It may not be amiss to say that the probabilities are that as this department of the university grows in importance there will be increased recognition of this forest, and there will be more frequent and general advertisement through the university publications of this munificent gift of "Whitaker's Forest." We also venture the suggestion that it is not too late for the regents to place in the park some suitable monument or inscription to commemorate the name and gift, if such action would be pleasing to the heirs. But, as before indicated, this step was and is not required, since the donor failed to so specify.

As to the second count of the complaint, it is sufficient to say that there was no substantial evidence to support it. It would be a gross misconception of the record to hold that the grantee had no intention of carrying out the terms of the grant, or that it made any false representations to the grantor, which induced the execution of the deed. There was some correspondence between the attorneys of the parties and a desire manifested on the part of the regents to have the gift burdened as little as possible with onerous conditions and to have the university spared unnecessary expense, but there is nothing to show that the regents did not act in the utmost good faith, or that they have failed at any time to appreciate the generosity of the donor, or to do what they deemed necessary to effectuate the intentions of Mr. Whitaker.

The evidence as to what was done by the regents negatives any implication of evil motive, and fully supports the finding of the court in that respect. In showing their conduct, it was proper, as contended by respondent, to describe what was done after the complaint was filed and before trial and what was in progress at the time of the trial, which was in furtherance of plans that had been matured and formulated before the action was brought. It had relevant connection with the good faith and diligence of the regents in administering the trust. 13 Cyc. 697; Chute v. Washburn, 44 Minn. 312, 46 N. W. 555.

It seems unnecessary to notice specifically the cases cited by appellants which enunciate well-established principles of law in reference to such deeds, as they are manifestly not opposed to the views herein expressed.

In conclusion, it may be proper to remember that this gift was for a public purpose, and it should be regarded with even greater consideration than if the grant were for the use and benefit of a certain individual. But even if the regents had a personal interest in the benefaction, we should be constrained to hold that the evidence is ample to support the findings of the court.

It was the intention of the grantor that the land should be preserved for all time for the use of the people of the state, subject to the conditions enumerated in the deed, and we are satisfied that the lower court's decision was in consonance with that intention.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

39 Cal. App. 192

OSWALD v. SLOANE, Superior Court Judge. (Civ. 2810.)

(District Court of Appeal, Second District, Division 1, California. Dec. 17, 1918.)

Appeal and Error ⚷443—Stay—Property in Controversy.

Where after appeal from judgment of superior court, awarding bonds to petitioner and interveners, all bonds were delivered to county clerk, pursuant to court's order and in accordance with Code Civ. Proc. § 943, the court was not, pending appeal, authorized to grant motion for an order commanding city clerk to deliver to petitioner bonds not included in amounts claimed by interveners; effect of original order being to stay enforcement of judgment.

Petition by George H. Oswald for a writ of mandate prayed to be directed against W. A. Sloane, as Judge of the Superior Court of the State of California, in and for the County of San Diego. Alternative writ discharged, and proceeding dismissed.

Crouch & Chambers, of San Diego, for petitioner.

CONREY, P. J. In response to the petition herein, an alternative writ of mandate was issued. On the return day it appeared that no answer was made by the respondent, and on motion of the petitioner the matter has been submitted, on which we must determine whether the writ should be made peremptory.

The facts, as they appear from the petition, are as follows: The petitioner applied to the superior court of San Diego county for a writ of mandate directing the county treasurer of San Diego county to deliver to petitioner certain road improvement bonds to the amount of $66,550, which were claimed to be the property of petitioner. The treasurer, by his answer, admitted that he held the bonds and had no claim thereon, but alleged that portions of the same were claimed by various persons and corporations, and asked that the court adjudicate and determine to whom he should deliver them. One Granger intervened and prayed for delivery to him of $30,420.76 of the bonds, and Pacific Metal Products Company intervened and prayed for delivery to it of $4,500 of said bonds. After trial, the court, by its judgment, awarded the bonds to said parties as follows: To petitioner, in the amount of $38,889.16; to Granger, in the amount of $23,160.84; to Pacific Metal Products Company, in the amount of $4,500; and ordered that Schwartz, the county treasurer, deliver to said parties, respectively, the said amounts of bonds. Petitioner appealed from that judgment, and Granger appealed from that part of the judgment which awarded $4,500 of the bonds to the Pacific Metal Products Company. Pursuant to an order subsequently made by the superior court, the county treasurer delivered all of the bonds to the county clerk to have custody thereof and keep the same until the final determination of that action. Thereafter petitioner moved the superior court for an order commanding the county clerk to deliver to petitioner that portion of the bonds not included in the amounts of bonds claimed by the interveners. The court refused to grant that motion, basing its refusal upon the ground that it had no jurisdiction to make such order, because of the said appeals to the Supreme Court. As the point has not been mentioned by counsel, we have not considered the question whether conflicting claims to personal property may be determined in a mandamus proceeding.

Section 943, Code of Civil Procedure, provides that:

> "If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint. * * *"

The delivery of the bonds disposed of by the judgment in the court below appears to have been made to the clerk by order of the court, in accordance with the above-stated provisions of section 943. The necessary effect of the delivery so made was to stay the enforcement of the judgment, the same as where a required stay bond has been given. This being so, the court was not authorized to grant appellant's motion.

The alternative writ is discharged and the proceeding dismissed.

We concur: JAMES, J.; MYERS, Judge pro tem.

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39 Cal. App. 101

BACKER v. GRUMMETT. (Civ. 2484.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1918.)

1. Contribution ⚷6—Joint Obligation—Payment from Funds of Another.

Under Civ. Code, § 1432, giving joint obligor, who satisfies more than his share of claim against all, right to require contribution, where plaintiff, joint maker of note with defendant and another, borrowed money on second note executed by himself, defendant, and two others to take up first note, which he should have paid with proceeds from sale of stock of company in which he and defendant were interested, but which he himself appropriated, he cannot exact contribution from joint makers of second note on account of his payment of it.

2. Bills and Notes ⚷96—"Accommodation Maker."

An "accommodation maker" of a note is one who receives no part of the proceeds, which are used exclusively for another maker's benefit, as in discharging his own personal obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accommodation Maker.]

Appeal from Superior Court, Fresno County; George E. Church.

Action by H. H. Backer against John Grummett. From judgment for plaintiff, defendant appeals. Reversed.

W. P. Thompson and A. W. Carlson, both of Fresno, for appellant.

C. K. Bonestell, of Fresno, for respondent.

BEASLY, Judge pro tem. Plaintiff and defendant and two others were joint makers of a promissory note. The parties, with the exception of the defendant, paid three-fourths of the amount of the note, and upon the failure and neglect of the defendant to pay the remaining one-fourth the plaintiff was compelled to and did pay it, and now sues the defendant for reimbursement.

As a defense to the action the defendant pleaded, first, that he signed the note at the request of the plaintiff upon the distinct understanding with him that he would not be called upon to contribute to the payment thereof, and that he received no part of the proceeds of the note; and further pleaded the following facts: That the plaintiff borrowed the money represented by the note in suit for the purpose of taking up a prior note, of which the plaintiff, defendant, and another were joint makers, the money obtained on which was borrowed for the benefit of a corporation in which plaintiff and defendant were jointly interested; that said corporation had issued to the plaintiff certain shares of its capital stock of the value of the last-mentioned note for the purpose of enabling the plaintiff to repay the amount borrowed thereon; that the plaintiff sold the said stock, and, instead of using the proceeds in taking up said last-mentioned note, appropriated them to his own use; and that the money obtained by plaintiff upon the note in suit had been applied by him in taking up the note that he should have paid with the proceeds realized by him from the sale of said capital stock.

The testimony as to the first of these defenses, namely, that the defendant signed the note in suit at the request of the plaintiff and upon the understanding that he would not be called upon to pay any part thereof, was conflicting, and the court resolved the conflict in favor of the plaintiff; and upon the objection by the plaintiff that it was "irrelevant, incompetent, and immaterial, there is but one issue in this case, and that is, did the defendant sign this note as an accommodation maker?" excluded all evidence offered for the purpose of proving the other facts pleaded as a defense.

[1, 2] We are clearly of the opinion that in excluding this evidence the court committed error to the prejudice of the defendant. The right given by section 1432 of the Civil Code to a joint obligor who satisfies more than his share of the claim against all to require a proportionate contribution from all the parties joined with him is based upon the principle of equity that one who has paid money which in equity and good conscience should be paid by another should be reimbursed therefor; and it is apparent that this equitable principle cannot be invoked by one who has paid no more than what he in equity and good conscience ought to have paid. If the facts above pleaded by the defendant were true, they showed that the plaintiff in paying the note in suit to the extent that he did was discharging a debt for the payment of which he had been furnished with funds by the person or corporation for whose benefit the original indebtedness represented by the note giving rise to the present suit had been contracted. He cannot be permitted to appropriate such funds to his own use; and then claim that, because he had subsequently paid a note given by himself and others to take up the prior note which it was his duty individually to pay, he may now turn around and exact contribution from the joint signers of the second note. Moreover, the proof of these last facts would have gone far towards establishing the defense of accommodation maker, for they would have shown that the proceeds of the note in suit were used exclusively to discharge the plaintiff's own obligation.

The pleading of these facts raised a material issue in the case. Evidence should have been admitted thereon and a finding made.

For the reasons given the appeal taken by the defendants from the judgment in plaintiff's favor should prevail, and the judgment is, accordingly, reversed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

39 Cal. App. 108

WOOD et al. v. MESMER. (Civ. 2750.)

(District Court of Appeal, Second District, Division 1, California. Dec. 10, 1918.)

1. COURTS ⚷85(1)—RULES—EFFECT.

The rules of court as to appellate practice have the effect of statutes.

2. APPEAL AND ERROR ⚷765—BRIEFS—TIME FOR FILING.

Under Rules of Court (Rule 2, subd. 4, 119 Pac. x), and in view of rule 5, *held* that, as the filing of briefs is not necessary to give the appellate court jurisdiction of an appeal, the time for filing briefs may be extended by the court after expiration of the time fixed; respondent not having moved to dismiss.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Earl Charlton Wood and others against Joseph Mesmer. From a judgment for plaintiffs, defendant appeals. On motion to dismiss the appeal for failure to file briefs in time. Motion denied, and defendant granted leave to file, etc.

Stanley Visel and J. L. Murphey, both of Los Angeles (Arthur G. Fisk, of Los Angeles, of counsel), for appellant.

James S. Bennett, of Los Angeles, for respondents.

MYERS, Judge pro tem. Respondent moves to dismiss this appeal and affirm the judgment on the ground of appellant's failure to file his brief in time. Appellant's brief was due on August 5, 1918, at which time an order was made extending the time to and including August 25th. On August 28th, on ex parte motion therefor and affidavit filed, a second order was made:

> "That the time for filing appellant's brief in the above-entitled cause shall be and the same is hereby extended sixty days from the date hereof."

This motion to dismiss was made October 28th, pursuant to notice served and filed October 16th.

[1, 2] Respondent contends that the order of August 28th, purporting to extend the time, was ineffective for the reason that appellant's time had then already expired and no right then remained in him which could be the subject of an extension, citing Clark v. Crane, 57 Cal. 629, 632, wherein it is said, speaking of an attempted extension of the time for a motion for a new trial after the time therefor had expired:

> "The court or judge can extend the time under section 1054, above cited, but such extension must be granted within the period of ten days, or within such other period during which the right to give such notice is still alive. After the right to give such notice is gone, giving further time could not be called an extension of the time, but it would be in effect reviving a right which no longer exists. In other words, when such right to give notice is gone, there is really no period of time to extend."

The rules of court provide:

> "Thirty days after the filing of the transcript the appellant shall file with the clerk his printed points and authorities. * * * The time above limited for filing points and authorities shall not be extended, except by order of the court, upon stipulation of the parties, or an affidavit showing good cause therefor." Rule 2, subd. 4; 119 Pac. x.
>
> "If * * * appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed on motion upon notice given. If the * * * points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." Rule 5; 119 Pac. xi.

These rules of practice have the force of positive law, so far as the rights of the parties are concerned. Brooks v. Union Trust Co., 146 Cal. 134, 138, 79 Pac. 843. They have been uniformly held to "confer rights which may be enforced by litigants." McCabe v. Healey, 139 Cal. 30, 32, 72 Pac. 359; Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148; White v. White, 112 Cal. 575, 580, 44 Pac. 1026; Bergin v. Hinckley, 123 Cal. 166, 169, 55 Pac. 896; Barnhart v. Conley, 17 Cal. App. 230, 119 Pac. 200.

Respondent's position, as we apprehend it, is that the "right" thus referred to is a vested right which cannot be ignored or interfered with by this court. We think, however, in view of the provision of rule 5, above quoted, that it is rather in the nature of an inchoate or contingent right which is perfected or becomes vested only in the event that the respondent gives notice of motion to dismiss before the points and authorities are filed.

It cannot be here said that to hold valid the order of August 28th "would be in effect reviving a right which no longer existed." On the day that order was made, even though appellant's time for filing brief had expired, he still had, with permission of the court, a right to file it on that day and on every day thereafter until respondent should give notice of a motion to dismiss. Therefore the effect of the order was to extend a right then existing, not to revive one which had elapsed.

The rules of court expressly recognize the power of the court to extend the time therein limited for filing briefs, and neither in the rules nor in the statutes do we find any provision which expressly or by necessary implication limits that power to those cases wherein the time so limited has not expired.

The instant case is readily distinguishable from those involving attempted extensions of time in proceedings for a new trial or in the perfection of an appeal. In those cases the steps prescribed by statute are jurisdictional, and a strict compliance therewith is a jurisdictional prerequisite to the power of the court to entertain the motion or consider the appeal. But the filing of appellant's points and authorities is in no sense jurisdictional. This court acquired jurisdiction of the appeal by the perfection of the appeal in the court below, even though no transcript had ever been filed herein. Smith v. Jaccard, 20 Cal. App. 280, 288, 128 Pac. 1023, 1026; Clemens v. Gregg, 34 Cal. App. 272, 279, 167 Pac. 299.

This motion must be determined by the facts existing at the time the notice of motion was given. McCabe v. Healey, supra; Barnhart v. Conley, supra. Concluding, as we do, that the order extending time was valid, it follows that appellant was not in default at the time this motion was noticed.

The motion is denied and leave is given to appellant to file his points and authorities heretofore tendered for that purpose.

We concur: CONREY, P. J.; JAMES, J.

39 Cal. App. 85

SCHMIDT v. SANTA MONICA COMMERCIAL CO. and three other cases.

(Civ. 2588–2591.)

(District Court of Appeal, Second District, Division 1, California. Dec. 9, 1918. Rehearing Denied by Supreme Court Feb. 6, 1919.)

1. Municipal Corporations 🔑568(3)—Improvements — Lien — Assignment — Evidence.

In assignee's action to foreclose street improvement assessment lien, production in evidence of assessment roll, diagram, and certificate of city engineer, affidavit of demand and nonpayment and warrant signed by street superintendent, *held* to prima facie prove assignment, under Vrooman Act, § 12.

2. Trial 🔑395(6)—Findings of Fact—Sufficiency.

Where there were no affirmative defenses contained in answer, findings of fact "that all of the allegations of the complaint are true" is a complete decision of all issues of fact in the case.

3. Municipal Corporations 🔑568(2) — Street Improvement—Assessment Lien—Foreclosure—Evidence.

In action to foreclose assessment lien under Vrooman Act, where defense was that assessment was void because contractor had not entered into written contract with superintendent of streets, as required by sections 5 and 6, or executed bond as required by section 6½, as added by St. 1899, p. 23, exclusion from evidence of purported contract, produced by city clerk from files of his office, and of testimony that contract and appended bond were not signed by contractor until after assessment, and that city clerk had drawn line through signature then made "when his back was turned," was prejudicial error.

4. Municipal Corporations 🔑493(1)—Improvements — Assessments — Irregularities—Appeal to City Council.

Vrooman Act, § 53, as amended in 1911, providing that the exclusive remedy of a person affected by error or irregularity in improvement not affecting city council's jurisdiction, shall be by appeal to city council "as herein provided," does not add to the subjects of appeal as defined in section 11.

5. Constitutional Law 🔑290(4)—Municipal Corporations 🔑562(1)—Due Process —Void Assessment.

In action to foreclose street improvement assessment lien under Vrooman Act, defense that assessment was invalid because work was done without contract was available, notwithstanding section 11, and section 53 as amended in 1911, such irregularity not being one which the city council might have remedied and avoided, for to deny defendant such defense would be to take property without due process of law.

Appeals from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Actions by Gilbert Schmidt against the Santa Monica Commercial Company, against the Patten & Davies Lumber Company, against the Los Angeles Pacific Land Company, and against Abraham S. Reel and others, respectively. Decrees for plaintiff and from orders granting motions for new trial, plaintiff appeals. Affirmed.

Crouch & Crouch, of Los Angeles, for appellant.

Tanner, Odell, Odell & Taft, of Los Angeles, for respondents.

CONREY, P. J. It has been stipulated that the issues involved in these appeals are identical, and that the cases shall be considered together. Our statement of facts, therefore, will be made from the record in one case only—case No. 2588.

In this action the plaintiff seeks to foreclose liens claimed by him for unpaid assessments for work done by the plaintiff's assignor in the due performance of an alleged contract for street improvements on Elena avenue, a public street in the city of Venice. The proceedings in question are governed by the provisions of "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and the amendments thereto—commonly called the Vrooman Act (St. 1885, p. 147). The proceedings were commenced by a resolution of the board of trustees of the city, adopted on the 4th day of December, 1911.

A decree in this action was entered in favor of the plaintiff on the 24th day of December, 1914. Thereafter, a bill of exceptions having been duly settled and allowed, the defendant presented its motion for a new trial, and by order entered on the 25th day of March, 1915, the motion for a new trial was granted. The plaintiff's appeal is from that order.

The grounds upon which respondent claims to be entitled to a new trial are: (1) That the plaintiff did not, at the trial of this action, introduce any evidence tending to prove the assignment to him of the contractor's rights. (2) That the findings of fact were so defective and uncertain as to render the conclusions based thereon "a decision against law." (3) That the assessment on which the judgment was based was void, because no contract was entered into between the street superintendent and the plaintiff's assignor, and because no bond was executed for the performance of the work.

[1] 1. Under the terms hereinafter quoted from section 12 of the statute, the documents produced in evidence by the plaintiff were sufficient, prima facie, to prove the assignment. The provisions are that "the contractor or his assignee" may sue, and that those documents are prima facie evidence "of the right of the plaintiff to recover in the action."

[2] 2. The findings of fact in this case are "that all of the allegations of the complaint are true, and all of the allegations of the answer opposed thereto are untrue." In view of the fact that there are no affirmative defenses contained in the answer (and assuming without deciding that the objection is one which may be raised on motion for a new trial), the finding that all of the allegations of the complaint are true is a complete decision of all issues of fact in the case.

3. The plaintiff introduced in evidence the assessment roll, the diagram and certificate of the city engineer mentioned in the complaint, the affidavit of demand and nonpayment, and the warrant signed by the street superintendent. No objection is made concerning the form, sufficiency, regularity, or effect of said documents, and for that stated reason they were not set out in the bill of exceptions. Section 12 of the statute provides that "the contractor or his assignee may sue, in his own name," to recover the amount of an unpaid assessment, and that those documents "shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrants, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action."

Section 6 provides that "the superintendent of streets is hereby authorized, in his official capacity, to make all written contracts * * * authorized by this act." Section 5 requires that the successful bidder, to whom the contract has been awarded, shall "enter into a written contract" for the work, and at the same time shall execute a bond, with two or more sureties, for the faithful performance of the contract. Section 6½, as added by St. 1899, p. 23, requires that the contractor, before executing the contract, shall file with the superintendent of streets a bond executed by the contractor, with at least two sureties, for the benefit of those who furnish materials to be used in the work, or who perform labor thereon.

At the trial, Charles S. Thatcher, city clerk of the city of Venice, and H. B. Eakins, superintendent of streets, were witnesses for the defendant. Eakins testified that he had made search in his office for any contract between Mr. Mayer (the alleged assignor of plaintiff) and Mr. Beemer as superintendent of streets; that he had not in his office any original records of the proceedings, or any copy of contract or instrument purporting to be a contract between Mayer and Beemer; that he knew of no contract other than the one concerning which Thatcher testified. Beemer was the superintendent of streets in office at the time when the contract is alleged to have been made.

Thatcher, at the date of the trial on December 14, 1914, was city clerk and had been in office during the preceding three years. He identified a document purporting to be a street contract dated February 5, 1912, between Mayer and the street superintendent for street work on Elena avenue. Thatcher testified that this document was a file in his office, and was the only contract or instrument, purporting to be a contract between said parties, that he had seen, or of which he had any knowledge. By stated questions, and by offers duly made, the defendant's attorney endeavored to introduce testimony of the witness, to the effect that the said document was never signed by the contractor until October, 1912, after the assessment was made up, and after the warrant was issued; that on the 3d day of October, 1912, the said document and the form of bond appended thereto, were for the first time signed by the contractor; that on the same day Mr. Thatcher, on discovering these facts, drew a line through the signature of Mayer upon the bond and made indelible pencil indorsements upon the contract and upon the bond, to the effect that said signatures were made "when his back was turned," October 3, 1912, 9:40 a. m.; that Mr. Beemer died before this case came on for trial. The defendant offered said document in evidence in connection with the testimony offered. To all of this evidence the plaintiff objected and the objections were sustained.

[3] The order granting a new trial should be affirmed, if the court erred in rejecting

this evidence. We are satisfied that it was error, and very prejudicial error. Counsel for appellant state in their brief that by section 6 of the statute the street superintendent is made the custodian of the contract and is required to keep a book in which the contracts are recorded, and that therefore it was incumbent upon respondent to produce the original record, or make proof of its contents, and that this the respondent did not do, or offer to do. Section 6 does not contain any such provisions, and we have not found them elsewhere in the statute. While contracts for street work might very reasonably be retained in his office by the street superintendent, yet in the absence of specific statutory direction no reason appears why they may not (at least by consent of the street superintendent) be kept in the office of the city clerk, who by virtue of his office is the keeper of records of the board of trustees, by whose authorization street work contracts are made. The evidence offered had a clear tendency to prove that the contract relied upon by appellant was the same document produced by the city clerk, and that it was not signed by the contractor before the work was done; and the same observation applies to the bond.

Appellant tacitly recognizes, as he must, that it is essential to the creation of a valid contract that the contractor must within due time affix his signature thereto. He claims, however, that respondent having failed to appeal to the board of trustees, within 30 days after the date of the warrant, and thereby having failed to make any objection to the correctness or legality of the assessment, is in this action estopped from making the objection that the contract was not signed by the contractor within the proper time.

[4, 5] Section 53 of the statute, as amended in 1911 (St. 1911, p. 634), provides that "no error, irregularity, informality, * * * which does not directly affect the jurisdiction of the city council to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided." The cases in which an appeal to the city council may be taken are provided for by section 11 of the same statute. That section says that "the owners whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work provided for in this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets," may appeal to the city council within 30 days after the date of the warrant. After notice duly given a hearing shall be had before the city council, which is given very complete authority to remedy and correct errors or informalities in the proceedings. It is then provided that "all the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalties, and irregularities which said city council might have remedied and avoided."

In Manning v. Den, 90 Cal. 610, 27 Pac. 435, the defendant in an action to foreclose the lien of a street assessment under this act, offered evidence tending to show that the contract was one which the street superintendent attempted to execute at a time when he had not yet acquired power to enter into such contract. It was held that this evidence should have been received by the court, and that any objections to the correctness of the proceedings by reason of the defect above stated were not waived by the failure of the defendant to appeal to the city council. Section 11 was there relied upon by the plaintiff, but the court determined that the defect in question could not have been remedied or avoided by the city council upon any appeal from the assessment. "The provision, in the latter part of section 11, that 'no assessment shall be held invalid except upon appeal to the city council,' etc., has no application to a case in which an appeal is not authorized." The decision in Manning v. Den, supra, has been referred to with approval in subsequent cases, such as Chase v. City Treasurer, 122 Cal. 540, 55 Pac. 414; MacLaughlin v. Knobloch, 161 Cal. 676, 682, 120 Pac. 27; Imperial Land Co. v. Imperial Irrigation Dist., 173 Cal. 660, 663, 161 Pac. 113. We are of the opinion that section 53 of this act does not add to the subjects of appeal to the city council as defined in section 11. It follows that if the defendant in this case is not permitted to introduce evidence for the purpose of showing that the work was done without any contract therefor, it will be deprived of its property without a hearing before any authorized tribunal, and therefore without due process of law.

The several orders granting the motions for new trial in the above-entitled cases, respectively numbered 2588, 2589, 2590, and 2591, are and each of them is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

39 Cal. App. 790

SCHMIDT v. YOAKUM.

SCHMIDT v. JOHN E. YOAKUM CO.

(Civ. 2596, 2597.)

(District Court of Appeal, Second District, Division 1, California. Dec. 9, 1918. Rehearing Denied by Supreme Court Feb. 6, 1919.)

Appeals from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Actions by Gilbert Schmidt against John E. Yoakum and against the John E. Yoakum Company. From orders granting motions for new trial, plaintiff appeals. Affirmed.

Crouch & Crouch, of Los Angeles, for appellant.

Jones & Weller, of Los Angeles, for respondents.

CONREY, P. J. In each of these cases the plaintiff appeals from an order granting a motion for a new trial. The only questions presented for determination are included among those considered by this court in Schmidt v. Santa Monica Commercial Co. (Civil No. 2588) 178 Pac. 315, in which the decision of the court has been this day filed. On the authority of that decision, the orders granting the motions for new trial in the above entitled actions, numbered 2596 and 2597, are and each of them is affirmed.

We concur: JAMES J.; MYERS, Judge pro tem.

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39 Cal. App. 154

BUCKINGHAM v. COMMARY-PETERSON CO. et al. (Civ. 1885.)

(District Court of Appeal, Third District, California. Dec. 13, 1918. Rehearing Denied by Supreme Court Feb. 10, 1919.)

1. Highways 🔑211—Automobile Accident—Sufficiency of Evidence — Contributory Negligence.

Evidence *held* to show that automobile driver injured by driving into pit and dirt embankment knew that road was being reconstructed, was unfit for travel, and that his destination could have been reached by another road which was safe.

2. Highways 🔑197(3)—Automobile Accident—Contributory Negligence.

Automobile driver, who used road knowing that it was being reconstructed and was unfit for use and that he could have used another road in condition for travel, was negligent.

3. Highways 🔑197(6) — Accident—Dirt Embankment—Lights and Barriers.

When automobile driver injured in driving into pit and dirt embankment knew that road was being reconstructed and that it was unsafe, it was immaterial that contractor failed to use barriers to prevent use of road or by lights or other warnings give notice of road's unfitness.

4. Highways 🔑197(3)—Injury—Notice of Defect—Contributory Negligence.

One who uses and is injured on defective highway knowing or having reason to know that it is in process of construction and not open to general use is guilty of negligence unless he uses such highway because it is necessary, and in such case he must exercise great care.

5. Counties 🔑1—Nature of.

"Counties" are mere governmental agencies of the state vested with a variety of powers which the state itself may assume or resume and directly exercise.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County.]

6. Highways 🔑198—Construction — Negligence of Contractor—Liability of Officials.

St. 1911, p. 823, § 9, amending act passed in 1907 (St. 1907, p. 215), pursuant to Const. art. 4, § 36, creating department of engineering to have charge of public highways, does not make advisory board, consisting of members of the highway commission, and the state engineer under whose general direction state highway construction is carried on, liable for negligence of contractor in construction of highway.

7. Master and Servant 🔑318(2) — Independent Contractor—Highway Contractor.

Highway contractor having contract with advisory board of department of engineering and state engineer drawn in accordance with act of 1907 (St. 1907, p. 215) and amendatory act (St. 1911, p. 823), giving advisory board and state engineer right to determine whether contract is being performed and to require such performance, but giving them no control over employés or mode of doing work contracted for, is independent contractor.

Appeal from Superior Court, Solano County; William T. O'Donnell, Judge.

Action by Paul D. Buckingham against the Commary-Peterson Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Samuel Knight and F. E. Boland, both of San Francisco, and C. C. Carleton, of San Diego, for appellants.

Brantley W. Dobbins and H. M. Anthony, both of San Francisco, for respondent.

HART, J. This is an action to recover damages for personal injuries.

The complaint alleges that on or about the 8th day of June, 1914, the defendant Commary-Peterson Company, to which we shall hereinafter refer as the "corporation," entered into a written agreement with the state of California for the construction of a portion of the state highway in the county of Solano, between the town of Fairfield and the town of Vacaville, known as "Highway

Division 3, Route 7, Section C"; that thereafter the corporation "and said defendant Austin B. Fletcher, the highway engineer named in said contract and defendants Darlington, Stern, and Blaney, the highway commission named in said contract, commenced each and all to construct the said portion * * * of said highway and entered into complete control and supervision of the said highway; that said portion of said highway was at all times herein mentioned and particularly on the date next hereinafter mentioned an open public road and highway and the public was permitted to and did travel over and along said highway by means of vehicles and otherwise." Then follow allegations that the defendants, while engaged in constructing said highway, opened and left open a certain culvert crossing under the traveled portion of said highway and placed and left on the same near said culvert a quantity of dirt and gravel in such manner as that it formed across the surface of said highway "a small and abrupt embankment about one foot in height above the surface of the traveled portion of the highway"; that the defendants negligently and carelessly failed and omitted to place at or upon the highway any sign, warning, light, or signal of any kind to warn or give notice to persons traveling on and along said highway, "and approaching the said pit, of the danger of running upon and into the same, or of the condition thereof as hereinabove alleged"; that on the night of November 3, 1914, the plaintiff was carefully proceeding upon and along said highway in an automobile, traveling from the town of Vacaville southerly towards the town of Fairfield, and that by reason of the negligence of the defendants and each of them, as above indicated, he was unable to see the said pit and to know the danger thereof to persons traveling on said highway, and ran the automobile into said pit and said embankment of dirt and gravel, causing the machine "to vault and jump in such manner as to violently throw plaintiff out of the same onto the ground, causing a compound fracture of the left leg." The effect of plaintiff's injury upon his capacity to perform his usual or accustomed duties is then alleged, and the prayer is for judgment in the aggregate sum of $7,284.

The several defendants interposed answers, in which they specifically deny each and all of the material averments of the complaint.

A trial by jury resulted in a verdict for the plaintiff and against all the defendants for damages in the sum of $5,284. Judgment was entered upon the verdict in the sum so awarded.

The appeal is by all the defendants from said judgment.

Two points principally relied upon by the appellants are: (1) That the plaintiff himself was guilty of negligence which contributed to the accident and the injuries which he sustained as a consequence thereof; (2) that the corporation was an independent contractor, and consequently the state engineer and the members of the highway commission, named and joined as defendants with the corporation, are not chargeable with any negligence on the part of the corporation which might have been the direct cause of the injuries received by the plaintiff.

1. The facts disclosed by the evidence are as follows: Pursuant to the contract referred to in the complaint and to which we have alluded above, the contractor commenced work on the highway in question, beginning at the town of Fairfield and working northerly toward Vacaville. At the time of the accident complained of the concrete base of the highway had been laid for a distance of five miles north of Fairfield to a point variously called "Titel's," "White Caps," and "Halfway House." For a distance of two miles further, to what is called in the record "Nelson's Ranch," the roadbed had been graded, cement had been poured, and "checks," formed by throwing up dirt to a height of a few inches, had been placed on the concrete to hold the water used to set the concrete. Beyond the Nelson ranch, toward Vacaville, was a ranch owned by T. H. Buckingham, father of the plaintiff. For some time previous to the time of the accident the plaintiff had been operating a pumping plant, located at the side of the road in front of his father's property, supplying water to the mixer used in making the concrete which was poured onto the roadbed.

About one-half mile south of Titel's, and at Nelson's ranch, about 2½ miles further north, are roads running at right angles to the highway and connecting, at a point several miles to the east, with a road paralleling the highway under construction. The accident occurred at a point near Titel's about 225 yards south of the road first above mentioned, which is known as the "Cement Road," the other being spoken of as the "Nelson Road." At this point there was a break in the highway about 5 feet wide and an excavation 5 feet deep, it being the intention later to place therein a concrete culvert. Dirt had been thrown up to a height of about 3 feet, lying across the highway from side to side on both sides of the excavation.

A general election was held in the state of California on the 3d day of November, 1914, and plaintiff, at that time 23 years of age, was engaged during the day in conveying voters to the polls at Vacaville. At about 2 o'clock on the morning of the 4th of November, plaintiff entered the election booth at Vacaville "to see how the count was," and there met S. P. Dobbins, Jr., a young man 21 years of age. Plaintiff remarked that he would like to know "how it is coming out in Suisun," to which Dobbins replied that he would like to go himself and that he had a machine in the garage. He got the automobile, and, at some time between 2:30 and 3 o'clock in the morning, the two started for Suisun. It was a bright moonlight night. Plaintiff testified:

> "We left right straight out the highway, as I always do when I go home, and then it was pretty rough in spots, and in order to cut out some of the rough spots I went through the ranch, and I also wanted to get a robe, so I stopped in at the ranch, and by going through the ranch I cut off about half a mile or so of this bad road, or three-quarters. * * * From Vacaville to my father's place we could go right on top. * * * We proceeded on down the road. There is where the rough road commenced. We had to go on the low gear and intermediate gears; it was so rough you could not do anything else. We proceeded along the highway until we got to the concrete. As I remember it, the concrete had a small break in it there about the Swanson place, the other side of White Caps. * * * We went over a little knoll and slowed up at this road that turns off for Cement. This was a road after I got on this concrete. I knew that I did not know the road; and we slowed up at this point to see if there was anything to tell us, any barriers to stop. There did not seem to be anything noticeable there that we could see. I had raised up in my seat. I could not see any lantern; I could not see any sign. There had been one there once, that I knew. * * * I just told Mr. Dobbins: 'I guess she is open, I don't see anything.' * * * Driving along, the next thing I know I think we saw a pile of dirt there, and the accident occurred, and I was knocked unconscious, and I don't remember anything much about it. * * * All I can remember is seeing this little pile of dirt, I should judge a foot and a half or 20 inches high."

The witness stated that he did not remember seeing any boards on top of the concrete next to the opening or any lights, and said:

> "We came over some pretty horrible roads before we got there and seemed to see all turns and so forth."

He testified that he was familiar with the road as far down as the Halfway House; that while he was pumping water he would jump on auto trucks loaded with rock and ride up to the mixer where they were laying the concrete, "so that I was familiar with all the turns of the road." At that time the mixer was in front of the Nelson ranch. Asked if he knew whether the road was completed from the point where the mixer was to Fairfield, he replied:

> "That seemed to be the general public report, that was the news that was buzzing around, that they had scraped the dirt off the road from the Halfway House to Fairfield, and that you could use it. The general information was, you could hear people say, 'You can travel the road now from the Halfway House to Suisun.'"

On cross-examination plaintiff testified that after the polls closed he went to his home and returned to Vacaville at about 8 o'clock. At 8:15, a party of three or four, including plaintiff, drove to a roadhouse about six miles above Vacaville (which town was "dry") "and had a glass of beer and left." They returned to Vacaville at about 10 o'clock. Plaintiff went to a hall where a dance was in progress, stayed there a few minutes, and then went to the polling place. The same parties again drove to the roadhouse at about 11 o'clock, stayed there a few minutes, "had a glass of beer," and returned to Vacaville. He said that when he and Dobbins went to the Buckingham ranch they each "had a very small drink of whisky." The witness testified:

> That he "recalled" that they passed three barriers between Vacaville and the place where the accident occurred and that at the first road they passed there was a sign reading, "Turn here." That he saw such signs "lots of times, but not on that particular night. I had seen them there before as I had driven down that road weeks before. Q. At the corner of that road (Nelson's) was there not a sign saying, 'Road closed, turn here'? A. Yes, sir. Q. On this particular night? A. Yes, sir. Q. You saw that, did you not? A. I took no particular notice of it. Q. You knew it was there from being there formerly? A. Yes, sir."

He said that he knew of the crossroad between Titel's place and the point where the accident occurred and which turned off about 225 yards from where the automobile struck the dirt pile. As to the speed at which they were traveling, plaintiff said that they traveled in first and second gears up to the concrete and then went into third, and "were going somewhere between 20 and 30 miles an hour." When he stood up to look ahead, they had slowed down to 10 or 15 miles, and then started ahead at 25 or 30 miles an hour; he thought probably 25 or 26 miles.

S. P. Dobbins, Jr., testified: That he was playing pool all the evening of election day until about half past 2 in the morning, when he went to the polls and there met plaintiff. He drove the machine in which they left Vacaville, and he said that after leaving the Nelson ranch he saw no barriers or lights on the highway. At the Nelson road "there was a barrier there that had been a barrier, the sides of the road were fenced up, but the middle of the highway was open. From there to White Caps the road had been graded and before we got there, and was all cut up in big clods; it was high in the middle and the sides were in ditches. Had to run in the ditches, sometimes on the top and sometimes clear across to the other ditch. In fact, we were all over the road." The witness described the accident as happening in about the same manner as testified to by plaintiff. On cross-examination he stated that he did not take a drink at Buckingham's; that he did not get out of the machine; and that plaintiff did not bring him one, but that at 11:30 of the night before he had gone to the same roadhouse mentioned by plaintiff and had one glass of beer.

The testimony shows that the barriers maintained consisted of posts, two by four, with two by four rails placed on them and wired. The barriers extended clear across the right of way, from one fence to the other. There was a traveled way along the side of the material, and the barriers, were left in such manner that persons passing might take them down; people traveling to the ranches along the highway would have to use the highway to get to their places of abode; the concrete having checks of dirt upon it, people would have to use the side of the road.

[1, 2] There was testimony given by other witnesses, introduced by the plaintiff, that there were neither lights nor barriers where and at the time the accident occurred. On the other hand, the defense presented witnesses who testified that there were barriers at certain points on the highway and a light placed at the point where the automobile struck the dirt pile. It is not necessary, however, to reproduce herein any of said testimony; nor do we consider it important, in the decision of this case, definitely to know whether there were barriers at any points on the highway or a light at the obstruction with which the automobile collided. It may, indeed, be conceded that, at the time of the accident, there were no barriers extending completely across the road anywhere and that there was no light at the point where the accident occurred, and still we are constrained to the conclusion, from the plaintiff's own testimony as well as from that of his companion, Dobbins, that he, by his own inexcusable and culpable negligence, contributed to the damage sustained by him as a consequence of the collision of the automobile in which he was riding with the dirt pile. In other words, we think it is plainly manifest from his own admissions that but for his own negligence the accident would never have occurred. He had for many years resided in the community through which the road passes and had for some time been employed at a place situated in near proximity to the road. He knew that the road was being reconstructed under the authority of the state and that the character of highway construction being prosecuted by the state was such as to require the old roadbed and culverts crossing it to be torn up and removed so that the highway was wholly unfit for use by the traveling public. He knew that barriers had all along been maintained on the highway to prevent its use while under reconstruction and knew that at a certain point between Vacaville and the place where the accident happened, a crossroad leading to Suisun, the place of destination of himself and companion on the night of the mishap, turned away from the road under construction and over which he was traveling, and he further knew that there was maintained at the point where said crossroad so turned off a sign, warning people traveling over the road under construction to take the crossroad. He, in brief, at all times knew the general conditions existing in and upon the road under construction. Neither the plaintiff nor his companion, Dobbins, testified that he had any positive or definite information that the highway, on the night of the accident, was in a condition to be used by the traveling public. In fact, the plaintiff himself testified that all the information he had on the subject was that whose source was a vague, indefinite rumor in the neighborhood that the highway was completed and available for use, or, as he himself expressed it, "that the news was buzzing around that they had scraped the dirt off the road from the Halfway House to Fairfield, and that you could use it." It is very clear, therefore, that, while he was familiar with the fact that the highway was under process of reconstruction and had, down to the time of the accident, knowledge of the conditions which had existed with respect to the highway, and knew that, unless the dirt had been scraped from the road and other obstructions necessitated by reason of the work of construction had been removed, it was not safe to attempt to pass over the road with an automobile in the nighttime, he never had taken the pains to ascertain definitely or with certainty for himself whether the report of its completion which was "buzzing around" was correct or not. That both he and Dobbins were in grave doubt as to the safety of the road is plainly shown by the fact that, just prior to reaching the point at which the accident occurred, the plaintiff arose from his seat in the automobile and, standing erect for a moment, thus took a survey of the situation before him to determine whether the road was or was not perfectly safe to proceed on at the rate of speed—25 or 30 miles an hour—at which they had previously been traveling. Furthermore, according to the testimony of Dobbins, he was required to drive the machine, before reaching the dirt pile, "in the ditches, sometimes on the top and sometimes clear across to the other ditch—in fact all over the road." This itself ought to have been sufficient warning that the greatest care was required of them to get the machine over the highway with safety to themselves. Both the plaintiff and his companion knew of the crossroad above referred to, knew that it would take them, if used by them, to the place where they proposed going, and knew that, although not a modern highway, it was in a good and safe condition for use by the traveling public.

[3] With the knowledge which the plaintiff had of the condition of the highway over which he attempted to make his way to Suisun, it is, as above stated, a matter of no material importance whether the barriers were

maintained across the road or lights kept at points where there were obstructions caused by the tearing up of the road or the piling thereon of materials to be used in the work of construction. Barriers and lights and other such warnings placed on streets or highways which are undergoing construction or improvement are for those of the traveling public who have no knowledge or previous notice of the conditions which render the thoroughfare unsafe for use. Therefore, those having actual knowledge of the existence of such unsafe conditions, or who, having had such knowledge, attempt to use the street or highway without first informing themselves as to whether such conditions have been removed and the highway thus made suitable and safe for general use, do so at their own peril.

There are innumerable cases the facts of which are strikingly similar to those disclosed by this record and in which the courts have with unbroken uniformity held that the injuries complained of were entirely and directly imputable to those complaining. To some of those cases we will now refer.

In Compton v. Revere, 179 Mass. 413, 60 N. E. 931, a Massachusetts case, the plaintiff complained of injuries sustained in slipping and falling on a highway. It appears that the grade of the highway was being changed; but, the winter season coming on before the work was completed, further work thereon was abandoned and postponed until better weather returned, the defendants leaving the road in a rough and unsafe condition for use. The plaintiff testified that he was and had been familiar with the fact that the same condition of the highway had existed for a month, and that there was another way of reaching the place where he was going when hurt, but that it was not so convenient a way of getting there. The defendants requested an instructed verdict, which was refused. The court, holding that the request of the defendants should have been granted, said:

> "It is obvious that the plaintiff knew all that there was to know about the condition of things, and, in attempting to use the street, did it at his peril. The case cannot be distinguished from Jones v. Collins, 177 Mass. 444, 59 N. E. 64, unless the question of a want of barriers makes a difference. There was a conflict of evidence on the point whether barriers had ever been placed on Beach street. But we do not regard the question as material in this case. The object of a barrier is to notify the public that it is unsafe to proceed; but, where the condition of the street is such as is shown by the evidence in this case, the condition itself is as strong a notice as any that could be given. Nor do we regard it as material that prior to the accident some wagons were driven over the street. There are always persons who take risks, if a short cut can be made, and who will go over a street even if it is obviously not open to public travel."

In Jones v. Collins, 177 Mass. 444, 59 N. E. 64, referred to in the above-cited case of Compton v. Revere, the action was for injuries sustained by the plaintiff while in the act of passing along a new street, which was then undergoing construction under proceedings duly inaugurated by the public authorities. There was evidence to the effect that, although barriers with proper signs had been placed and were maintained across each end of the new street and across the ends of the streets leading into it, the plaintiff was not aware of the fact that the street was in process of construction. It seems, though, that the barriers did not extend across the entire space at the end of the street, a sufficient space being left open at each side to enable pedestrians to pass by. The plaintiff secured a verdict, and, in granting a new trial on appeal, the Massachusetts Supreme Court, among other things said:

> "It is not essential that such notice shall be brought to the actual knowledge of all persons; and it is immaterial to the duty of the defendants to the plaintiff in the present case whether she had actual knowledge that the street had been closed for travel. The barriers and signs which were in fact up, and had been so for many days, were enough to fix the right of the defendants to control the place, without being under obligation to keep it in any condition other than that resulting from the legitimate prosecution of the work of construction in accordance with the order under which they worked. In the opinion of a majority of the court, the verdict should be set aside, and a new trial granted."

In the instant case, as has been shown, the plaintiff knew of another road which he could have taken to Suisun—a road which had been generally used and which was perfectly safe for use. In Hill v. Tionesta, 146 Pa. 11, 20, 23 Atl. 204, 205, decided by the Supreme Court of Pennsylvania, the court said:

> "It was proved by undisputed testimony on both sides that there was another road, somewhat longer, over which the hauling could be done, and as to a few of the earlier loads was done, without incurring the risks which were so very manifest on this road. The case is plainly brought within a long line of the decisions which established as an inference of law the contributory negligence of the plaintiff."

In the West Virginia case of Shriver v. Marion County Court, 66 W. Va. 685, 690, 66 S. E. 1062, 1064 (26 L. R. A. [N. S.] 377), the plaintiff was driving a team hitched to a wagon loaded with merchandise over a street which was plainly and conspicuously defective. The wheels of the wagon went into a deep mud hole in the street, with the result that the vehicle was tipped over and the plaintiff thrown with violence to the ground, whereby he sustained a fractured leg. The serious question in the case was whether there was another way which the plaintiff could have taken, and as to that the evidence was not certain or clear. The court said:

> "The liberty, right, and power of the citizen in respect to the use of highways being very broad, it is neither unreasonable nor unjust to require him to avail himself of his wide latitude of choice, impose upon him the duty to exercise reasonable care and prudence, and hold him guilty of contributory negligence when, by reason of his omission thereof, injury results to him or his property. As in all other cases arising under the law of negligence, his voluntary and unnecessary encountering of danger amounts to an assumption of risk and bars recovery, if he had knowledge of the danger, or, *by reason of its obviousness, he was bound to know it.* [Italics ours.] This principle has been uniformly adhered to in the decisions of this court. We do not recall an instance in which a recovery for injury occasioned by a known or obvious defect has ever been allowed, and some of our decisions go so far as to intimate that under no circumstances can there be a recovery for such an injury, if the defect by which it is occasioned was so open and apparent that the traveler, exercising reasonable care and prudence for his safety, ought to have detected and avoided it."

Again, the court in that case further said:

> "Another principle, asserted by the courts generally, though correct, has a tendency to mislead. It is that the use of a road by a traveler with knowledge of its bad condition is not per se negligence. On its face this principle seems to be inconsistent with preclusion from recovery by assumption of risk. It seems necessarily to imply a right to use in a careful manner a bad road and recover in case of injury, but this is not necessarily true. Rightly interpreted, the expression means no more than that the citizen may use such a road with knowledge of its condition and still recover for injury, if the circumstances were such as to justify the assumption of risk, on the ground of necessity, and he exercised care, and also when the injury was caused, not by the open and apparent defects of which the plaintiff had knowledge, but by another latent, hidden defect in the same street or walk of which he had no knowledge, as in the case of Moore v. Huntington." Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22.

See, also, Klatt v. City of Milwaukee, 53 Wis. 196, 10 N. W. 162, 40 Am. Rep. 759; Hunter v. City of Montesano, 60 Wash. 489, 111 Pac. 571, 572, Ann. Cas. 1912B, 955; McGraw v. Friend, etc., Lumber Co., 120 Cal. 574, 578, 52 Pac. 1004; Slaughter v. City of Huntington, 64 W. Va. 237, 61 S. E. 155, 156, 16 L. R. A. (N. S.) 459.

[4] By the foregoing authorities it is clearly and unquestionably established that any person who uses and is injured on a defective highway, knowing, or having reason to know, that it is then in process of construction, and for that reason is not open to general use by the public, is himself guilty of negligence, unless he has used such highway because it was necessary to do so, and that even in such case he must exercise great care. There seems to be no reason for doubting that the facts of the present case bring it clearly within the principles enunciated and applied in the cases above considered. Indeed, in our opinion, there is such a marked similarity between the facts of this case and those of the cited cases, that nothing more need be said of the case before us upon the question of contributory negligence, than what has been reproduced above from the cases referred to.

While the conclusion thus arrived at is, of course, decisive of the case, yet, in view of the fact that the state is a party to the contract in question here, and of the further fact that it is probable, if, indeed, not certain, that similar contracts will, in the future, be made by the state, we feel that it is no more than right and proper that the public officers, upon whom the law imposes the duty of inaugurating and prosecuting state highway construction, should know what their legal status is with respect to such contracts. Therefore we deem it only just to them, since the question is here put squarely before us, to consider and decide whether, under such circumstances as are present in this case, the state engineer and the members of the highway commission, in whom is vested by law the authority to inaugurate and supervise the construction of state highways, can be held liable for any damage to third persons which may follow from acts of negligence by the contractor, committed in the performance of his contract. This question, in the form in which it arises and is presented here, is whether the corporation defendant was an independent contractor, and is alone responsible and liable for the damage of which complaint is herein made.

In the year 1902, the people adopted section 36 of article 4 of the Constitution, which reads as follows:

> "The Legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct * * * the same, and to extend aid for the construction and maintenance in whole or in part of any county highway."

[5] Whether, in view of the fact that, prior to the adoption of that section into the Constitution, the counties, which are mere governmental agencies of the state, vested with a variety of powers which the state itself may assume or resume and directly exercise, were given, by the Legislature, full and plenary power over the matter of constructing and maintaining highways within their respective limits, the Legislature has, by said section, been given power which it had not theretofore possessed, is a question wholly foreign to the present discussion. It is enough, for present purposes, to know that thus the state has expressly taken to itself

the right to establish and maintain a system of state highways, and to give aid in the construction of county highways, and that, in pursuance of said section, the Legislature of 1907, and by a subsequent amendatory act (Stats. 1911, p. 823 et seq.), has established the machinery whereby the terms of the constitutional provision referred to should be, and is being, carried out. By section 9 of said act it is provided:

> "The department of engineering shall take full possession and control of all roads which have been declared state highways, * * * and all other state highways which may hereafter be constructed and all public work being done or now completed by the department of highways. All expenditures by the state for highway purposes except as otherwise hereafter provided by law shall be under the full charge of the department of engineering. * * *
>
> "It shall have power to alter or change the route of a road and shall do all things necessary, and obtain all tools and implements required to properly care for and manage the roads under the charge of the department. * * *
>
> "Whenever under any statutes of this state the performance of any duty or obligation is imposed upon the department of highways, the same shall be assumed by and the performance of the same shall devolve upon the department of engineering."

Counsel for the respondent argue that, under the foregoing provisions of the act creating the department of engineering, the officers appointed to execute the duties thereof, being responsible and legally liable for the negligent performance of their duties as such officers, are also likewise liable for any damage resulting from any negligence characterizing the performance by the contractors of contracts for highway construction inaugurated and prosecuted under said act, where injury or damage to person or property has directly followed from such negligence. In other words, as we understand the contention of the respondent, it is that the provisions of the act in question, ex proprio vigore, make the advisory board, consisting of the members of the highway commission, and the state engineer, under whose general direction and superintendence all state highway construction must be carried on, responsible and liable for any damage which directly results from negligence occurring in the actual execution by the contractor of a contract for the construction of a state highway.

[6] There is obviously no merit in the contention, or the argument advanced in its support.

There must always be existent in all public, as well as private, transactions, such as that involved here, the power to compel compliance with the terms of contracts made with reference thereto. If there existed no such power, then, obviously, contractors would be at liberty to, and could, change the terms of their contracts according to their own free will and caprices, to the great detriment of the principal or the other contracting party. The man who builds a house upon his land always has the right, whether expressly reserved or not, to see that the contractor performs the contract of construction according to the adopted plans and specifications, and to compel the performance of the contract as the contractor has agreed to do the work. And all that the law establishing the department of engineering, and vesting in it the power to establish a system of state highways, attempts or pretends to do in that regard is to clothe the officers of that department with the power to let contracts for highway construction and to supervise the work of construction of the highways for the purpose only of seeing that the work is done, in all particulars, agreeably to the terms of the contract and the plans and specifications. The act really does no more than directly and expressly authorize the state, through its duly appointed and constituted officers, to exercise the same power with respect to the construction and maintenance of public highways as has always been vested in and exercised by counties through their duly constituted authorities. The power thus conferred upon the state is, in a general sense, the same as that vested in municipalities by the general street improvement act (Stats. 1911, p. 733), under the provisions of which the improvement of streets in cities and towns may be coerced at the expense of property owners according to plans and specifications duly prepared for and adopted by the local legislative body and the work carried on under the direction of the superintendent of streets, who is also empowered by section 18 of said act, in his official capacity, to make written contracts for such work and to receive bonds for the faithful performance thereof. The street superintendent, under the law, has a general supervisory control over all such contracts for the purpose only of seeing that the work is performed in conformity with the plans and specifications, in accordance with which the contractor has agreed and bound himself to do the work. Further than that, the superintendent has absolutely nothing to do with the contract. He has no voice or choice as to the particular means which the contractor may adopt for performing the contract, and neither he, nor the municipality, can legally be held, merely by reason of the powers and duties they are authorized to exercise and required to perform under the provisions of the street law, responsible or liable for the consequences of any negligent acts, resulting in damage to others, committed by the contractor in the course of the performance of the contract. So it is true as to the case at bar. The law gives to the members of the highway commission and the state engineer only such power over, and control of, contracts which the state is authorized to make for state highway construction as is absolutely necessary to enable them to discharge the duty with which they, as such officers, are charged, to wit, to make such contracts on behalf of the state and to compel the contractors for such work of construction to perform their contracts in accordance with their terms and the plans and specifications in conformity to which they have agreed to do the work of construction. This states the limit of their connection and concern with such contracts, and it therefore results that the law itself cannot justly be so construed as to justify the confirmation of the contention of the respondent that by the very terms of the law themselves the members of the advisory board and the engineer may be compelled to respond in damages for injuries which may follow from the negligent execution of such contracts by the contractors.

So much for the law prescribing and fixing the duties and responsibilities of the state highway commission and the state engineer with respect to state highway construction.

[7] That the corporation defendant in the case at bar was an independent contractor, and therefore wholly responsible for the proper execution of the terms of its contract, and likewise liable for any damage directly resulting from any negligence committed by it in the course of the performance of the contract, is clearly shown by the contract. The contract is, as the complaint alleges, between the state of California, acting through the defendants Blaney, Darlington, and Stern, constituting the advisory board of the department of engineering, and Fletcher, the state engineer, and the corporation named as defendant. It is drawn in accordance with the provisions of the act creating the general scheme for the construction of highways by the state, and provides that the corporation shall construct the highway, furnishing for that purpose the materials and labor, according to certain specifications prepared by the advisory board, under the direction of the state engineer. The specifications, in conformity with which the work was to be done, prescribe with particularity the character of the work to be done, the kind and the character of the materials to be used, the price of each particular piece of work essential to the construction of the highway as outlined by the contract, and the price of the materials to be used. The instrument reserves to the advisory board, and the state engineer, the right to exercise such supervision over the work as may be necessary to enable them to determine whether the contractor was performing the work and using the character of materials specified in the contract, and to require the contractor to perform the contract in all respects according to its terms. They were authorized to make alterations in, deviations or omissions from, or additions to, the contract. But they had no right of control as to the mode of doing the work contracted for; that is, neither the board nor the engineer had any say or discretion, under the contract, as to the particular manner in which, or the means by which, the contractor should carry on and complete the work. Neither had they any control over the employés engaged in assisting the contractor, nor could they authoritatively interfere in the matter of determining who should be employed by the contractor to aid him in consummating the contract. The highway, upon the making of the contract, was to be and was turned over entirely to the contractor, and it allowed to proceed in its own way to accomplish the desired result. Neither the state nor its agents, charged with the duty of letting the contract, were authorized to interfere in the matter of maintaining warning signs and barriers interdicting or cautioning the public against any attempted use of the highway while it was in the course of construction, or to say or determine at what point on the highway such warning signs should be maintained. They were wholly without authority to interfere with the contractor's determination of where, on the highway, it would be the more convenient for the purposes of the work to place and maintain the materials necessary to be used in the work of construction. They, indeed, had absolutely nothing to do with the contract, or the means employed by the contractor for the accomplishment of the work he had agreed to perform, except, as before stated, to compel the contractor, as the superintendent of streets may do in the case of street improvements, or the owner in the case of the erection of a house on his land by a contractor may do, to do the work in all respects according to the terms of the contract; that is to say, to use the specified materials and to make the road that the contract called for.

If the foregoing considerations do not plainly show that the corporation defendant was an independent contractor, we are at a loss to know what would. " 'An independent contractor,' says the Supreme Court, in Green v. Soule, 145 Cal. 96, 99, 78 Pac. 337, 339, 'is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. * * * The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for.' 16 Am. & Eng. Enc. of Law (2d Ed.) p. 187. The fact that the work is to be done under the supervision of an architect, or that the employer has the right to make alterations, deviations, additions, and omissions from the contract, does not change the relation from that of an independent contractor to that of a mere servant. 16 Am. & Eng. Enc. of Law (2d Ed.) p. 187; Frassi v. McDonald, 122 Cal. 402 [55 Pac. 139, 772]." We cite the following cases as in support of the foregoing description of an independent contractor, and as confirming our conclusion that the facts of the transaction involved herein bring the defendant corporation clearly within the category of independent contractors: Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 59 Am. Rep. 117; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065; Johnson v. Helbing, 6 Cal. App. 424, 92 Pac. 360.

There is no force in the point sought to be extracted from the proposition that the defendants Darlington, Stern, Blaney, and Fletcher are sued as individuals, and that the verdict is against them as such, and not as state officers. Conceding that they were sued individually, and not as state officers, and that therefore the verdict affects them only as individuals, yet it is obvious that that fact would not make the corporation any the less an independent contractor, solely responsible for any ill consequences resulting to third parties from any negligence of which it might be guilty in performing its obligations under the contract.

For the various reasons herein set forth, the judgment appealed from is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

39 Cal. App. 139

WHITNEY v. NORTHWESTERN PAC. R. CO. (Civ. 2596; S. F. 8346.)

(District Court of Appeal, First District, Division 1, California. Dec. 12, 1918. On Petition for Rehearing, Jan. 4, 1919. On Application for Hearing by Supreme Court in Bank, Feb. 10, 1919.)

1. APPEAL AND ERROR 🔑533(1)—REVIEW—MEMORANDUM NOT PART OF THE RECORD.

An alleged memorandum, given to the clerk of the trial court and stating a ground for order granting defendant new trial, is not a part of the record on appeal.

2. APPEAL AND ERROR 🔑854(1)—REVIEW—ORDER GRANTING NEW TRIAL — MEASUREMENT BY TERMS.

Order of trial court entered upon its minutes is only evidence of action of court in granting new trial, and such order is to be measured by its terms, and not by reasons which court may give for it.

3. APPEAL AND ERROR 🔑533(1)—REVIEW—PERSONAL LETTER FROM JUDGE AS PART OF RECORD.

Personal letter from trial judge to plaintiff's attorney, written subsequently to order granting defendant's motion for new trial, and stating single ground of contributory negligence was considered in making ruling, constitutes no part of record on appeal.

4. APPEAL AND ERROR 🔑933(4)—PRESUMPTIONS FAVORING COURT BELOW—GRANT OF NEW TRIAL.

If any grounds specified in defendant's notice of motion for new trial are sufficient to sustain trial court's order, appellate court is compelled to assume, in favor of order appealed from, that motion was granted upon such ground.

5. APPEAL AND ERROR 🔑979(2)—NEW TRIAL 🔑71 — CONFLICTING TESTIMONY — DISCRETION OF COURT.

Where there was much conflict in the testimony, which was voluminous, order granting defendant new trial was wholly within discretion of trial court, and cannot be disturbed, in absence of abuse of discretion.

6. RAILROADS 🔑350(13)—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action against railroad for death of plaintiff's decedent, struck by freight train on highway crossing, question of decedent's contributory negligence *held* for jury.

On Petition for Rehearing.

7. RAILROADS 🔑335(5)—INJURIES AT CROSSING—FAILURE TO STOP, LOOK, AND LISTEN—PROXIMATE CAUSE.

If decedent, who drove his automobile along a highway crossing a railroad track, could not have seen or heard a freight train from any point where he might have stopped in safety, after he started up hill toward the crossing, his failure to stop, look, and listen was not the proximate cause of his death.

8. RAILROADS 🔑346(5)—INJURIES AT CROSSING—PRESUMPTION OF DUE CARE.

There is a presumption that decedent, who drove an automobile along a highway to a railroad crossing, where he was struck by a train and killed, acted with proper regard to his own safety.

9. APPEAL AND ERROR 🔑996—REVIEW—PROVINCE OF JURY—DEDUCTIONS FROM EVIDENCE.

It is province of jury, not of appellate court on appeal, from order granting defendant new trial, to make deductions from evidence in order to arrive at ultimate facts.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Valerie Sinclair Whitney, administratrix of the estate of Oliver Willard Sinclair, deceased, substituted in the place of W. E. Cook, administrator, etc., against the Northwestern Pacific Railroad Company. There was judgment for plaintiff, and from an order granting defendant a new trial, plaintiff appeals. Affirmed.

Pierce H. Ryan, of Eureka, for appellant. Stanley Moore and F. A. Cutler, both of San Francisco, for respondent.

LENNON, P. J. This is an appeal from an order granting a new trial. The action is one for damages, and is brought by the administrator of the estate of O. W. Sinclair, deceased, for the death of Sinclair in an accident in which an automobile which was being driven by the deceased was struck by a train of respondent at a public road crossing in Humboldt county. Judgment was rendered on a verdict of the jury in favor of the plaintiff for $25,000. The defendant regularly made a motion for a new trial on practically all the grounds authorized by statute, including that of insufficiency of the evidence to justify the verdict.

[1, 2] The trial court disposed of this motion by making a general order granting the same. The appellant urges that this order should be considered as made upon the sole ground that the evidence showed deceased guilty of contributory negligence as a matter of law which would prevent a recovery; and in support of this claim, it is alleged in appellant's brief that at the time the order was made a memorandum was given to the clerk stating such ground for the order. No such memorandum is a part of the record, and therefore cannot be considered by this court. It has, however, been repeatedly held that any limitation of such a general order, to be effectual, must be specified in the order. The order of the court entered upon its minutes is the only evidence of the action of the court in granting the new trial, and such order is to be measured by its terms, and not by the reasons which the court may give for it. Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 Pac. 110; Weisser v. Southern Pac. Ry. Co., 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636.

[3] Appellant also sets out in his brief a personal letter from the trial judge to appellant's attorney, written subsequent to the order, stating that only one ground was considered in making the ruling complained of, namely, that the deceased was guilty of contributory negligence. This is attempted to be used as a limitation of the general order. This letter constitutes no part of the record on appeal. Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830. An exactly similar question has been decided in the case of Weisser v. Southern Pacific Ry. Co., supra.

[4] If any of the grounds specified in the notice of motion for a new trial are sufficient to sustain the order, we think this court is compelled to assume, in favor of the order appealed from, that the motion was granted upon that ground. Ben Lomond Wine Co. v. Sladky, supra.

[5] Insufficiency of the evidence to justify the verdict was one of the grounds specified in such notice of motion. There is a voluminous record in the case, and an examination of it discloses much conflict in the testimony. Under these circumstances, the order granting a new trial was wholly within the discretion of the trial court. The record affords no basis for a claim that there was any abuse of discretion, and the ruling of the trial court cannot be disturbed. Newman v. Overland Pac. Ry. Co., supra.

[6] While it is unnecessary, for the purposes of this appeal, to consider any of the other points made in support of the order, the question as to whether deceased was guilty of contributory negligence as a matter of law, thereby barring a recovery against defendant, has been carefully briefed by counsel for both appellant and respondent, and its determination may be necessary for the purposes of a new trial.

From the evidence it appears that the deceased was driving his automobile from his home in Eureka to Dyerville. The top of the machine was up. At about 5 o'clock in the afternoon he crossed Eel river on a pontoon bridge, and proceeded thence along a winding road up a steep grade, traveling slowly, to the top of the river bank, along which was the railroad track, across which the highway ran. While crossing the railroad track, the automobile was struck by defendant's freight train, and deceased sustained injuries from which he died. It is conceded that the testimony shows that the view of the railroad track was obstructed by trees and weeds, and that a steel bridge was being erected across the river, and the noises incident to its construction would make it difficult for a traveler to hear an approaching train. The testimony is to the effect that the deceased did not stop his automobile from the time he started up the hill until he was struck by the train. The testimony is conflicting as to when the train started to blow a warning whistle. The defendant, however, contends that it was the duty of the deceased to stop his automobile and look and listen for an approaching train before crossing a steam railroad track, where the view of the track was obstructed, and that, failing to do so, he was guilty of contributory negligence as a matter of law.

The plaintiff contends that the peculiar facts of this case place it outside of this rule, for the reason that there was no place of safety in which the defendant could stop after he had reached a point where, by stopping and looking, he might have seen the train. There is some testimony to the effect that, until the deceased had passed the last obstruction, he could not have seen the train, and that, when the last obstruction was passed, deceased was so close to the track that, had he stopped his car, he would have been struck by the overhang of the engine. Even according to defendant's contention, deceased had but 1.9 feet clearance after passing the last obstruction, within which to stop. Clearly, then, deceased could not have stopped his automobile in a place of safety, where he could have seen the train, and at least some of the evidence is to the effect that he could not have heard the train if he had stopped, on account of the noise of the work of constructing the bridge. Under the circumstances, was it the duty of deceased to have stopped his machine before passing the obstructions, and to have proceeded ahead on foot, if necessary, in order to ascertain if there was any danger before crossing the track?

We think the case of Murray v. Southern Pacific Ry. Co. (Sup.) 169 Pac. 675, relied upon by defendant, does not lay down the rule of law as broadly as contended for by defendant. In that case the Supreme Court takes particular care to point out that it is not the rule of law in this state that a driver of a motor vehicle, approaching a steam railroad crossing, is negligent if, his vision being obstructed, he does not stop his vehicle, leave it, and go forward for the purpose of observation. The Supreme Court, in adopting the decision of the Court of Appeal, points out that the discussion therein is addressed to the motion for a nonsuit under the particular facts of that case. As said in that case, it is only when but one conclusion can reasonably be reached from the evidence on the question of contributory negligence that the question is one of law for the court, and that, even where there is no conflict in the evidence, contributory negligence is a mixed question of law and fact for the jury, if different conclusions upon the matter can rationally be drawn from the evidence. Fernandes v. Sacramento, etc., R. R. Co., 52 Cal. 45; McKeever v. Market St. R. R. Co., 59 Cal. 294; Chidester v. Consolidated Ditch Co., 59 Cal. 197; House v. Meyer, 100 Cal. 592, 35 Pac. 308.

In the case at bar it would seem that the question of negligence was one for the jury. To reach a conclusion on this question involves several deductive processes. First, it seems the jury would have to decide from the evidence whether or not deceased knew of the location of the crossing, and that he was approaching it, for, until they had decided that matter, they could not decide whether or not, under all the circumstances, deceased was negligent in not stopping to look and listen. As said by the court in the case of Murray v. Southern Pacific Ry. Co., supra, there is no absolute duty on a driver to stop before crossing a railroad track. Negligence is measured by the conduct of a reasonably prudent man, and cannot be determined until all the facts surrounding the incident are determined. All of the decisions cited by respondent, which set out the duty of plaintiff to stop and look and listen upon approaching a crossing, assume that the location of the crossing was known to the plaintiff, and that by stopping, looking and listening before reaching the track, the approach of the train could be discovered. These are all disputed facts in the case at bar, upon which the evidence is conflicting.

We think the question of the contributory negligence of the deceased in this case is a question for the jury, under proper instructions from the court.

The order granting a new trial is affirmed.

We concur: BEASLY, Judge pro tem; STURTEVANT, Judge pro tem.

On Petition for Rehearing.

Pierce H. Ryan and C. A. Tuttle, both of Eureka, for appellant.

F. A. Cutler, Stanley Moore, and Gillett & Cutler, all of San Francisco, for respondent.

LENNON, P. J. A petition for rehearing having been filed in this case, this supplemental opinion is filed in reply thereto.

[7] In our review of the evidence in this case, in the opinion filed herein, it will be observed that we stated:

> "In the case at bar it would seem that the question of negligence was one for the jury. To reach a conclusion on this question involves several deductive processes. First, it seems, the jury would have to decide from the evidence whether or not deceased knew of the location of the crossing and that he was approaching it, for until they had decided that matter, they could not decide whether or not, under all the circumstances, deceased was negligent in not stopping to look and listen."

It is not a question of conflict—it is a question of drawing an inference from testimony. As indicated in the above-quoted portion of the opinion, there were other circumstances also from which the jury would have to draw further inferences. For under our view of the law it was not only necessary for the jury to draw an inference from the testimony upon the subject of deceased's knowledge of the location of the track, but it was also necessary for them to decide from the testimony before them (which was conflicting on these points) whether, if the deceased had stopped and looked and listened, it would have been possible for him to have discovered the train approaching, in view of the obstructions and of the noises incident to the construction of the new bridge. For it seems to us that if he could not have seen or heard the train from any point where he might have stopped in safety, after he started up the hill, then his failure to so stop and look and listen was not the proximate cause of his death.

[8] From the nature of the case it was impossible to have any direct evidence upon the question of whether or not the exact location of this railroad track was known to the deceased. The evidence relied upon by the defendant, and strongly urged in his petition for rehearing, is to the effect that deceased had been over the road before. Some of it does not even necessarily warrant that conclusion, for it is that deceased was at a hospital in Scotia on several occasions—but there is no evidence that he passed over this road to get there, or that he came to Scotia from Eureka upon the occasions in question. It was our opinion, and it is now our opinion, that the conclusions to be drawn from this evidence should be drawn by the jury, in view of the presumption of the law that the defendant acted with proper regard to his own safety. The jury would have to believe from the evidence offered to the effect that the deceased had on former occasions passed over this road—that at the time of the accident he knew the location of the track. Certainly defendant will not argue that there is any legal duty upon the deceased to remember the location of a railroad upon a road over which he may have previously traveled. There being no conclusive presumption of this fact, the jury should be permitted to draw its own inference from the testimony, and that inference would naturally depend upon what the evidence showed as to the number of occasions upon which deceased had traveled the road and at how long a time prior to the accident.

And it is further our opinion that, even if it were conceded that the evidence is direct and positive and unconflicting upon the question of the deceased's knowledge of the location of the track, nevertheless, in view of the fact that the evidence is plainly conflicting as to whether deceased could have heard the approach of the train if he had stopped, after passing the last obstruction to his view, on account of the noise of riveting, etc., on the new bridge, and in view of the fact that the evidence is conflicting as to whether it was possible for the deceased to have stopped in a place of safety after reaching a point where the last obstruction to his view had been passed, the question was one of fact for the jury. In other words, it is our view that, in order to reach a conclusion upon the question of contributory negligence in this case, it is necessary first for a conclusion to be reached by the jury as to whether defendant could have stopped in a safe place where he could have seen the train, after passing the obstructions to his view, whether he could have heard the train if he had stopped, and whether he was aware at the time of the location of the railroad track. All of these matters would have bearing either upon the questions of reasonable care or proximate cause.

[9] This court has carefully read the 1,200 pages of transcript of testimony in this case, and we think, as said before, that it is the province of the jury to make deductions from evidence in order to arrive at ultimate facts. In the case of Murray v. Southern Pacific Ry. Co. (Sup.) 169 Pac. 675, it is said that, even where there is no conflict in the evidence, contributory negligence is a mixed question of law and fact for the jury, if different conclusions upon the matter can rationally be drawn from the evidence (citing Fernandes v. Sacramento, etc., R. R. Co., 52 Cal. 45; McKeever v. Market St. R. R. Co., 59 Cal. 294; Chidester v. Consolidated Ditch Co., 59 Cal. 197; House v. Meyer, 100 Cal. 592, 35 Pac. 308). This case was cited by the defendant in its brief. We have carefully read, not only every authority cited by appellants and respondents, but we have also read the authorities referred to in such cited cases. The language of some of these cases at times seems to lay a more positive obligation upon plaintiff, but it is our opinion that a careful examination of such cases indicates that they are expressly confined to the peculiar facts of the case under discussion, and that, upon the whole, there is no set formula by which the matter can be measured in all cases. It is true that in some cases the evidence is such that it becomes plainly apparent that it was the imperative duty of the injured person to stop, look, and listen under all the circumstances, for by so doing he could have avoided the accident. In the present case we think that may or may not have been the case, but it is not a question about which there could be but one opinion and the matter should be left to the jury.

The defendant points to the evidence of the companion of deceased, who was in the automobile at the time of the accident, to the effect that deceased had said: "Well, I know the way to Scotia." Also respondent urges that the testimony shows that the deceased was an old resident of Humboldt county, that he had been at a hospital in Scotia on several occasions, that the uncle of deceased formerly was the superintendent of a mill near the scene of the accident, and that deceased visited him in former years. These matters are susceptible of the deduction which respondent draws from them to the effect that the location of the track was known to deceased, and yet they are nothing more than premises upon which counsel for respondent bases his conclusion.

The respondent also urges that from the photographic exhibits it appears that a railroad crossing sign confronted deceased about 100 feet away from the track. The evidence upon the question of whether or not this sign was visible to one in the position of the deceased as he approached the scene of the accident was conflicting.

The facts of this case, we think, do not bring it within the rule of Larrabee v. Western Pac. Ry. Co., 173 Cal. 743, 161 Pac. 750. The facts in that case, as stated by the court, were:

> "That the man was driving in a slow-moving wagon, in broad daylight, was approaching a crossing with which he was perfectly familiar, and approaching it under circumstances where he could with perfect safety have stopped his progress and looked back to see whether or not the train was approaching him from behind. His view of that train was unobstructed for at least 1,500 feet."

The question of negligence was submitted to the jury under an instruction that the speed of the train did not relieve the deceased from the duty of stopping, looking, and listening, and if he failed so to do, and such failure contributed directly and proximately to the accident then, regardless of said speed, the verdict must be for the defendant. The appellate court reversed the judgment for the plaintiff, because it found that the verdict was against law, having ignored completely the above-mentioned instruction. Under that instruction, the question of proximate cause was the ultimate question before the jury.

If, therefore, under the evidence in the case at bar, the jury should find that the deceased knew the location of the track, and did not stop to look or listen, yet it seems to us that, if they also found that the deceased could not have heard or seen the train if he had stopped, they would be forced to the conclusion that his failure to stop to look and listen was not the proximate cause of the accident. And this, to our minds, is an additional reason why, in the present case, the question of contributory negligence is one for the jury under proper instructions.

In the case of Green v. Southern Cal. Ry. Co., 138 Cal. 1, 70 Pac. 926, also cited by defendant, it appears conclusively that if the plaintiffs had stopped to look and listen they could have seen the train and therefore the question of the proximate cause of the injury was beyond dispute.

In the case of Koch v. Southern Cal. Co., 148 Cal. 677, 84 Pac. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795, the court said that according to the map or plat of the locality found in the record, as well as according to the undisputed evidence of the witnesses, the buildings in the vicinity of the accident were so disposed that, if the plaintiff had been on the alert and driving with reasonable caution, he might have caught sight of the approaching train in ample time to have avoided the accident. This is one of the matters which, in our opinion, the jury should decide in the case at bar. It is a necessary step toward the conclusion contended for by defendant that the deceased was guilty of contributory negligence, and the evidence upon it is conflicting.

In the case of Griffin v. San Pedro Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842, it is stated in the opinion "that the plaintiff * * * Griffin unquestionably could have seen the train if he had stopped at a point only a few feet from that at which he did pause." In that case the court recognized the doctrine announced in the opinion in the case of Eaton v. Southern Pacific Co., 22 Cal. App. 461, 134 Pac. 801, where it was held:

> "That plaintiffs were bound to stop upon coming out from between the box cars only in case they had time and space within which to do so. Negligence cannot be imputed to them by reason of their failure to do an impossible act."

The court in the case of Griffin v. San Pedro, supra, also recognized the doctrine announced in Vance v. Santa Fé, 9 Cal. App. 20, 98 Pac. 41, wherein the court, while asserting the duty of a traveler to look and listen when near a railroad crossing held that the obligation to look is only enjoined when, by its exercise, the approaching train could have been discovered. And while recognizing the doctrine in these two last-cited cases, the court, in the said case of Griffin v. San Pedro Co., expressly differentiated that case by the fact that in it the plaintiff unquestionably could have seen the train if he had stopped at the proper place.

We see no reason to change our views as announced in the former opinion in this case, and therefore the petition for a rehearing is denied.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

On Application for Hearing by Supreme Court in Bank.

PER CURIAM. The application for a hearing in this court, after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied upon the ground first stated in the opinion of said District Court of Appeal, and without regard to anything that is stated in the opinion upon the question of contributory negligence of the deceased, as to the correctness of which we are not to be understood as expressing or intimating any opinion.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; WILBUR, J.

39 Cal. App. 180

KAHN v. ROYAL INDEMNITY CO.

(Civ. 2610.)

(District Court of Appeal, First District, Division 1, California. Dec. 13, 1918. Rehearing Denied by Supreme Court. Feb. 10, 1919.)

1. INSURANCE ⊂⊃265—ACCIDENT INSURANCE —STATEMENTS IN APPLICATION AS WARRANTIES.

Where there is a distinct agreement that application for accident insurance is part of contract, and statements in application are expressly declared to be warranties, they are to be treated as such, not merely as representations, and must be strictly true or policy will not take effect.

2. INSURANCE ⊂⊃151(2) — ACCIDENT INSURANCE—WARRANTIES IN APPLICATION—FAILURE OF INSURED TO SIGN.

Fact that application for policy of accident insurance was not signed by insured, it being a paper attached to the policy, therefore a part of the contract under it, *held* immaterial on matter of insurer's nonliability because statements in application, expressly declared to be warranties, were not true.

3. INSURANCE ⊂⊃136(2) — ACCIDENT INSURANCE—FALSE STATEMENTS IN APPLICATION —POSSESSION OF POLICY BY INSURED.

Possession of accident insurance policy by insured's broker, who had procured it at request of insured, was as effectual as possession by insured himself to render him bound by false statements contained in application attached.

4. INSURANCE ⊂⊃136(5) — ACCIDENT INSURANCE—ACCEPTANCE AND RETENTION OF POLICY—BINDING FORCE OF TERMS.

By accepting and retaining accident policy without objection, insured became bound by its terms, and beneficiary claiming thereunder cannot be heard to state insured did not read policy or any of its provisions.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Flossie Kahn against the Royal Indemnity Company. From judgment for plaintiff, defendant appeals. Reversed.

James Alva Watt, Rolla B. Watt and Watt, Miller, Thornton & Watt, all of San Francisco, for appellant.

Wise & O'Connor, of San Francisco, for respondent.

BEASLY, Judge pro tem. Plaintiff brought this action as beneficiary under a policy of accident insurance issued by the defendant company to one Frank G. Kahn, her husband, to recover $7,500, the principal sum named therein.

The insured died suddenly after having partaken of a hearty meal. A post mortem examination was held, and the coroner's jury found that death was caused by acute dilation of the heart, following chronic myocarditis, an affliction of the muscles of the heart, and a disease of the liver. It was the claim of the defendant at the trial that death was caused by heart failure, due to heavy and excessive eating. Plaintiff, on the other hand, contended that death was the result of ptomaine poisoning. The finding upon the cause of death was in favor of the plaintiff's theory; and it is conceded by the attorney for defendant and appellant that this finding is conclusive against him. The case was tried by a jury, and a verdict was rendered in favor of plaintiff, and from the judgment thereon defendant appeals.

As grounds for reversal, appellant claims that the trial court erred in overruling the demurrer to plaintiff's amended complaint, and further erred in refusing to instruct the jury to find a verdict for the defendant.

The questions involved upon the demurrer are: (1) Is ptomaine poisoning a bodily injury? (2) Is death which is caused thereby death by external and accidental means, as those terms are used in the policy?

It is defendant's claim that ptomaine poisoning is not a bodily injury in any sense that will permit a recovery under the policy, but rather that it is a disease, the same as any other caused by bacteria or germ infection, such as typhoid or scarlet fever; and that to include such cases within an accident policy is virtually to make a life insurance policy out of one merely intended to have a limited application. Interesting as is this subject, we do not consider a discussion of it necessary, for the reason that we are of the opinion that the second point relied upon for reversal, namely, that the court erred in refusing to instruct the jury to find a verdict for the defendant, presents a legal barrier against any recovery upon the policy, irrespective of the cause of death.

The question presented upon this motion involves the breaches of certain warranties contained in the policy. The facts which appellant claims constitute said breaches are admitted. The policy here sued upon was issued upon a written application made on behalf of the insured, which application is attached and made a part of the policy, and from which it appears that the insured stated at the time of his application for insurance, among other things, that he had no accident, health, or benefit insurance, nor any application for such, pending elsewhere, except a policy for $5,000 about to expire, and which was to be replaced by the policy here involved. The application further recites that the insured had not obtained medical or surgical advice regarding any illness or injury during the past seven years preceding his application, except medical attention for a sprained back. These statements were admittedly untrue, the insured having, at the time of the application, another policy of accident insurance, and he had undergone, within the time specified, an operation for a mastoid. The policy contains a warranty clause as follows:

> "I hereby warrant that the above statements are in every respect complete and true, and I apply for a maximum disability insurance policy, which shall be based upon such statements, and which policy I agree to accept subject to all its terms and conditions."

The policy further provides that it is issued in consideration of the premium, and of the statements contained in the application for the policy.

[1] Where, as here, there is a distinct agreement that an application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are to be treated as such, and not merely as representations, and must be strictly true or the policy will not take effect.

[2] Respondent concedes this to be true, but contends that inasmuch as the application in question was not signed by the insured, and that the policy never came into his personal possession, the statements contained therein were mere representations, and not warranties, and, further, that the application was not intended by the company to constitute a warranty unless signed by the insured.

It is admitted by the respondent that the circumstances under which the application was received are somewhat vague and uncertain, but it is true, as claimed, that it was never signed by the deceased. The policy further provides, however, that:

> "This policy with a copy of the application therefor signed by the insured, and such other papers as may be attached to or endorsed hereon, shall constitute the entire contract between the company and the insured. * * *

As urged by the appellant, the policy gives no support, therefore, to the contention of counsel for respondent, for whether the application was signed by the insured or not, it is a paper attached to the policy, and therefore constitutes a part of the contract between the company and the insured, under the provisions of which the insured agreed to accept the policy subject to all the terms and conditions contained in the application. And the fact that it was not signed is immaterial. Madsen v. Maryland, 168 Cal. 204, 142 Pac. 51; Solomon v. Federal, 167 Pac. 859.

[3] As to the claim that the policy was never delivered to the insured, and that because of that fact plaintiff should not be bound by the statements contained in the application attached thereto, it is sufficient to say that the policy was delivered to one Siegel, who had procured the policy at the instance and request, and as the broker, of deceased. The possession of the policy by his broker was as effectual as possession by the insured.

[4] Nor is there any merit in the further claim that the provisions of the policy cannot be enforced against plaintiff for the reason that the insured did not read it and was unfamiliar with its provisions. By accepting and retaining the policy without objection, the insured was bound by its terms; and plaintiff claiming thereunder cannot be heard to state that the insured did not read the policy or any of its provisions. Madsen v. Maryland, supra. And the same may be said with respect to the claim that, even assuming the involved statements to be warranties, their effect was waived by the general agent of the appellant. There is no evidence in the record warranting this contention.

For the reasons given, the judgment is reversed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

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39 Cal. App. 104

McLAREN v. HARDS et al. (Civ. 2614.)

(District Court of Appeal, Second District, Division 1, California. Dec. 10, 1918.)

APPEAL AND ERROR ⚷757(1) — REVIEW — RECORD.

Where the record on appeal is prepared under the alternative method as to typewritten transcripts, appellant should, under Code Civ. Proc. § 953c, print in his brief or in a supplement thereto such portions of the record as it is desired to call to the attention of the appellate court, and, if the appellant fails to print sufficient to illustrate the points made, the respondent need not supplement the record, but may rely on it as printed.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by A. R. McLaren against J. Fred Hards and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Joseph W. Mowell, of Los Angeles, for appellant.

Charles L. Evans, of Los Angeles, for respondents.

MYERS, Judge pro tem. Plaintiff appeals from a judgment in favor of defendants and from an order denying his motion for a new trial.

Appellant informs us in his brief that this was a creditor's suit under sections 3439, 3441, and 3442 of the Civil Code to avoid and set aside alleged voluntary and fraudulent conveyances from defendant J. Fred Hards to a Mrs. Slatter, and from the latter to defendant Beatrice E. Hards, wife of the first-named defendant. From statements in his brief we gather that appellant predicates his appeal upon claimed insufficiency of the evidence to support certain findings of the court below. The record comes to us under the "alternative method" in typewritten transcripts. Neither the findings nor any part thereof is printed in appellant's brief; nor is there printed any portion of the pleadings framing issues to which such findings would be responsive.

The reporter's transcript covers 133 typewritten pages. The only portion thereof printed in the brief is the following:

> "Hards testified on direct examination as follows: Q. What was the consideration of the transfer (to Mrs. Slatter)? A. There was none. Q. What was the property conveyed from Mrs. Slatter to Mrs. Beatrice E. Hards for? What was the consideration for that? A. There was no consideration. Q. Well now, by no consideration, do you mean what? A. No monetary consideration. (Rep. Tr., p. 66, l. 8.)
>
> "Mrs. Hards, on cross-examination, testified as follows: Q. Did Mrs. Slatter pay you or Mr. Hards anything for that property? A. No, sir. Q. Did you pay her anything for the deed to the San Pedro lot? A. No, sir. (Rep. Tr., p. 99, l. 14.)"

It is apparent that there is nothing here which is necessarily inconsistent with a finding in favor of the defendants upon the question of a valuable consideration, if such an issue was framed and such finding made.

The law with respect to appeals under this method expressly requires that—

> "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c.

This court and the Supreme Court have frequently pointed out that they cannot be expected to and will not search through typewritten transcripts for matter which parties have neglected to print in their briefs, as this section requires them to do. See California Savings Bank v. Canne, 34 Cal. App. 768, 770, 169 Pac. 395, 396, and cases there cited. "The law requires * * * that enough must be printed to illustrate the points made and to enable the court to determine those points." Id. The appellant here has wholly failed to comply with that requirement of the law.

It seems that the Legislature in providing for the so-called "alternative method" of appeal contemplated that the parties should print in their briefs (or in a supplement thereto) so much of the record as under the old method would have been embodied in a bill of exceptions, one difference being that under the new method respondent's amendments to such "bill of exceptions" are not presented until he files his brief. It follows from this that, if appellant fails to present a record which would justify a reversal of the judgment or order appealed from, respondent is not called upon to supplement it by additions thereto, but may stand upon the record so presented, which is apparently what respondent in this case has elected to do.

For this court to depart from its rule of conduct, as indicated in the case above referred to and in many others which might be cited, would be in effect to repeal the code provision above quoted.

There is no record here presented in the manner prescribed by law upon which this court can consider the merits of this appeal.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

39 Cal. App. 118

FAIRCHILD v. CARTWRIGHT. (Civ. 1867.)

(District Court of Appeal, Third District, California. Dec. 11, 1918.)

1. CONTRACTS 🔑54(3)—COMPROMISE—CONSIDERATION.

An agreement, whereby defendant, president and director of a corporation, promised to be primarily liable for the payment of $6,000 to settle a claim of $20,000 against corporation, *held* based upon a sufficient consideration.

2. CONTRACTS 🔑68—COMPROMISE OF DOUBTFUL CLAIM.

The compromise of even a doubtful right is a sufficient consideration for a promise to pay money.

3. CONTRACTS 🔑53 — CONSIDERATION — AMOUNT.

Where there is a valid consideration, the law will not attempt to measure the amount thereof.

4. FRAUDS, STATUTE OF 🔑33(3)—PROMISE TO ANSWER FOR OBLIGATION OF ANOTHER.

An agreement, whereby defendant, president and director of a fire insurance company, promised to be primarily liable for the payment of $6,000 to settle a claim of $20,000 against company, was not required to be in writing, since it came within Civ. Code, § 2794, subd. 3, making promise original in case of consideration beneficial to promisor.

5. FRAUDS, STATUTE OF 🔑158(4)—EVIDENCE OF WRITING—SUFFICIENCY.

Evidence *held* to warrant finding that defendant, president and director of a fire insurance company, agreed "in writing" to pay plaintiff a certain sum in compromise of a claim against the company.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. Contracts 🔑170(1)—Construction.

The conduct of the parties is a circumstance of moment, where the written contract is of doubtful meaning.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Leon H. Fairchild against George W. Cartwright. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Inman and W. T. Phipps, both of Sacramento, for appellant.

Charles B. Harris and L. M. Shelley, both of Sacramento, for respondent.

BURNETT, J. This is an appeal from a judgment of the superior court of the county of Sacramento, sitting without a jury, in favor of plaintiff and respondent for the sum of $2,100, with interest from June 1, 1913, at the rate of 7 per cent. per annum, amounting to $502.25, and for costs in the sum of $42.

Appellant specifies as causes for said appeal that the evidence adduced at said trial does not justify the said findings of fact and conclusions of law in four particulars, namely:

First, that said alleged agreement to pay is in contravention of the statute of frauds;

Second, that said alleged agreement to pay is without consideration and void;

Third, that said alleged agreement to pay was canceled and rescinded by mutual consent of the parties thereto; and

Fourth, that defendant's counterclaim should have been allowed in full.

A brief summary of the salient facts will suffice to show the nature of the controversy. It appears generally that an insurance corporation, known as the Pacific National Fire Insurance Company, was organized, having as an adjunct another corporation, called the Pacific States Holding Company. While the relation of these two companies does not very clearly appear from the record, it is reasonable to assume from the evidence that the purpose of the former corporation was the transaction of a general fire insurance business, while the function of the latter, as evidenced by its name, was the holding and handling of the corporate shares of the fire insurance company.

Preliminarily, we may say that plaintiff sustained certain relations to said Pacific States Holding Company, either as its agent or employé, but such relations are not clearly indicated in the record. He further appears from the evidence to have been a promoter, stock salesman, and broker of corporate securities, and at various times engaged in interesting investors in the purchase of such collateral. Indeed, his resourcefulness in such capacity is evidenced from the correspondence with the defendant, wherein he communicates the various "deals" he is on the verge of consummating and, possibly, might have succeeded in effecting but for the failure to receive from defendant the unpaid balance, sued upon and made the basis of this action. However, no claim is made for such remote and speculative profits.

We may add that defendant, during the years 1912 and 1913, was president and director of said Pacific National Fire Insurance Company, and it is admitted by appellant in his brief that the parent corporation and its holding company had some business relations. It also appears from the evidence that said defendant was a man well and favorably known in state and financial circles, and that he intended to lend his recognized ability and financial resources to quite an extent in the promotion, and we may easily infer, to the salvation of the insurance company's affairs, which were threatened with disaster. In the early part of defendant's administration of the affairs of the insurance company the prospects seemed roseate and alluring, and in his exuberant expectation of success appellant resolved to make the business of the company his life work. At this time he was apparently willing to become personally responsible for the payment of plaintiff's claim. Afterward, as the business declined, his attitude toward plaintiff's claim naturally changed.

There is sufficient evidence in the record to justify the conclusion that respondent had a contract with the holding company for the payment of a large sum of money, which the directors of the insurance company considered themselves obligated to pay; that it was agreed that this contract should be rescinded, and said directors would give respondent a written contract for the payment of some $7,000 and guaranteeing him the privilege of selling for many years the stock of the company on a percentage basis; that the said directors declined to carry out their agreement, and respondent insisted that his old agreement was still in force; that to compromise and settle this claim appellant promised to pay respondent the sum of $6,000, $3,000 down and the balance in 60 or 90 days, and that respondent accepted the agreement in satisfaction of all claims against the company or its directors.

There can be no doubt as to the sufficiency of the showing that appellant promised to be primarily responsible for the payment of said sum. Mr. Clarence E. Peters, an attorney at law, and apparently a disinterested witness, testified that he was present when the matter was discussed by the parties, and "Senator Cartwright said that he had been up in Humboldt county, soliciting stock subscriptions for the company, and that in exchange for stock subscriptions he had taken a number of promissory notes in payment of stock, but that these notes would not be paid until fall or about the 1st of November, and that some time in November, or early, or before the middle of November, the money would come in, the money owed him; he would then receive it, and he would pay Mr. Fairchild in November, which was about six or seven weeks subsequent to the time. * * * He said that he had invested his entire private fortune, in the sum of about $80,000, in the company, that he was president of the company and desired to see it a success, and that he was giving it his entire attention and intended to make it his life work. * * * He said that he was under no legal obligation to the company to pay this debt, but he desired to see the company a success; therefore he had personally assumed the obligation to pay Mr. Fairchild, and desired to see it paid." It may be added that plaintiff testified that defendant promised unequivocally to pay the money.

[1, 2] As to the law of the case there would seem to be no obstacle to the enforcement of the contract. The appellant wanted to avoid trouble, lawsuits, and unenviable notoriety in reference to the company in which he had such an interest, and the consideration was therefore beneficial to him. Burr v. Cross, 3 Cal. App. 416, 86 Pac. 824. The compromise of even a doubtful right is a sufficient foundation for a promise to pay money. Gardner v. Watson, 170 Cal. 575, 150 Pac. 994.

[3] Where there is a valid consideration the law will not attempt to measure the amount thereof. Whelan v. Swain, 132 Cal. 389, 64 Pac. 560.

The credit of a corporation, especially one dealing in matters of such public concern as fire insurance, is exceedingly sensitive to criticism of its management, and is likely to be greatly affected by the exposition of the inner secrets of its creation, such as the agreement among the directors and promoters to collect and divide among themselves a large portion of the amount subscribed by the stockholders, and it may be that appellant had this in mind when he promised to pay $6,000 for an asserted claim of some $20,000. At any rate, there was sufficient consideration to support the promise.

[4] It is also true that such contract is not required to be in writing, as it comes within the terms of subdivision 3 of section 2794 of the Civil Code providing:

> "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor and need not be in writing: * * * 3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; * * * or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."

[5] However, respondent alleged in his complaint that the defendant "promised and agreed in writing to pay plaintiff the sum of $6,000." The finding of the court was, also, that he so agreed to pay the said amount, and that there was no such verbal agreement. It becomes important, therefore, to inquire as to the alleged written agreement. As to the fact itself we may first observe that there was no specific denial in the answer that a written promise was made by appellant to pay said sum. The only denial was that he made such promise "for a valuable or for any consideration." For a further defense, appellant alleged:

> "That heretofore, to wit, on or about February 25, 1913, said defendant, without any consideration to him moving from plaintiff, promised and guaranteed that he, defendant, would pay to plaintiff the sum of $6,000 as the amount of an indebtedness which plaintiff then claimed had long since been due and owing to him from persons other than plaintiff, and of which defendant owed no part; and thereafter, to wit, on or about the —— day of ——, 1913, said defendant, in pursuance of said promise and attempted guaranty, paid to plaintiff the sum of $3,900, to be applied on account of said $6,000 indebtedness."

Plaintiff might well have relied upon the admission as to the contract being in writing, but the trial seems to have proceeded upon the theory that there was such an issue, and the correspondence of the parties and certain parol evidence in reference to the claim were admitted without objection. As to this, however, it may be added that, since appellant among his four specified grounds of the insufficiency of the evidence has not claimed or designated a failure to prove that a written promise was made by him, we would probably be justified in paying no further attention to said correspondence. Nevertheless, we have read carefully the letters, and while they might reasonably be construed as embodying a conditional promise to pay the money or to guarantee its payment, dependent upon collection from subscriptions to stock, or upon the ratification of the promise by the directors of the company, yet there are expressions therein clearly indicating the intention of appellant to be personally responsible for the payment of the claim; and, since it was so understood and acted upon by respondent, it is rather late to indulge in refinement as to the exact significance of certain somewhat indefinite phrases in the letters. At any rate, we think it not an unreasonable contention that thereby appellant promised to answer for the claim.

[6] We may add that the conduct of the parties—which is, of course, a circumstance

of moment where the written contract is of doubtful meaning—was strongly corroborative of respondent's position. In this connection we may refer to the fact that in part payment of the debt appellant gave his personal check for $2,100 to respondent, upon the lower left-hand corner of which was written these words: "Compromise Agreement." Appellant also gave his personal check for $900 and his promissory note for a certain sum to Mr. Meredith in part payment of the claim. In this correspondence in reference to the cancellation of the supposed contract between the plaintiff and defendant, there seems to be also on the part of appellant a recognition of his personal obligation.

Upon a consideration of the whole record, we think it cannot be said that there is no substantial support for the finding against appellant upon this issue. The other findings, including the questions of rescission and counterclaim, are supported, and we think the judgment should be affirmed.

It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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39 Cal. App. 134

MITCHELL et al. v. SAMUELS. (Civ. 2591.)

(District Court of Appeal, First District, Division 1, California. Dec. 11, 1918.)

1. Contracts ⚷194—Advancement of Money—Condition of Repayment.

Contract whereby plaintiff advanced money to defendant, hotel proprietor, to be repaid from net profits of business, plaintiff to manage the hotel on a salary, with option to buy an interest within a year, any of the advancement not repaid to be applied on purchase price in case of exercise of option, with right, in case option was not exercised, to manage hotel another year on salary, does not limit the fund, from which repayment is to be made, to profits of first year.

2. Contracts ⚷266(1)—Rescission—Restoration of Benefits.

Plaintiff, who by agreement advanced money for defendant's hotel business, to be repaid from profits, and was to manage the business on salary, on defendant's refusing to allow him to continue as manager, could recover the advancement, on the theory of rescission, without returning the salary received.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Roy G. Mitchell and another against Louis T. Samuels. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lloyd S. Ackerman, of San Francisco, for appellant.

Frank J. Murphy, of San Francisco, for respondents.

STURTEVANT, Judge pro tem. This is an action for money had and received. The complaint consists of several alternative counts. In the first the facts constituting the cause of action are set out. The second and other counts are stated in the form of a suit for money had and received, and judgment is prayed for in the sum of $3,350, being the sum of $2,500 advanced at one time, and $850 at another, and for further minor sums laid out and expended. The amounts sued for were received by defendant under a contract the execution of which is admitted by the pleadings. The undisputed facts show that defendant was in the possession of the Hotel Minster, situated at the northeast corner of Mason and O'Farrell streets in San Francisco, under a lease for the term of five years from November 1, 1913, and was the owner of the hotel business conducted therein, together with the furniture thereof. Plaintiffs agreed to manage the hotel for the defendant for a salary and share of the profits, with an option to purchase a one-half interest therein for the sum of $7,000. The parties entered into a written contract covering their agreement which is somewhat lengthy, the substance of which, however, is as follows:

After reciting the lease that the defendant had in the premises, it provided that plaintiffs should advance to defendant all the money received by them from the sale of a certain piece of property owned by the plaintiff Lena Mitchell, said money to be applied by defendant in the payment, from the date of its receipt, of the rent and operating expenses of said hotel to the extent of the sum received. No interest was to be paid by defendant on the amount so advanced, but provision was made for the repayment of the principal as hereinafter recited. The agreement also provided that the plaintiffs were to have the control and management of the hotel, but were not to make any purchases of furniture or furnishings, or incur any obligations thereunder in excess of the existing charges without the consent of defendant. Plaintiffs agreed to use their best efforts and devote such of their time and attention as might be necessary for the proper discharge of their duties, and to conduct the said hotel in a first-class manner, and to accept as and for their joint compensation for the services so to be rendered by them the sum of $150 per month for a period of 12 months, unless they sooner exercised the privilege of the option of purchase. With reference to the payment of the money advanced by plaintiffs, the agreement provided that it should be made out of the net profits, if any, derived from the conduct and operation of the hotel each month until the full amount should have been paid. In the event that the gross income from the hotel for any month was insufficient to pay the operating expenses, including the salary of plaintiffs, provision was made by which the defendant was to make up the deficiency on his personal account.

Relative to the option of purchase it was agreed that plaintiffs should have the right at any time within 12 months from the date of the agreement to purchase an undivided one-half interest in the hotel and lease for the sum of $7,000; it being further provided in this behalf that upon plaintiffs' exercise of the option they should be credited with any sum unpaid to them on the money they had advanced through the sale of the land as above mentioned. The agreement further provided that, until plaintiffs elected to exercise the privilege of the option granted, the relation of employer and employé should exist between the parties, and not that of partnership.

Further provision was made against the transfer or assignment by defendant of any interest in the property during the life of the agreement without the consent of the plaintiffs. And, finally, the agreement provided that, in the event that plaintiffs failed to exercise the privilege of the option within the time specified, they should still have the privilege of retaining the control and management of the hotel for a period of one year from the date of the expiration of the option at the monthly salary of $150, together with 20 per cent. of the net profits, determined monthly, from the conduct and operation of the hotel.

After the execution of this agreement plaintiffs borrowed the sum of $2,500 on the real property referred to and paid the same to defendant. Later they sold the property for the sum of $3,400, out of which sum they paid defendant $850, making a total of $3,350 paid by them. Plaintiffs never exercised their option of purchase, but they managed the hotel from March 3, 1914, the date of their agreement, to April 17, 1915, regularly receiving their salary of $150 per month. The business proved to be unprofitable, and defendant, being desirous of ending his business relations with the plaintiffs, advised them by letter that he was losing money and did not wish to continue to do so; that he had an offer for the purchase of the hotel, and was willing to return to plaintiffs such sums of money as they had advanced, if they would agree to cancel their agreement with him. This the plaintiffs refused to do, whereupon defendant attempted to oust them. Plaintiffs then sought, but were refused, an injunction preventing their removal, whereupon they treated the contract as being rescinded, and brought this action to recover the sum of $3,350, the amount paid by them upon the contract as above recited.

Judgment was had against defendant for the amount sued for, and this appeal is from such judgment.

[1] As grounds for reversal appellant claims that neither under the contract nor pleadings is a right of action shown in favor of plaintiffs. This claim is based upon the construction which appellant placed upon the contract. It is his contention that the contract provides two distinct periods, and contains separate and distinct provisions for each of such periods; the first being one for a salary and a year's option to purchase a one-half interest in the hotel, and the other a period during which plaintiffs were to receive $150 per month salary and 20 per cent. of the net profits. Under this construction it is argued that the provisions relative to the first year were fully performed and ended when plaintiffs failed to exercise their option of purchase, and that, even conceding there was a breach by defendant of the convenants of the contract relative to the second period under which the contract was to continue, it afforded no ground for a rescission of the first year's severable provision, or for a recovery of the money paid for the privilege of purchase which plaintiffs failed to avail themselves of. Under this construction it is argued that plaintiffs' only remedy, if any they have, is an action for damages. As a further and distinct defense it is claimed that as the contract provides that the sums received by defendant should be used by him in the payment of the rent and operating expenses of the hotel, and were to be repaid only out of the net profits, and there were none, the express condition under which the money was to become payable never came into existence, and therefore no action lies for its recovery,

We are of the opinion that these defenses are based upon an improper construction of the terms of the contract. Though loosely drawn the agreement between the parties called for the performance of not one but several covenants, which were dependent upon each other, and supported by a single consideration. The sum paid by plaintiffs not only entitled them to the right of exercising the option of purchase, but it also conferred upon them additional privileges. Under the agreement they had the right to manage the hotel, and to receive a salary therefor, with the additional right of participation in the profits for the entire term, together with the privilege of having the sums so advanced by them repaid out of the net profits. The contract contains no express provision limiting the repayment of the sums advanced by plaintiffs to the net profits of the first year, nor is there any circumstance from which such an inference can be drawn.

On the contrary, the parties having determined of what the net profits should consist, provided without limitation that such profits should be applied to the satisfaction of the money advanced until it was repaid in full. These different covenants running as they do to the entire contract show that the parties had in contemplation the execution of one indivisible contract, and negative the theory of appellant that the contract was divisible. To the claim of defendant that he has a right to retain the money for the reason that it was used for the purpose for which it was given, and was not to be returned except out of the profits, it is sufficient to say that defendant by his acts prevented plaintiffs from the enjoyment of the full term of their contract during which they might have recouped themselves. The suggestion of counsel for the respondents in this behalf that the contract was repudiated by defendant during the Exposition year, when the hotel business was profitable, by reason of which fact plaintiffs could have been repaid, requires no discussion.

[2] Appellant's further contention that plaintiffs are not entitled to a rescission for the reason that there is no allegation, proof, or finding that they ever surrendered or offered to surrender the benefits they had received under the contract, is without merit. The only benefit received by plaintiffs was their salary. This they were entitled to in any event, and they were not required to return it (Richards v. Fraser, 122 Cal. 457, 55 Pac. 246).

The conclusion of the trial court that the plaintiffs had in all respects fully performed their contract and that defendant had abandoned and repudiated his, is fully supported by the evidence. Under these circumstances the plaintiffs were entitled to sue for money had and received and to recover the sums paid under the contract.

The judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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39 Cal. App. 202

PEOPLE v. GIBSON. (Cr. 740.)

(District Court of Appeal, First District, Division 1, California. Dec. 18, 1918. Rehearing Denied Jan. 16, 1919; Denied by Supreme Court Feb. 13, 1919.)

1. CRIMINAL LAW 🔑759(5)—FLIGHT—INSTRUCTIONS.

Where there was evidence that defendant fled after commission of the crime of which he was accused, an instruction on the weight to be given such flight was proper, though defendant's evidence was that he did not flee because of the accusation, but left for other reasons.

2. CRIMINAL LAW 🔑822(4)—FLIGHT—INSTRUCTION AS A WHOLE.

An instruction on defendant's flight after commission of the crime of which he was accused *held* not an instruction on the evidence, when considered as a whole.

3. CRIMINAL LAW 🔑560, 782(12) — INSTRUCTIONS—DEGREE OF PROOF.

A cautionary instruction, which, in addition to telling the difficulty of defending against the charge, told the jury that before convicting they should be satisfied, not by the mere preponderance of the evidence, but by evidence entirely convincing, was properly refused, for the law only requires that the jury be convinced beyond a reasonable doubt.

4. CONSTITUTIONAL LAW 🔑199—JURY 🔑84—ELIGIBILITY—WOMEN—EX POST FACTO LAW.

The question of what citizens shall sit on juries is merely one of procedure, and a law qualifying women to serve, though it did not go into effect until after the crime was committed, is not ex post facto as to defendant.

Appeal from Superior Court, Alameda County; William M. Conley, Judge.

Charles E. Gibson was convicted of felony, and he appeals. Affirmed.

John W. Stetson, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BEASLY, Judge pro tem. This is an appeal from a judgment of the superior court of Alameda county by which the defendant was convicted of a felony. The chief point made in the appeal is that the court erred in instructing the jury upon the subject of flight.

The appellant contends that the sole direct testimony upon which the conviction is based is that of the prosecuting witness, Thelma Lee, who is alleged to have been his victim. This testimony is sufficient to sustain the verdict, if believed by the jury to be true. It is admitted to be a fact that the defendant left the town in which the crime is alleged to have been committed on the evening of the day on which it was alleged to have been committed, and remained away for some months. His flight was explained by himself and his mother as not being prompted by consciousness of guilt, but rather because of an unfortunate previous experience, when he was falsely accused of grand larceny, and, notwithstanding his innocence, he was compelled to "lay in jail" for several weeks before being finally discharged.

[1, 2] Upon this record, and other facts not necessary to recite, the trial court gave certain instructions to the jury upon the subject of appellant's flight, and it is now contended that these instructions were erroneously giv-

en. In support of this contention, the appellant invokes the authority of the case of People v. Matthai, 135 Cal. 442, 67 Pac. 694, claiming that it was decided in that case that where a defendant, having fled after the commission of the crime, offers evidence explaining his flight, no instruction whatever upon the question of flight should be given to the jury. The language quoted by counsel in his brief simply characterized an instruction there given on this subject as an instruction upon the facts, and was intended rather to caution the court as to the necessity of being careful in stating evidence not to give an instruction upon the facts. The explanation of his flight, given by and on behalf of appellant at his trial, might have been true or false, and the question whether it was true or false was a question for the jury, and therefore the instruction upon the subject of flight was quite proper.

Counsel also attacks this instruction as erroneous, upon the ground that it was an instruction upon the evidence. The instruction was abstract in form. "You are instructed," said the court, "that the flight of a person immediately after the commission of a crime of which he knows he is accused is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case." There was more in the instruction to the same effect, and some of the language was put in concrete form and referred to the immediate case before the court. But it seems to us that, taken as a whole, the instruction could not have been misunderstood by the jury as intimating any view that the trial judge may have had of the case.

[3] It is also contended that the court erred in refusing to give a certain cautionary instruction, the substance of which was to impress upon the minds of the jurors that a charge of the nature of that upon which the defendant was being tried was particularly hard for him to defend against. The instruction is argumentative in certain particulars, namely, where the jury were instructed that, before they could convict the defendant, they must be satisfied, not by the mere preponderance of the evidence, but by evidence entirely convincing to themselves that the defendant was guilty, because it was beyond the law, which only requires that the jury be convinced of the defendant's guilt beyond a reasonable doubt.

[4] Defendant committed this crime—if he committed it at all—four days before the law qualifying women to serve upon juries went into effect. He contends now that this law, as to him, was ex post facto, and that his trial by a jury partly of women was therefore an invasion of his constitutional rights; it being contended that women, under the circumstances, were more willing to convict than men. This contention seems to us to be a false quantity in this case. The question of whom among the citizens of the state should comprise a jury is a question of procedure, and a statutory change in the qualifications of jurors after a crime has been committed is not obnoxious to the constitutional provision against ex post facto laws.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

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39 Cal. App. 123

STORROW v. GREEN. (Civ. 2599.)

(District Court of Appeal, Second District, Division 1, California. Dec. 11, 1918.)

1. APPEAL AND ERROR 🔑931(1)—QUESTIONS OF FACT—REVIEW.

In considering the evidence upon which the trial judge made up his findings, appellate court must take all of such evidence favorable to prevailing party in its strongest effect.

2. EASEMENTS 🔑30(2)—RIGHT OF WAY—FORFEITURE.

Mere nonuse will not forfeit a right of way over land of another acquired by deed.

3. LANDLORD AND TENANT 🔑66(2)—NATURE OF OCCUPANCY—ADVERSE POSSESSION.

Where one enters into possession of property as a tenant, he will be presumed in occupancy thereafter as a licensee or by permission, regardless of whether he continued to pay rent, until by some unequivocal act he gives notice of a change in his attitude from that of peaceful to hostile possessor.

4. APPEAL AND ERROR 🔑1011(1)—FINDINGS OF FACT—WEIGHT OF EVIDENCE.

Where evidence of a witness in a deposition and his testimony on trial are contradictory, a determination of fact thereon by trial court is conclusive upon appellate court.

5. EASEMENTS 🔑32—ADVERSE POSSESSION.

Failure of one who had a right of way over land of another to object to a fence indicated no acknowledgment of hostile possession in the owner of the subservient estate, where he had no occasion to use the right of way.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by Samuel Storrow against G. G. Green. From a judgment in favor of plaintiff and an order denying a new trial, defendant appeals. Affirmed.

C. J. Willett and A. G. Allen, both of Pasadena, and Leonard B. Slosson, of Los Angeles, for appellant.

Lynn Helm, of Los Angeles, for respondent.

JAMES, J. This action was brought by complaint filed in October, 1912, to secure a decree determining that the plaintiff possessed an interest of a right of way in and over a strip of land 50 feet in width, and to enjoin defendant from interfering with the plaintiff in the enjoyment of its use. The judgment of the court was in favor of the plaintiff, and defendant has appealed therefrom and also from an order denying him a new trial.

In February, 1891, defendant acquired by purchase a parcel of land having its westerly frontage along Raymond avenue in the city of Pasadena. Along the northerly line of this property was a hotel building owned by the defendant, and along the westerly line was a fence. Immediately after making this purchase the defendant sold to one Swales, since deceased, the southerly 140 feet of the land, measured along the Raymond avenue side. This left title remaining in defendant to the 50-foot strip intervening between the hotel property and the northerly line of the property so sold to Swales. In the deed to Swales, however, in addition to granting title to the southerly 140 feet of the land, the defendant granted the right to use the 50-foot intervening strip, the term of the deed making the grant (excepting the particular description of the property) reading as follows:

> "Together with a right of way for all purposes over that certain parcel of land described. * * *"

Swales having died, his heirs in 1905 conveyed the property in question, together with the right of way interest, to this plaintiff. The defendant admitted in this action that the instruments of conveyance had passed as we have stated. He asserted in defense the affirmative claim that he had acquired by adverse user all interest of the plaintiff in the 50-foot strip, and further that all right of way privileges granted under the deed to Swales, had been lost by non-user or abandoned.

[1] It is hardly necessary to suggest that, in considering the evidence upon which the trial judge made up his findings, we must take all of such evidence favorable to the plaintiff in its strongest effect. In other words, as it is often said in the decisions, if we find any substantial evidence which may be used to support all the material findings of the court, the judgment must be sustained. Therefore, in such statement of the evidence as we are about to append, no consideration is given to evidence introduced by the defendant the effect of which is merely to contradict the evidence offered by the plaintiff.

[2, 3] It appears from the transcript of the testimony that, when defendant purchased the 190 feet of ground first mentioned, it had upon it a fence along the entire Raymond avenue frontage. This fence was still there when defendant transferred the south 140 feet to Swales. The defendant replaced the fence shortly after the purchase made by him, and it appears that he replaced the entire fence at that time, both that along the 50 feet immediately adjoining the hotel and along the 140 feet which he had transferred to Swales. At any rate, the fence was standing along that entire line in the year 1900, although we cannot determine from any of the testimony definitely as to how long it remained standing thereafter. It seems quite clear that the fence, long after the date of the purchase by the plaintiff, still stood along the Raymond avenue line for more than the 50 feet next south of the hotel. At the time defendant Green purchased the property it was an uncultivated lot. After he acquired the ownership of it and after he made his sale to Swales, he began to improve the ground, particularly the 50 feet immediately adjoining the hotel, being the 50 feet over which he had granted to Swales right of way privileges. This 50-foot strip was parked by Green, and his manager at the hotel obtained permission to use Swales' 140 feet for purposes of placing thereon tennis and croquet courts. Some of the gardeners of the defendant planted grass and trees upon the 50-foot strip and even across on the land of Swales, and the land of Swales was used, under permission obtained from its owner, by the guests of the hotel, for tennis and croquet games. A rental of $50 was paid to Swales for that use for at least one year. Later it is not shown that any rental was collected, but defendant continued to use the ground for the purposes mentioned thereafter and up to at least the year 1909. At this time defendant built a fence along the line dividing the 50-foot strip from the property of plaintiff, the latter having in the meantime acquired title to the south 140 feet which has been hereinbefore referred to. Such were the circumstances and conditions surrounding the use to which the land was put, up to the year 1909. That there could have been no abandonment of the right of way admits of little argument under the facts stated. Where an interest in land is acquired through user only, it is very plain that the right so acquired may be abandoned by non-user. Not so, however, with an interest in real property obtained by grant, and there is no difference in the resulting legal situation between the nonuser of a right of way acquired by grant and the nonuser of any other quality of interest in real property acquired by the same means. This, of course, assuming an unqualified and unconditional grant, such as the one expressed in the deeds here made. If the right of way had been conditional upon use, then the condition should have been expressed; not being expressed, the right acquired will be

taken to be what the deed purports to make it—an unlimited, unrestricted right. It seems so plain to us that mere nonuse will not forfeit a right acquired by deed as to make unnecessary the citing of authorities to sustain that proposition. The evidence shows no formal relinquishment of the right of way; neither does it show (assuming that such would be sufficient) acts on the part of the plaintiff or his predecessor in interest which would estop plaintiff from further asserting the right. There is no doubt, either, but that at a considerable time prior to the commencement of this action the defendant did assert a claim adverse to any right of way being possessed by the plaintiff. As has been before stated, the acquiring of the whole 190 feet and the selling of the 140 feet were practically simultaneous acts. The land was then fenced on the Raymond street side, and the defendant continued to keep it so fenced, and by an arrangement with Swales acquired the right to use the 140 feet sold by him to the latter. Having established the relation of landlord and tenant between himself and Swales, and having entered into possession of the Swales property by reason of the privileges acquired as such tenant, defendant would be presumed to be in occupancy thereafter of the Swales ground as a licensee or by permission, regardless of whether he continued to pay rental for it and until by some unequivocal act he gave notice of a change in his attitude from that of peaceful to hostile possessor.

> "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of a legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate. This is quite obvious in cases where the consent, permission, or license is expressly given. But it is no less true where the permission or license is implied, as it may well be from the facts and circumstances under which the use was enjoyed. * * * The question is one for the jury, or for a court sitting as such, to determine as a fact in the light of the relations between the parties and all the surrounding circumstances." Thomas v. England, 71 Cal. 456, 12 Pac. 491.

See, also, Abbott v. Pond, 142 Cal. 394, 76 Pac. 60; Clarke v. Clarke, 133 Cal. 670, 66 Pac. 10; Reed v. Smith, 125 Cal. 491, 58 Pac. 139.

[4] In his testimony given at the trial the plaintiff stated that he first became apprised of the hostile attitude of the defendant with respect to the right of way in 1908, less than five years prior to the commencement of the action. In a deposition taken prior to the trial this witness had made statements somewhat inconsistent with his statement at the trial with reference to this important date; but it was for the trial court to determine as to when it was that defendant gave notice of a hostile claim, and, under any contradictory state of the evidence, that determination is conclusive upon this court.

[5] Taking the testimony of the plaintiff as last given, we must conclude that the possession of the defendant did not become hostile until about four years prior to the commencement of the action. For the lack of a contrary claim, evidenced by word or unequivocal action, made more than five years before this action was commenced, defendant's possession must be held not to have been adverse for the period prescribed by the statute. The mere fact that plaintiff made no attempt to use the right of way indicates no acknowledgment of hostile possession in the defendant. The land of plaintiff had not been built upon and was not being used by him in any way other than as he permitted the defendant to use it; he had no occasion to go across the 50-foot strip, but he had allowed the defendant to use it for the purposes before mentioned. The right of way granted is not one that was open to use by the public, but was a right of way simply in the owner of the south 140 feet of the land to pass across the 50-foot strip and to and from his own property. Until he desired to make such use of it, there was no occasion for his expressing an objection to the maintenance of the fence on the Raymond avenue side. As indicated by what has been stated, we find in the record sufficient evidence to sustain the findings of the court upon the issues presented.

The judgment and order are affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

179 Cal. 616

BLOOMBERG v. LAVENTHAL.

(L. A. 4582.)

(Supreme Court of California. Jan. 28, 1919. Rehearing Denied Feb. 27, 1919.)

1. Assault and Battery 🔑35, 40—Excessive Damages—Evidence.

Evidence *held* to sustain a verdict for plaintiff and to justify an alleged excessive award of $5,000 for assault and battery.

2. Evidence 🔑268—Prior Statements—Existing Discomforts.

Statements by plaintiff, suing for assault and battery, that he had pains in the head and was unable to sleep, being with regard to existing discomforts, and not narratives of past condition, were admissible.

3. Appeal and Error 🔑218(1)—Requests Below—Verdict Segregating Damages.

Defendant, not having requested it, may not complain that the jury were not given a form of verdict for segregating compensatory and punitive damages.

4. Assault and Battery 🔑43(5) — Exemplary Damages—Instruction.

Evidence as to circumstances of assault and battery *held*, on the theory of actual malice, to warrant an instruction on exemplary damages.

5. Appeal and Error 🔑882(13)—Invited Error—Instructions.

Defendant may not complain that instruction on exemplary damages was not warranted by the evidence, he having offered an instruction submitting the question of actual malice, with statement that in the absence thereof exemplary damages could not be awarded.

6. Trial 🔑250—Instruction—Conformity to Pleading and Proof.

Requested instruction eliminating from consideration, in an assault and battery case, conditions caused by catarrhal affliction, *held* properly refused; there being neither pleading nor proof of such cause.

Department 2.

Appeal from Superior Court, Los Angeles County; Merle J. Rogers, Judge.

Action by Leon Bloomberg against Julius Laventhal. From a judgment for plaintiff and an order refusing new trial, defendant appeals. Affirmed.

T. J. K. MacGowen, Ernest C. Griffith, and Denis & Loewenthal, all of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles (J. D. Taggart, of Los Angeles, of counsel), for respondent.

MELVIN, J. Plaintiff sued to recover damages alleged to have been caused by a blow struck upon the side of his head by defendant's fist. A verdict was given against defendant in the sum of $5,000, and judgment was entered accordingly. From said judgment and from an order denying his motion for a new trial, defendant appeals.

[1] The first contention made by defendant's counsel in their brief is that the verdict was grossly excessive, and that it was not supported by the evidence. It is true that there was a decided conflict in the testimony offered by plaintiff and that on behalf of the defendant; but, if the jurors believed plaintiff and his witnesses, there was ample support for the conclusions reached by the jury regarding both the fact and the seriousness of the injury.

The essential circumstances developed by the testimony on the part of plaintiff, and the witnesses called in his behalf, were that Mr. Bloomberg was a clerk in the employ of Mr. Laventhal in the latter's store; that they had a difference regarding some merchandise which a customer returned pursuant to an arrangement with Bloomberg that he might do so if dissatisfied with the goods; that on January 26, 1912, the employer said to the clerk, "You are pretty low"; that this evoked a retort to the effect that Laventhal had collected and kept $4 witness fees belonging to Bloomberg; that the employer then exclaimed, "If you know what is good for your eyes and face, you had better keep your mouth closed"; that, apprehending an attack, plaintiff tried to get away, exclaiming, "If you strike me, I will have you arrested"; but that before he could turn around defendant struck him on the temple "with his full force, full weight." Plaintiff testified that after the blow he was in a dazed condition, but that he found his way in some manner to the office of a friend, Mr. Hirsch. In the days and months following, according to his testimony, plaintiff suffered great pain, loss of memory, insomnia, and other physical discomforts; whereas, he had always been in perfect health prior to the assault.

Mr. Hirsch corroborated plaintiff regarding the fact of the latter's visit to his office. At that time Mr. Bloomberg seemed to the witness to be irrational, and Mr. Hirsch took plaintiff home. His family physician, Dr. Quint (who was also a neighbor), was called in, and, as he testified at the trial, he found his patient suffering from concussion of the brain, with quite a large welt or bump on the left side of the head, just above the temple. He complained of headache. His eyes were twitching; he talked irrationally; and he seemed bewildered. The patient was put to bed, was given a dose of bromide and had an ice pack put upon his head. About 4 o'clock on the following morning he appeared at Dr. Quint's home. He was partially clad and talked and acted in a bewildered manner. Later in the day he was taken to a hospital, where he remained about a week, when he was sent home because he had become irritable and hard to manage. Afterwards he became melancholy, depressed, and was easily discouraged, was more nervous than he had been before the injury, and was troubled with an apparently involuntary "batting" or blinking of the eyes. About two years after the assault he suffered a relapse. Dr. Quint also testified that the welt on the side of Mr. Bloomberg's head could have been produced by a blow from a fist.

Dr. Ross Moore, a specialist to whom Dr. Quint sent Mr. Bloomberg, testified that the patient exhibited symptoms due to concussion of the brain. The confused condition in which the doctor found Mr. Bloomberg continued up to the period of the last examination before the trial, which was more than two years after the alleged assault. Other facts and circumstances which we need not be at pains to describe in detail were brought out by the testimony of the plaintiff's witnesses. The showing made in plaintiff's behalf was amply sufficient to support the verdict and justify the amount of the award. It is true that defendant, under oath, stoutly protested that he had struck no blow, and he even denied any controversy with the clerk; but, upon the latter subject he was contradicted by his own witness.

[2] Appellant's counsel assert that prejudicial error was committed by the court in allowing witness Hirsch to relate statements which he said had been made to him by plaintiff to the effect that the latter had pains in the head and that he could not sleep. It appears from the record that these were complaints regarding, and were the usual concomitants of, existing discomforts, and not narratives of past miseries. Such statements may be properly admitted in evidence. Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139; Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747; Evarts v. Santa Barbara Ry. Co., 3 Cal. App. 712, 86 Pac. 830.

It is true that after describing the appearance of Mr. Bloomberg when he visited Mr. Hirsch's office, and saying that "his eyes were starey and he was very much disturbed," Mr. Hirsch volunteered the statement: "So I asked him what happened, and he said Mr. Laventhal had struck him." Instantly the court admonished the witness: "Refrain from stating what he said to you." No motion was made by defendant to strike out the improper testimony, perhaps because counsel thought, as we do, that the court's prompt admonition removed any bad effect which this hearsay testimony, volunteered by the witness, may have had upon the jury.

It is contended that the testimony of witnesses Hirsch and Riva Bloomberg that plaintiff appeared at times "irrational" related to plaintiff's soundness of mind itself, and not to any outward manifestation or observed facts; but an examination of the record (including the rulings of the court and the discussion in which the court declared that a witness may testify whether a person "acted" rationally or irrationally) convinces us that witnesses were describing appearances and not seeking to speak regarding the sanity or insanity of Mr. Bloomberg. In other words, this testimony was within the rule declared in such cases as People v. Manoogian, 141 Cal. 592, 75 Pac. 177.

[3] Appellant's counsel complain because the court did not give the jury a form of verdict which would segregate the amounts, if any, which might be awarded respectively for compensation and for punitive damages. The conclusive answer to this contention by respondent's counsel is that no request was made for a form of verdict suitable for such segregation, and that therefore appellant may not justly complain. This position is fully sustained by Foley v. Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123, and by Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672.

[4, 5] There is no force in appellant's contention that the court erred in giving any instruction relating to exemplary damages because the assault was one provoked by plaintiff and made in the sudden heat of passion. The description of the occurrence in defendant's place of business, as given by plaintiff, showed a deliberate seeking of a quarrel by Mr. Laventhal, followed by threats of personal violence soon succeeded by the striking of a blow. This, if believed by the jury, would support a conclusion that actual malice existed. It is a fact, also, that defendant did not request the giving of any instruction which would eliminate the matter of exemplary damages. On the contrary, he offered an instruction, which was given, that left to the jury the duty of determining whether or not defendant was actuated by malice towards plaintiff and informing the jurors that exemplary damages might not be

awarded if defendant committed the battery "in a sudden heat of passion and not maliciously."

[6] The court properly refused to give an instruction to the effect that, if the jurors found that plaintiff was suffering from a catarrhal disease of the head, they could only award damages for conditions which were the direct result of the battery, and that suffering and injury should be distinguished from the catarrhal affliction. The jury was elsewhere instructed that damages could only be given for injuries which were the proximate result of the battery, if any were proven. There was neither pleading nor proof justifying the giving of the part of the instruction relating to a catarrhal affliction as a producing cause of any of the described conditions of plaintiff's health after the striking of the blow by defendant.

Other instructions were offered by defendant and refused, but the material matters contained in them were given to the jury, substantially, in other parts of the very full and fair charge. We see no necessity for reviewing these proposed instructions in detail.

Judgment and order affirmed.

We concur: WILBUR, J.; LENNON, J.

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179 Cal. 604

WELK v. SORENSON et al. (L. A. 4721.)

(Supreme Court of California. Jan. 27, 1919.)

APPEAL AND ERROR ⚷760(2) — APPEAL BY ALTERNATIVE METHOD — BRIEF — SUFFICIENCY.

Where the appellant neither prints any of the record in the brief nor designates the parts of the transcript upon which the alleged statement of facts is based as required by Code Civ. Proc. § 953c, court on appeal will not consider the brief.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Theodore J. Welk against Albert Sorenson and another. From an order refusing to credit the sum of $15 costs (for which judgment had been entered in favor of Grace A. Sorenson) upon a judgment against her codefendant in the same action, Albert Sorenson appeals. Order affirmed.

Edward E. Kelley and Dian R. Gardner, both of Los Angeles, for appellant.

E. S. Janes, of Los Angeles, for respondent.

MELVIN, J. This is an appeal from an order refusing to credit the sum of $15 costs (for which judgment had been entered in favor of Grace A. Sorenson) upon a judgment against her codefendant in the same action, Albert Sorenson, the appellant basing the argument against the order largely upon the case of Adams v. Baker, 24 Nev. 375, 55 Pac. 362.

The appeal is by the alternative method, but appellant neither prints any of the record in the brief nor designates in any way the parts of the transcript upon which the alleged "Statement of Facts" is based. We will not, therefore, consider the brief. Section 953c, Code Civ. Proc.; Estate of Keith, 175 Cal. 26, 165 Pac. 10; Miller v. Oliver, 174 Cal. 404, 163 Pac. 357.

Order affirmed.

We concur: WILBUR, J.; LENNON, J.

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176 Cal. 415

ADAMS v. MERCED STONE CO.
(S. F. 7295.)

(Supreme Court of California. Oct. 31, 1917.)

1. GIFTS ⚷20—GIFTS INTER VIVOS—REQUISITES—PROPERTY IN POSSESSION OF DONEE.

Under Civ. Code, § 1147, providing that a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee, the donor in a gift inter vivos must do something at the time of making the gift which has the effect of placing in the hands of the donee the means of obtaining control and possession of the subject of the gift, and it is not enough that the donee then have such means of obtaining possession.

2. GIFTS ⚷28(1)—GIFTS INTER VIVOS—REQUISITES—CHOSE IN ACTION.

In the case of a gift inter vivos of a chose in action not evidenced by a written instrument, the only "means of obtaining control" is an assignment in writing or its equivalent.

3. GIFTS ⚷28(1)—GIFTS INTER VIVOS—REQUISITES—ACCOUNT AGAINST CORPORATION.

Where the donor owned an account against a corporation of which the donee was an officer and empowered to make changes on the books, and the donor stated to the donee that he wanted to give him such account but did not know what to do in order to give it, and stated that he gave him the account, there was no valid gift inter vivos, since the donor did not give the donee the means of obtaining possession of the account.

In Bank.

Appeal from Superior Court, Alameda County; Marcel E. Cerf, Judge.

Suit by Edson F. Adams as executor of the estate of Thomas Prather, deceased, against the Merced Stone Company. From a judgment for defendant and order denying new trial plaintiff appeals. Reversed.

Corbet & Selby and J. P. O'Brien, both of San Francisco (Snook & Church, of Oakland, of counsel), for appellant.

A. L. Frick, Wm. S. Wells, Jr., and Chapman & Trefethen, all of Oakland, and R. H. Countryman, of San Francisco, for respondent.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant, and from an order denying his motion for a new trial.

The complaint states a cause of action against the defendant, in favor of the decedent, Thomas Prather, upon an indebtedness alleged to be the sum of $112,965.84. The defendant in its answer denied the existence of any indebtedness from it to said Thomas Prather at the time of his death, and on information and belief alleged that prior to his death said Thomas Prather made a gift of said indebtedness, due from the plaintiff to Thomas Prather, to one Samuel D. Prather, and that said Samuel then became and ever since has been the owner of said indebtedness.

The court found that during the last sickness of Thomas Prather, to wit, on April 17, 1913, said Thomas Prather made a gift to his brother Samuel D. Prather, of all of the indebtedness due from the defendant to said Thomas, being the indebtedness sued for by the plaintiff herein. That at that time Samuel was the president, the general manager, and a member of the board of directors of the defendant, said defendant being a corporation, and Thomas Prather knew that Samuel held said offices and by reason thereof had full and exclusive charge and control of defendant's books of account, including power to make or direct the making of entries and transfers in said books, and knew that by reason thereof Samuel D. Prather had the means of obtaining possession and control of the said indebtedness so given to him. The court further stated that by reason of the fact that Thomas Prather had this knowledge at the time he gave the indebtedness to Samuel, he therefore at that time gave to said Samuel the means of obtaining possession and control of the thing given, that is, of the said indebtedness. This last statement is, of course, a mere conclusion from the facts previously stated. The appellant contends that the transaction as stated in the findings did not constitute a valid gift of the indebtedness in question, and that the finding, so far as it states the ultimate fact of such gift, is contrary to the evidence.

It is conceded that at the time of the asserted gift Thomas Prather knew that Samuel D. Prather held the offices above mentioned, and that it was within his official power by reason thereof to make sufficient changes upon the books of account of the defendant to make them show that the said indebtedness had been transferred by Thomas Prather to Samuel D. Prather, and was owing by the defendant to Samuel D. Prather, instead of Thomas Prather. It is admitted that the asserted gift was made during the last sickness of Samuel Prather, two days before his death, which event occurred on April 19, 1913, and was therefore a gift in view of death. Civ. Code, § 1150. It is also admitted that no change was made upon the books of the defendant regarding said indebtedness, up to the time of the trial of this action, and that when the action was begun the account books of the defendant showed it to be indebted to the said Thomas Prather in the sum claimed in the complaint. The only evidence of the gift asserted in the answer is found in the testimony of Samuel D. Prather, and is as follows:

> "In talking business matters my brother said to me, 'Now, in reference to the account of Thomas Prather in the Merced Stone Company, I want to give you that account, all that is due me from that account. I don't know just how to do this, but I give it to you.' * * * A little further in the conversation my brother said to me, 'I give you the keys to my office, the combination of my safe and keys to my desk, and with these I give you all accounts, books, papers, letters, documents, furnishings, pictures, everything that belongs to me in that office. It is yours.'"

This he said occurred on April 17, 1913.

[1] The case depends upon the meaning and effect of section 1147 of the Civil Code, which reads as follows:

> "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

The contention of the respondent is that this section is complied with in every case of gift of a chose in action where, at the time the donor makes such gift, he knows that the donee has it within his power to secure the possession and control of the thing given, and that in such a case no delivery or transmission from the donor to the donee of the means of obtaining possession and control of the subject of the gift is necessary. We do not think this is the correct construction of the section quoted. It contemplates that the donor shall do something at the time of making the gift which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given. That the fact that the thing was already in possession of the donee at the time of declaring the gift is not enough, is well settled by the authorities. Denigan v. Hibernian, etc., Society, 127 Cal. 141, 59 Pac. 389; Smith v. Zumbro, 41 W. Va. 623, 24 S. E. 653; Drew v. Hagerty, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255;

Allen v. Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442.

In order to comply with the section the "means" must be "given." In the connection in which these words occur the effect is that such means must be given by the donor to the donee. This giving of the means is authorized, where the thing given is not capable of delivery, as a substitute for the actual or symbolical delivery of the thing by the donor to the donee required in cases where such thing is capable of delivery. No good reason can be given for supposing that a transmission or delivery by the donor to the donee of the means was not intended to be as essential in the case of intangible property, as the delivery, actual or symbolical, of the thing itself, where it is tangible.

[2] In the case of a chose in action not evidenced by a written instrument, the only means of obtaining control that is recognized by the authorities is an assignment in writing, or some equivalent thereof.

> "According to the weight of authority, in order to make a valid gift inter vivos of a chose in action not evidenced by a written instrument, there must be a written assignment, or some equivalent instrument." 20 Cyc. 1202.
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> "A written assignment of the demand by the donor to the donee is essential to complete the delivery" in the case of gifts causa mortis. 20 Cyc. 1237; 14 Am. & Eng. Ency. of Law, 1022.
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> "If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." 2 Kent Com. *p. 439.

This passage from Kent was quoted and approved in Driscoll v. Driscoll, 143 Cal. 534, 77 Pac. 471, and in Giselman v. Starr, 106 Cal. 657, 40 Pac. 8.

In Cook v. Lum, 55 N. J. Law, 373, 26 Atl. 803, the court said that the test of an effectual gift was this:

> "That the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action."

To the same effect was Ewing v. Ewing, 2 Leigh (Va.) 344; Shepard v. Shepard, 164 Mich. 183, 129 N. W. 201; McMahon v. Newton, 67 Conn. 79, 34 Atl. 709, and many other cases. That section 1147 was not intended to change the law respecting the necessity of an assignment, or its equivalent, to make a valid gift of a chose in action, not itself evidenced by a writing, is shown by the fact that in the annotated edition of the Code, edited by the committee that prepared it, there is cited to support the section Hunter v. Hunter, 19 Barb. (N. Y.) 631, in which case the above passage from Kent is quoted and approved.

[3] In the present case it is true that Samuel D. Prather was possessed of the physical power and of the official authority, by reason of his relation to the defendant, to make the necessary changes on its books to show that the indebtedness was due to him and not to the decedent. But this power did not emanate from the decedent. Samuel possessed it before the asserted gift as well as after. The decedent did not even authorize him to make such changes, nor suggest that the gift might be effected in that way. It was not shown that such method was in the mind of the donor. The fact that it was a book account, or that a change might be made in the name of the debtor, was not even mentioned in the conversation. The law intends something more than a mere power to make physical entries in the books of the debtor in such a case. The authority to make the change, or cause it to be made, must be vested in the debtor by reason of some act or direction of the creditor. If verbal gifts could be made in such loose manner as this it would open the door to innumerable frauds and perjuries. For this reason the authorities hold that something more than mere physical power is necessary; something more than the previous possession of the property or of the means of obtaining it; something emanating from the donor which operates to give to the donee the means of obtaining such possession and control.

The case is not different in principle from Pullen v. Placer County Bank, 138 Cal. 170, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19. In that case a father gave to his son a check for $1,000 upon the bank, with the intention of making to him a gift of that amount of money. After delivering the check to the son the father stated that he wished he would not present it until after his death. The son awaited his death and then presented the check, which the bank refused to pay, on the ground that the death of the father revoked it. The court said:

> "In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the property which the father intended to give, but was merely a direction to the defendant to pay $1,000 to the son. It indicated the amount to be given and the place at which the money was to be delivered. The check was not a symbolic delivery of the money, but it was a delivery of the means by which the son could obtain possession of the money. It was, however, subject to revocation by the father at any time before its presentation to the bank, and was in fact revoked by his death. The request of the father that the son would not present the check until after his death did not affect the sufficiency of the gift. If the gift were complete by his delivery of the check, such subsequent request would not destroy its validity, and if not then complete, this request would not have the effect to dispense with its presentation for the purpose of making

it complete. By the failure of the son to present the check, there was no delivery of the money during the lifetime of the father, and the gift was therefore not complete."

The mere delivery of an order for the payment of a debt is therefore not sufficient to make a complete gift thereof. In the present case there was not even the delivery of an order, nor any suggestion thereof. All that was done was to declare the present intention to give the indebtedness to Samuel D. Prather. No means whatever were delivered by the donor to the donee by which the latter could obtain payment of the indebtedness. The fact that Samuel D. Prather was the managing officer of the defendant and had power to change its books did not make the gift effectual. The indebtedness was due from the defendant and not from Samuel D. Prather, and it was necessary that the defendant should have some authority from Thomas Prather before it could legally make a change upon the books of the company to show the change in the indebtedness. Thomas Prather gave no such authority to his brother or to any other person.

The conclusion of the court below upon the facts found was not in accordance with the law, and its finding of the ultimate fact that Thomas Prather transferred the debt to Samuel D. Prather by way of a verbal gift is not supported by the evidence. Consequently the judgment and order cannot be upheld.

The judgment and order are reversed and the cause is remanded, with directions to the court below to enter judgment upon the findings in favor of the plaintiff for the amount prayed for.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

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179 Cal. 611

SMITH v. ATCHISON, T. & S. F. RY. CO. et al. (L. A. 4374.)

(Supreme Court of California. Jan. 28, 1919. Rehearing Denied Feb. 27, 1919.)

1. Appeal and Error 🔑1064(1)—Restricting Evidence—Harmless Error.

Conceding that provision in contract of employment barring suit if plaintiff fail to make claim for injuries within 30 days was valid and should have been received in evidence, unrestricted by instruction that it was not a bar, where evidence subsequently introduced without objection showed that defendant had waived the provision, defendant was not prejudiced by ruling assuming it was erroneous.

2. Master and Servant 🔑252—Agreement to Give Notice of Injury—Waiver.

In action by brakeman for injuries, evidence *held* to show that defendant waived provision in contract of employment requiring notice of injuries within 30 days.

3. Damages 🔑170—Number and Ages of Plaintiff's Children.

In action for personal injuries, the court erred in admitting evidence as to the number and ages of plaintiff's children.

4. Appeal and Error 🔑1052(5)—Erroneous Admission of Evidence—Harmless Error.

In action by brakeman for injuries, error in admitting evidence as to number and ages of his children *held* not prejudicial; the verdict having been reduced from $15,000 to $8,000.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Seamer S. Smith against the Atchison, Topeka & Santa Fé Railway Company and another. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

U. T. Clotfelter, M. W. Reed, Paul Burks, and Robert Brennan, all of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This appeal was originally taken to this court and was by it assigned to the District Court of Appeal for the Second District. The justices of that court being unable to agree, it has been transferred to this court for hearing and determination. As to all of the points presented upon this appeal, with one exception, the opinion of Mr. Victor E. Shaw, written while the case was before the District Court of Appeal, correctly determines them against the appellants' contention, and hence that portion of his said opinion, reading as follows, is hereby adopted as the decision of this court:

"Action to recover damages for personal injuries alleged to have been sustained as the result of defendants' negligence.

"Upon a verdict in favor of plaintiff, whereby his damage was fixed at $15,000, judgment therefor was entered against the defendants, the railway company and Ernest Howard, who was conductor in charge of the passenger train upon which plaintiff was a brakeman when injured. Thereafter, defendants moved for a new trial, which motion was by order of court denied upon condition, complied with, that plaintiff in writing remit $7,000 of the $15,000 judgment so entered. From this judgment and the order so made denying their motion for a new trial, defendants appeal.

[1] "As a separate defense, the answer of the railway company alleged that at the time when plaintiff entered its employ he executed a written document, designated in the record as 'Exhibit B,' which contained a provision that, as consideration for such employment, he agreed,

among other things, that, if while in the service of said defendant he should sustain personal injury for which he should make claim against the company for damages, he would within 30 days after receiving such injury give notice in writing of such claim to the general claim agent or claims attorney of said defendant, wherein should be stated the time, place, manner, and cause of the injury, together with the nature and extent thereof and claim therefor, 'to the end that such injury may be fully, fairly and promptly investigated,' and that his failure so to do within the time so specified should be a bar to the institution of any suit on account of such injury. It was further alleged and admitted that he failed to give such notice within the time specified, or at all. At the trial and in support of said separate defense so alleged in the answer, the defendant railway company offered this document, Exhibit B, in evidence, to which an objection interposed was overruled, with the modification stated by the court that 'I think it is the duty of the court to give instructions with reference to it.' In accordance with which statement the jury was instructed that plaintiff's failure to give the notice did not constitute a bar or affect his right to recover in the action. Prejudicial error is predicated upon this ruling; appellants' contention being that the agreement so made requiring plaintiff as a condition of maintaining the action to give the notice within 30 days was a reasonable and lawful one, and, since it was conceded that he failed so to do, the action was barred.

"Plaintiff's injury occurred on January 12, 1913, and it appears that, prior to January 20th, Dr. Tyroler, who was assistant chief surgeon of the railway company, called upon plaintiff at defendant's hospital for the purpose of examining him and, after telling him the purpose of such examination, plaintiff said, 'You want to look me over and report to the Santa Fé Railroad Company what is the matter with me, but I have on my side of it looked after a lawyer, so fire ahead.' Thereupon said surgeon representing the railway company made a physical examination of him and made a report to the general claims attorney of said company. 'Mr. Smith,' says the witness, 'allowed me to examine him fully, repeatedly.' He further said that he did not ask plaintiff how he was hurt, for 'I knew that from the accident report that came in; I knew all about that from our records in the office.' On cross-examination of this witness, the report which he stated he had made to the general claims attorney was, without objection, introduced in evidence, which report, dated January 30, 1913, showed the place of accident, the history of the accident which, as stated, occurred in a head-end wreck, as per statement of plaintiff to surgeon, the nature and extent of the injury, together with other facts required in the making of such reports. It thus appears that, within a few days after the injury, defendant was by this report, which embodied information from plaintiff upon an examination of him by defendant's assistant chief surgeon and transmitted to the general claims attorney, fully informed and notified as to the time, place, manner, cause, and extent of plaintiff's injuries. Hence, conceding but not holding, as claimed by defendant, that the agreement purporting to be a waiver of any claim for injuries against defendant, unless within 30 days he notified defendant in writing thereof as provided in said document, was a reasonable and lawful one and therefore should have been received in evidence, unrestricted in effect by the instruction given, nevertheless, as held in Smith v. Chicago, R. I. & P. Ry. Co., 82 Kan. 136, 107 Pac. 635, 28 L. R. A. (N. S.) 1255, where a similar question arose upon a like agreement, the evidence so received constituted a waiver by the railway company of this provision of the contract. The purpose for which the agreement was enacted, viz., 'to the end that such injury may be fully, fairly and promptly investigated,' was as fully served by the examination made by defendant's surgeon and report to the general claims attorney as though plaintiff had given the notice.

[2] "Assuming the ruling to have been erroneous, defendant under the circumstances shown was not prejudiced by reason thereof. It follows from what is said on this point that the court did not err in refusing to instruct the jury, as requested by defendants, that the action was barred, nor to return a verdict for defendants."

[3] The only other point requiring discussion is that raised by the appellants' contention that the trial court was in error because of the following evidence and that the error was sufficiently prejudicial to require a reversal of the case, viz., while the plaintiff was upon the witness stand he was asked by his attorney: "How many children have you?" Objected to as irrelevant and immaterial. The court said, "I do not see the materiality," to which counsel for plaintiff replied:

> "It is material for two reasons. It shows the man's condition, and if he had a helpless family how much more he would suffer in pain and mental anguish if he thought he was injured."

The court therefore overruled the objection, and the plaintiff was permitted to testify that he had two children, one a boy five years old and one a girl under three years of age. We are of the opinion that the court was in error in the admission of this evidence. While the authorities from other jurisdictions are not in harmony as to the admissibility of this sort of evidence in actions for damages for personal injuries, we think the weight of authority and of reason is against its admission. In the recent case of Steinberger v. California Electric Garage Co., 168 Pac. 570, it was held to be error to admit evidence as to the plaintiff's poverty in an action to recover damages for personal injuries. In so holding, this court not only approved the rule upon this subject laid down in the case of Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577, but also undertook to limit the general language employed in the case of Merrill v. Los Angeles G. & E. Co., 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, dealing with the subject of mental anguish for which recovery may be had in an action for personal injuries so as to confine the language of this latter decision to the facts of its particular case. The mental suffering which the plaintiff sought to prove and recover for in the instant case was that which, according to his counsel's statement to the court, the plaintiff would undergo from the thought that he had a helpless and dependent family. This necessarily implies that he would be entitled to follow up the inquiry as to the number and ages of his children with evidence that his state of poverty was such that on account of his injuries they had been rendered helpless and dependent by being deprived of his means of support. But since the plaintiff's situation as to wealth or poverty was held not to be a proper subject of inquiry in the Steinberger Case, it follows that such supporting proofs would not be admissible, and hence that the plaintiff's reason for educing proof as to the number and condition of his family would fail. The plaintiff's mental suffering due directly to his physical injuries was properly admissible in evidence under the rule set forth in the case of Merrill v. Los Angeles G. & E. Co., supra, and its supporting cases; but the rule ought not to be so far extended as to permit a recovery also for the mental suffering of the plaintiff's family arising out of the fact of his injuries. While we are therefore of the opinion that the trial court was in error in admission of this evidence as to the number and ages of the plaintiff's children, we are not inclined to adopt the appellant's view that the admission of this evidence was so far prejudicial as to compel a reversal of this case. A careful study of the record before us would rather lead to the contrary conclusion. The plaintiff and his wife were both witnesses upon the trial, and it was thus disclosed to the jury that so far at least the plaintiff was a man of family. Aside from the brief episode of the admission of this evidence above set forth, no special emphasis was given it either by the court in the instructions which it gave, or by the defendant in asking for any instructions embodying its contention that such evidence should not be considered by the jury. On the contrary, the instructions which the court actually gave upon the subject of the plaintiff's mental suffering stated what has long been the correct rule upon this subject, since by the terms of such instructions the jury was limited to "such reasonable sum as the jury shall award him on account of physical pain and mental anguish he has suffered by reason of his said injury." Malone v. Hawley, 46 Cal. 409.

[4] The record in this case further discloses that the plaintiff suffered very serious and permanent injuries sufficient to have justified a large verdict in his favor if the testimony of himself and his witnesses was to be believed; that the defendant substantially admitted its liability for such injuries as the plaintiff was actually shown to have suffered; that the jury brought in its verdict in the plaintiff's favor for the sum of $15,000, which sum the court upon motion for a new trial reduced to the sum of $8,000. The appellants neither upon new trial nor appeal specified any misconduct on the part of the jury or made any contention that its verdict was the result of passion or prejudice, except in so far as the single error above complained of might have produced such a result. Such being the state of the record in this case, we are unable to arrive at the conclusion that the error of the trial court in the admission of the foregoing evidence as to the number and ages of the plaintiff's children was sufficiently prejudicial to justify a reversal of this case.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J; WILBUR, J.

179 Cal. 652

HAMMOND LUMBER CO. v. FANTA et al. (L. A. 4626.)

(Supreme Court of California. Jan. 31, 1919. Rehearing Denied Feb. 27, 1919.)

1. MECHANICS' LIENS 🔑114(2), 239—ASSIGNMENT BY CONTRACTOR OF SUMS TO BECOME DUE—EQUITIES—APPLICATION OF PAYMENT.

Where contractor assigned a certain payment to become due, and owner consented to and made payment to assignee, the right of the assignee was subject to the equities (Civ. Code, §§ 1458, 1459), and equity will apply payment to material of assignee used, and not to satisfaction of a general debt owed by contractor to assignee; Civ. Code, § 1140, relating to transfer of title not applying.

2. MECHANICS' LIENS 🔑281(4) — DIRECTION AS TO APPLICATION OF PAYMENT—EVIDENCE.

Evidence *held* to sustain a finding that owner of property, in making payment to a materialman of an amount assigned by contractor to the latter, manifested intent to assignee materialman, within the meaning of Civ. Code, § 1479, that the money was to be applied to extinguishment of assignee's claim for materials, and not to satisfaction of a general debt owing by contractor to assignee.

3. APPEAL AND ERROR 🔑219(2)—MATTERS REVIEWABLE—SAVING OBJECTIONS.

The point cannot be raised for the first time in the Supreme Court on appeal that there was a conflict in the findings.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Hammond Lumber Company and others against B. Fanta and others. From a judgment in its favor for less than the amount demanded, and an order denying its motion for new trial, the named plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant.

James, Smith & McCarthy and A. B. Perdue, all of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for respondent John F. Poole.

John F. Poole, of Los Angeles, for respondent Union Lime Co.

James, Smith & McCarthy, of Los Angeles, for respondent Otto Bagula.

A. B. Perdue, of Los Angeles, for respondent A. S. Tyler.

C. L. Kilgore, of Los Angeles, for respondent L. A. Roofing Co.

Schweitzer & Hutton, of Los Angeles, for respondents Riverside Portland Cement Co. and others.

Gray, Barker & Bowen, of Los Angeles, for respondent James Shultz Lumber Co.

Willis O. Tyler, of Los Angeles, for respondents R. Brown and others.

Harry A. Hollzer, of Los Angeles, for respondent J. Brombacher.

George H. Moore, of Los Angeles, for respondent G. W. Wilson.

George H. Wilson, of Los Angeles, for respondent Wm. Schrontz.

Edwin H. Grobe and Angus R. Lindley, both of Los Angeles, for respondents J. F. Avery and others.

Macomber & Pendleton, of Los Angeles, for respondents J. C. Crawford and others.

George C. Mansfield, of Los Angeles, for respondent Herringbone Metal Lath Co.

Frank Stewart, of Los Angeles, for respondent J. R. Stead.

Smith, Miller & Phelps, of Los Angeles, for respondents B. and Amelia Fanta.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles, for respondent National Surety Co.

MELVIN, J. Hammond Lumber Company, one of the plaintiffs in a consolidated action by lien claimants, being dissatisfied with the amount of the judgment entered in its favor, appeals therefrom and from an order denying its motion for a new trial.

There is but one question in this appeal, depending for solution upon the construction to be given to a certain assignment. B. Fanta was the owner of real property upon which a building was being erected. J. M. Thomas was his contractor, and appellant was furnishing lumber not only for the house on Fanta's property, but for other buildings in course of construction by Thomas as a contractor. Before the fourth payment was due Thomas from Fanta under their contract, the former took to the latter an assignment written on paper bearing the letterhead of the Hammond Lumber Company. This was in the following words and figures:

> "Sept. 13, 1912.
>
> "For value received, I hereby assign all right and title to the fourth payment due on the B. Fanta job at 10th and Union to the Hammond Lumber Company, this payment being due on or about the first day of October, 1912.
>
> "J. M. Thomas."

After conference with his architect Mr. Fanta signed upon the instrument a certain indorsement, which was then as follows:

> "I hereby accept the above assignment, and agree to pay the money as assigned when due.
>
> "B. Fanta."

The testimony of appellant's witnesses was to the effect that upon the strength and security of this assignment the corporation loaned to Mr. Thomas $2,000, taking his note for that sum. When the fourth payment on the building contract became due, Mr. Thomas and Mr. Anderson, the latter representing the Hammond Lumber Company, called upon Mr. Fanta, who, having the architect's certificate that the payment was due, gave his check in favor of the contractor for $2,000. This was immediately indorsed payable to the Hammond Lumber Company, and the assignment was surrendered to Mr. Fanta, with a receipt thereon signed by Hammond Lumber Company. Mr. Fanta testified that he never heard of the loan and the contractor's note until after the indorsement and transfer of his check, and that he signed his acceptance of the assignment of the fourth payment on the contract to the Hammond Lumber Company upon the contractor's assurance that it was made to cover delivery of lumber by the Hammond Lumber Company to be used in the construction of his building. In this he is contradicted by Mr. Thomas, but the conflict is not one which this court is entitled to resolve by a conclusion based upon belief in the testimony of one rather than the other witness. There is also a conflict upon another matter. When the assignment was exhibited in court it bore, in addition to the words "Paid 10/15. By ck. to J. M. Thomas and indorsed by Thomas to Hammond Lumber Co.," the words "Credit for lumber on 10th and Union Ave." and the signature of the lumber company by C. S. Anderson. He and Mr. Thomas both testified that the expression "Credit for lumber," etc., was not written on the instrument when it was signed, while Mr. Fanta swore that those words were there at the time.

The Hammond Lumber Company furnished lumber for the building found by the court to be of the reasonable value of $2,032.13. The court held that the $2,000 should have been applied towards the payment for materials furnished by appellant for the building, and not for the payment of the note given for the loan by appellant to the contractor. This finding the appellant attacks as not supported by the evidence.

Appellant insists that all of the conversations by and between Mr. Fanta, Mr. Thomas and the representative of the Hammond Lumber Company, by which it was sought to show on the part of defendants that the intention of the owner, the contractor, and the corporation furnishing material was that the amount of the fourth payment on the contract should be credited for lumber, was inadmissible. In this behalf it is argued that the title of Mr. Fanta to the fourth payment passed, not when the payment became due, but at the moment of his acceptance of the assignment (appellant citing section 1140, Civ. Code, and Potts Drug Co. v. Benedict, 156 Cal. 322, 104 Pac. 432); and that the assignment, being unequivocal, the money when paid might be applied by the contractor in any manner he desired, unhampered by the desires or understandings of the owner based upon conversations. Appellant takes the position that the case at bar comes within the rule announced by such authorities as Newport Wharf & Lumber Co. v. Drew, 125 Cal. 585, 58 Pac. 187, Long Beach School District v. Lutge, 129 Cal. 409, 62 Pac. 36, and Miles v. Ryan, 172 Cal. 205, 157 Pac. 5. These and similar authorities which might be cited (all applying to public buildings which are not lienable) state the rule that a garnishment pro tanto of the contract price may be had in effect by assignment. None of them holds that an assignment of part of the building fund, as against the owner's equities, may be had until after the money is due.

[1, 2] This case is not ruled by section 1140 of the Civil Code relating to a present sale of personal property, but the facts present a case of the transfer of a nonnegotiable obligation where the right of the transferee is subject to the equities (sections 1458 and 1459, Civ. Code), and equity will apply this payment to the material used in the building, and not to the satisfaction of a general debt owed by the contractor to the lumber company. The evidence justified the court in concluding that in making the payment Mr. Fanta intended that the money was to be applied to the extinguishment of appellant's claim for materials delivered to the contractor, and that such intention was made manifest at the time to the lumber company. Section 1479, Civ. Code; Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679; Hanson v. Cordano, 96 Cal. 441, 31 Pac. 457.

[3] Appellant makes the suggestion in the briefs that there is a conflict in the findings, one of them being to the effect that $2,000 is due the corporation, and another that only $32.13 was payable at the time of suit; but counsel raises this point for the first time in this court. We need not, therefore, consider it. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828.

No other alleged errors require discussion. The judgment and order are affirmed.

We concur: WILBUR, J.; LENNON, J.

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179 Cal. 605

KELLAR v. CITY OF LOS ANGELES et al.

(L. A. 4294.)

(Supreme Court of California. Jan. 28, 1919.)

1. Municipal Corporations 🔑724—Liability for Negligence—Proprietary Functons.

In absence of statute, municipality is not liable for injuries caused by its negligence unless in exercise of private and proprietary functions as distinguished from functions purely governmental in nature.

2. Municipal Corporations 🔑734—Torts—Governmental Function—Conducting Children's Camp.

City, in conducting summer camp, under charter provisions, for maintaining health of children of city, *held* engaged in governmental function, though making small charge to help pay costs, so that it was not liable for negligence injuring boy at camp.

3. Municipal Corporations 🔑734—Governmental or Public Function—Conduct of Parks and Children's Playgrounds.

Children's playgrounds, maintained by city for general use, do not differ substantially from public park, in so far as question whether their conduct is governmental or proprietary activity of city is concerned, and maintenance of park for sole benefit of public, not for any profit to city, is a governmental function.

4. Municipal Corporations 🔑58—Conduct of Summer Camp—Private Enterprise—Charter.

City of Los Angeles, under its charter, art. 1, § 2, subd. 4, *held* not authorized to maintain children's summer camp in any proprietary or private capacity, as any substantial doubt concerning existence of power in such respect must be resolved against city.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by William Henry Kellar, guardian of the estate of Byron H. Kellar, a minor, against the City of Los Angeles and others. From a judgment for defendants, plaintiff appeals. Affirmed.

C. Ibeson Sweet, of Los Angeles, for appellant.

Albert Lee Stephens, City Atty., and Wm. P. Mealey and W. D. Spalding, Deputy City Attys., all of Los Angeles, for respondents.

ANGELLOTTI, C. J. This is an appeal from a judgment entered in favor of the de-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fendants upon sustaining their demurrer to plaintiff's third amended complaint. The only question presented by the briefs is as to the liability of the city of Los Angeles upon the facts stated in the complaint. It was sought by the action to hold the city liable for injuries accruing to the minor, a boy 16 years of age, by reason of the alleged negligence of its officers and employés in the matter of caring for him after he had accidentally been injured while an inmate of a summer camp maintained by the city, through its board of playground commissioners, in the San Bernardino mountains, "for the purpose of giving any children of said city, at certain prescribed charges to be paid by said children to said city, a vacation, with care, board, and lodging at said camp." The boy had gone to the camp under an agreement by which, in consideration of $3.75 per week to be paid by him, he was to be received and cared for, boarded and lodged, for two consecutive weeks. While there he accidentally fell and broke his arm. The alleged negligence was a failure to provide necessary care and attention, in view of his injury, occasioning, it is alleged, very serious results.

[1] It is thoroughly settled in this state that, in the absence of a statute imposing the liability, a municipality is not liable on account of acts such as those here complained of, unless the negligence was in the matter of the exercise of functions private and proprietary in their nature as distinguished from functions purely governmental in nature. We have no statute imposing any such liability. There thus arises the question whether the city, in the operation of this summer camp, was acting in its governmental capacity, or in a private and proprietary capacity. The decisions, both of this court and of the courts of last resort in other jurisdictions, show that it is not always an easy matter to determine in which of these capacities a city is acting, and that it is extremely difficult, if indeed not impossible, to prescribe the test so exactly by general rule as to always clearly show to which class a particular activity of a municipality belongs.

The summer camp was conducted by the city under authorization of certain provisions of its charter. It is provided therein that the city shall have power "to provide * * * and to establish, own, equip, maintain, conduct and operate libraries, reading rooms, * * * parks, playgrounds, gymnasiums, baths, public toilets; * * * also any and all buildings, establishments, institutions and places, whether situated inside or outside of the city limits, which are necessary or convenient for the transaction of public business or for promoting the health, morals, education or welfare of the inhabitants of the city, or for their amusement, recreation, entertainment or benefit." Subd. 4, § 2, art. 1, Charter. In article 26 of the charter, entitled "Playground Department," we find section 263, establishing a department of government, to be known as the playground department, under the management and control of a board of five commissioners, to be known as the board of playground commissioners. Section 267, contained in this article, provides: "All children's playgrounds, recreation centers and summer camps now or hereafter owned or controlled by the city of Los Angeles, either within or without its limits, shall be under the exclusive control and management of the board of playground commissioners." Other sections of the article provide for the acceptance and use in acquiring, establishing, improving, and maintaining of playgrounds, which, of course, includes children's recreation centers and summer camps, donations, legacies, and bequests given for those purposes, and also that the city council may appropriate annually such amount as may be necessary therefor.

[2] It seems to us that the function in which the city was thus engaged was purely in the exercise of the governmental power and the discharge of the governmental duty of maintaining the health of the children of the city, and was therefore essentially governmental in nature. It will not be questioned that a city is charged with such a duty of sovereignty as that of maintaining the public health, and that in any measures it may adopt solely for that purpose, which are reasonably adapted to that end, it is acting strictly in a governmental capacity. In this connection certain language in the prevailing opinion in our recent decision in Chafor v. City of Long Beach, 174 Cal. 487, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, is in point. It was said:

> "Nor is it difficult to set forth the definition of governmental functions as applied to a city. Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young; and in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle."

[3] Children's playgrounds and recreation centers established and maintained by a city for the general use of the children of the city, where so conducted as to partake in no degree of the nature of a private business enterprise, do not substantially differ from a public park in so far as the question here involved is concerned. Like the public parks, they are referable solely to the duty of maintaining the public health, and have nothing of the nature of an ordinary business enterprise. While our attention has not been called to any decision of this court expressly de-

ciding the question, it is clear, as was held in Harper v. City of Topeka, 92 Kan. 11, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032, that the maintenance of a park by a city for the sole benefit of the public, and not for any profit or benefit to the municipal corporation, is a governmental or public function. See, also, Hibbard v. City of Wichita, 98 Kan. 498, 159 Pac. 399, L. R. A. 1917A, 399; Board of Park Commissioners v. Prinz, 127 Ky. 460, 105 S. W. 948; Mayor, etc., v. Burns, 131 Tenn. 281, 174 S. W. 1111; Nelson v. City of Spokane (Wash.) 176 Pac. 149; Blair v. Grainger, 24 R. I. 17, 51 Atl. 1042. As said in Board of Park Commissioners v. Prinz, supra: "They are essentially public places, established for purely public purposes." In so far as any question here involved is concerned, there is no material difference between a children's playground, established and maintained by the city within the city limits, and the summer camp for the children of the city, established without the city limits in the mountain region some distance therefrom. It is substantially in the nature of a children's playground for the benefit of the children of the city, located, as it is, for the purpose of giving the children the advantages of recreation under different conditions from those existing in the city. By reason of its remoteness from the city it is essential to its enjoyment by the children that board and lodging be furnished to those enjoying the privileges thus afforded. This in no degree changes its nature. It rests on precisely the same basis as children's playgrounds and public parks within the city limits. It is conducted for the sole purpose of promoting the public interest by maintaining the public health, and has nothing of the character of a business enterprise. That a small charge is made upon those children going to and staying at the camp for the purpose of assisting in defraying the cost of maintenance of such children while at the camp does not change the situation. See Denning v. State of California, 123 Cal. 316, 55 Atl. 1000; Melvin v. State, 121 Cal. 16, 22, 53 Pac. 416; Blair v. Grainger, supra.

[4] It may further be said that we do not think that the city of Los Angeles is authorized by its charter to maintain such an institution as this summer camp in any proprietary or private capacity. Any fair, reasonable, substantial doubt concerning the existence of power in a municipality as to such a matter as this must be resolved by courts against the municipality. Dillon on Mun. Corp. §§ 237, 239. As we read subdivision 4 of section 2 of article 1 of the charter, it has to do with power granted for the purpose of the exercise of governmental functions alone. This is the result of a fair reading of the provision, and consideration of other subdivisions of the same section specifying matters in the nature of business enterprises in which the city may engage shows the correctness of this construction. Where it was thought advisable to confer a power as to any such matter it was carefully and specifically prescribed. And in subdivision 50 of the section, added by amendment in 1913, conferring most sweeping general power as to such matters, it was expressly provided "that under the authorization of this subdivision the city of Los Angeles shall not engage in any purely commercial or industrial enterprise not now engaged in by the city, except on the approval of a majority of the electors voting thereon at an election." It is not suggested that there was any provision for a summer camp prior to the adoption of this provision, or that the electors have ever authorized the maintenance of any institution of the nature of this summer camp, except as the same is authorized as a governmental function by subdivision 4 of the section.

In view of what we have said, we are of the opinion that there is no liability on the part of the city of Los Angeles on account of the matters alleged in the complaint.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.; WILBUR, J.; SHAW, J.; MELVIN, J.

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179 Cal. 598

MICHELIN TIRE CO. OF CALIFORNIA v. COLEMAN & BENTEL CO. et al.

(L. A. 4519.)

(Supreme Court of California. Jan. 27, 1919.)

1. Appeal and Error 🔑1011(1)—Findings of Fact.

Where there is a substantial conflict in the testimony, the findings of the trial court will be upheld on appeal.

2. Limitation of Actions 🔑175—Waiver of Bar—Stipulations.

In action on account, wherein it was stipulated that plaintiff corporation might file amended complaint and that objection that plaintiff was not owner of claim against defendant at time of commencement of action should be waived, defendant was held to have waived right to set up statute of limitations as to matter which would have become barred between filing of original and amended complaint.

3. Stipulations 🔑16—Accepting Benefits of Stipulation—Effect.

A party having accepted the benefits of a stipulation is bound by the fair and not reserved interpretation of its terms.

4. Limitation of Actions 🔑24(1)—Contract—Place of Execution.

Where contract, containing provision that it should not be binding until accepted by a party in New Jersey, was prepared in California, signed by one of parties, and forwarded to New Jersey for acceptance, and New Jersey party made a substantial change, signed it, and returned it to California party with advices as to change, and California party approved change by letter, the contract was executed in California, and therefore not governed by the two-year limitations statute as a written instrument executed out of the state.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Michelin Tire Company of California, a corporation, against the Coleman & Bentel Company and George R. Bentel. Judgment for plaintiff, and defendants appeal. Affirmed.

H. C. Millsap, of Los Angeles, for appellants.

Ward Chapman, of Los Angeles, for respondent.

LENNON, J. Action to recover an indebtedness which arose out of the sale of automobile tires and accessories to the Coleman & Bentel Company under certain agency contracts, the defendant George R. Bentel having been included as a party defendant on account of his proportionate stockholders' liability to the extent of the stock owned by him in the defendant corporation. The action was begun January 17, 1912. The court made findings and rendered judgment in favor of plaintiff corporation for $17,749.14 and interest from January 17, 1912, and against George R. Bentel for $7,522.90 and interest, for his proportionate share of said indebtedness as a stockholder of defendant corporation.

In August, 1908, a contract was made between Coleman & Bentel and the Michelin Tire Company of New Jersey, whereby the former was given an exclusive agency for handling Michelin tires in Los Angeles county, and bound itself to keep a minimum stock on hand of the value of $5,000 and to purchase its supplies outright from the New Jersey corporation at its schedule of prices, with a five per cent. discount, and to make monthly settlements for all goods received. At the time this contract was entered into, the plaintiff was a branch subsidiary California corporation of the New Jersey corporation, which latter corporation held all its stock. Under the contract large quantities of goods were supplied, mostly from Milltown, N. J., but some also from the San Francisco branch. The appellants contended that this contract was executed in New Jersey, but the court found that it was executed in California. It was superseded about the 10th of August, 1909, by a new contract, executed by the plaintiff corporation, whereby the Coleman & Bentel Company was constituted the agent of said corporation for handling and distributing its goods upon consignment. Under these contracts and successive yearly contracts, large quantities of goods were supplied, either from Milltown, N. J., or through branches of the Michelin Tire Company, upon consignment, and, as the goods were sold or adjustments or replacements made, monthly statements thereof were required to be sent to the Milltown offices of the corporation with remittances to cover the indebtedness therefor, after deducting the discounts allowed. Remittances were sometimes made through the San Francisco offices. Business was conducted in substantially the same manner during the existence of the contracts and until the month of January, 1912. The controversy out of which this litigation arose was precipitated by a demand in the month of November, 1911, by the Michelin Tire Company for the payment of the balance shown to be due from defendant company by the books of the Michelin Tire Company, and culminated in January, 1912, by the removal from the possession of defendant company of all goods, wares, and merchandise in its possession under consignment from the Michelin Tire Company, and the bringing of suit on January 17, 1912, for the sum of $22,366.19, which is the amount of the judgment less $480.03 found by the court to be barred by the statute of limitations and the allowance of a credit of $2,888.80 claimed as a rebate by defendant company and disputed by plaintiff, and a further amount of $1,247.99 collected. In its answer the defendant company admits an indebtedness of $11,863.97. The court found that the defendant company had not accounted for or paid to plaintiff or its assignor, the Michelin Tire Company of New Jersey, the whole of the purchase price of goods shipped to defendant company under these contracts. It further found that there had never been an account stated between the parties.

As a foundation for the introduction of the ledger sheets showing the account between the Michelin Tire Company and the defendant company disclosed by the Michelin Tire Company's books, the business methods of the Michelin Tire Company, at its principal place of business in New Jersey and at its various branch houses, in its sales and accounting departments, was testified to in detail by the auditor of the Michelin Tire Company and the various steps followed in the handling of accounts from the initial order to the final entry in the Milltown ledger. This testimony was corroborated by the various managers and heads of the collection and credit, the order, the stock, the shipping, and the claim departments, as well as by the manager of the California branch and his subordinates; invoices of deliveries from the San Francisco and Los Angeles branches were produced, and authenticated copies of the house orders and invoices on file at the Milltown office were introduced and received in evidence as part of the foundation for the introduction of the ledger sheets of the account here involved. From the testimony as to the routine of checking, double checking, rechecking, comparing, and posting, it is fairly inferable that the business of the Michelin Tire Company and its branches was conducted with all the safeguards of modern business efficiency so as to reduce the possibility of error to a minimum. From these ledger sheets so introduced in evidence upon this foundation, Mr. Connolly, the auditor of the Michelin Tire Company, as he is permitted to do under subdivision 5 of section 1855 of the Code of Civil Procedure (People v. Dole, 122 Cal. 486–496, 55 Pac. 581, 68 Am. St. Rep. 50; Wilson v. Asphalt Co., 142 Cal. 182–189, 75 Pac. 787), summarized as follows:

Total debits are	$185,286.06
Total credits are	167,056.89
Leaving a balance of	$ 18,229.17

Of this the court disallowed the item of $480.03, above referred to, leaving a balance for which judgment was rendered of $17,749.14. The disallowance of this item is not complained of.

[1] Upon the defendant company's side the court had before it evidence to the effect that Coleman & Bentel had been furnished with a bill of particulars as early as February, 1912, which contained a complete statement of the account and referred to certain duplicate entries of credit made by defendant company's bookkeeper in her account as rendered. No substantial criticism was raised as to the correctness of the Michelin Tire Company's account until the trial, and what criticism then and since made in the brief of appellant has been satisfactorily explained away by respondent's attorneys. The bookkeeper of defendant, Mrs. Edmond, apparently could not explain the duplication of credits in favor of the Coleman & Bentel Company above referred to, and the accounts she submitted were entered on sheets torn from several different permanent books; but the books themselves were not accounted for. The following indicates the condition at the time of the trial:

> "Q. Where were those books? A. I don't know where they were. Q. Have you looked for them? A. No, I have not looked for them because I do not know where they are. Q. Would you not know where to look for them? A. No, I don't. Q. You kept also a private book called an adjustment book in the sales room? A. Yes. Q. Where is that book? A. I don't know. Q. Would you not know where to look for that either? A. No, I would not; it may be in the building, but I wouldn't say, because we have moved since then, and I couldn't say whether it was moved or not. * * * Q. Have you made any further search for any of the books of this corporation, journal, sales book, or adjustment book? A. No, sir. Q. Why not? You were served with a notice to produce them, were you not? A. I have no books in my possession. Q. Who has charge of them now? A. I don't know where they are."

Inasmuch as the whole question involved upon the facts was the correctness of the account, a conflict of evidence was presented to the court which it has decided in favor of the correctness of the books kept by the plaintiff corporation as against the very unsatisfactory testimony and showing of a foundation for the account contended to be correct by the defendant company. Where there is a substantial conflict in the testimony, this court must uphold the trial court in its findings.

[2, 3] The appellant filed an opening brief and the respondent filed an answer thereto. Instead of a reply brief, appellant has printed and filed his oral argument before this court in which he apparently abandons many of the points urged in his opening brief and urges this court to modify the judgment to the extent of $2,583.88 on the ground that on June 4, 1912, the date of the filing of the amended complaint, the amount due and unpaid the Michelin Tire Company was during the preceding two years $3,063.91, which reduced by $480.03 the amount the court found was barred by the statute of limitations, which allowance, although erroneous, is not complained of, makes the amount of $2,583.88. The contentions of appellant in this regard are: (1) That the action was not commenced until June 4, 1912, the date of the filing of the amended complaint; and (2) that the contract was executed in the state of New Jersey and not in California.

At the time of the filing of the original complaint on January 17, 1912, the plaintiff corporation had not been assigned the claim of the Michelin Tire Company of New Jersey. This assignment did not take place until April 2, 1912, and the filing of the amended complaint setting forth this assignment on June 4, 1912, was the pleading of a new cause of action, but in the meantime the defendant company had entered into a stipulation in consideration of "mutual stipulations," whereby it stipulated:

> "That the Michelin Tire Company of California may file an amended complaint in the above-entitled action upon the assigned claim of the Michelin Tire Company of New Jersey, and that the objection 'that the Michelin Tire Company of California was not the owner and holder of said claim, or of any claim, against the defendants or either of them at the time of the commencement of the above-entitled action,' shall be for the purposes of the further prosecution of this action waived, in consideration of, and subject to the conditions hereinbefore expressed. That no objection to the prosecution of this action will be made by defendants,

or either of them, on the ground that the Michelin Tire Company of California is not the owner and holder of said claim against the defendants, or either of them, at the time of the commencement of the above-entitled action."

The court in this regard found that the defendants had waived the objection:

> "That the Michelin Tire Company of California was not the owner and holder of said claim or any claim against the defendants or either of them at the time of the commencement of this action."

In view of the fact that the Michelin Tire Company of California was but a subsidiary domestic corporation of the Michelin Tire Company of New Jersey, its stock being held by the New Jersey corporation, organized as a California branch for the better distribution of its wares; that all contracts save the original contract were entered into between the California corporation and Coleman & Bentel, and the latter company was being supplied in part and making settlements at times through this branch as well as with the parent corporation; and that we may assume that a desire for fair dealing and an equitable adjustment of the differences between the respective parties moved them—it is hard to believe that the stipulation was intended to mean anything else than what it says, and that the minds fairly met, and having accepted the benefits of the stipulation defendants are bound by the fair and not reserved interpretation of its terms. The trial court so held, and we will not disturb its finding in this regard. The fact that the action was instituted on January 17, 1912, coupled with the stipulation waiving whatever objection might have been made to the amendment of the cause of action originally pleaded and which plainly permitted the prosecution and defense of the action upon the amended pleading on the theory that the original cause of action was still extant and being litigated, suffices, we think, to toll the statute of limitations.

[4] The second contention of appellant is that the contract first entered into between the parties was executed in New Jersey instead of in California, and therefore the two-year bar of the statute of limitations applies. The contract in question was prepared in Los Angeles, signed by the defendant company there and forwarded to the Michelin Tire Company of New Jersey at Milltown for acceptance. It contained a provision that it should not be binding until accepted by the Michelin Tire Company. Upon receipt of the contract at Milltown, the Michelin Tire Company, after making a substantial change in one of the provisions of the contract, signed the same and returned it to the defendant company with advices as to the change. Until this change had been approved, it was not the contract between the parties. The defendant company upon receipt of the contract as modified, by letter dated November 5, 1908, and mailed from Los Angeles, advised the Michelin Tire Company that it accepted the contract as modified. Under the authorities the contract was clearly executed in California, where the last act in its execution was performed. Ivey v. Kern County Land Co., 115 Cal. 196, 46 Pac. 926; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90. The trial court correctly found in this regard.

The judgment is affirmed.

We concur: WILBUR, J.; MELVIN, J.

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179 Cal. 629

In re ROSS' ESTATE.

ROSS et al. v. VAN DYKE et al.

(S. F. 8776.)

(Supreme Court of California. Jan. 29, 1919.)

1. Wills 🔑386—Contest—Verdict on Conflicting Testimony.

Judgment upholding contested will based on verdict reached after consideration of sharply conflicting testimony will not be reversed, unless Supreme Court finds substantial error of law.

2. Appeal and Error 🔑662(1)—Review—Record.

Supreme Court is bound by record, and must hold that omission of instruction asserted by appellants and shown by record really occurred.

3. Appeal and Error 🔑1064(1), 1067—Harmless Error—Refusal of Instruction.

Giving or refusing to give instruction relating to witness who may have willfully testified falsely and jury's right to disregard whole of his testimony does not constitute prejudicial error, unless injury is shown.

4. Wills 🔑384—Contest—Refusal of Instruction—Prejudicial Error.

On contest of will, refusal of instruction to contestants, relating to witness who may have willfully testified falsely regarding any material fact, and jury's right to disregard whole of his testimony, *held* prejudicial to contestants.

5. Wills 🔑329(3)—Insanity—Burden of Proof.

Instruction in will contest that contestants had burden to prove insanity by preponderance of evidence, defined as amount of evidence which produces conviction in unprejudiced mind, *held* erroneous, as requiring contestants to establish insanity beyond a reasonable doubt.

6. Wills 🔑384—Invited Error—Adoption of Error in Instruction.

Expressions "satisfied" and "believe," used by contestants of will in proposed instructions, *held* not to have amounted to concurrence in court's erroneous instruction that contestants had burden to prove insanity by preponderance of evidence, defined as amount of evidence which produces conviction in an unprejudiced mind.

Department 2.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Contest of the will of Isaac J. Ross, also known as I. J. Ross, deceased, propounded by B. F. Van Dyke and others, by T. F. Ross and W. J. Ross. From judgment for proponents, contestants appeal. Reversed.

Mastick & Partridge and H. F. Chadbourne, all of San Francisco, and J. W. Dignan, of Oakland, for appellants.

Driver & Driver, of Sacramento, and John L. McNab, of San Francisco, for respondents.

MELVIN, J. This is an appeal from a judgment of court upon verdict of a jury in favor of proponents in a contest of the will of Isaac J. Ross, deceased.

There was a former appeal, in which this court reversed a judgment entered after the sustaining of a motion for nonsuit. Estate of Ross, 173 Cal. 178, 159 Pac. 603. At the second trial the contestants introduced virtually the same testimony as that produced upon the previous hearing, and, as a summary thereof was given by Mr. Justice Henshaw in the opinion which appears in 173 California Reports, we refer to that opinion as containing a fair statement of the essential matters regarding which testimony was given for the contestants.

This testimony was opposed at the second trial by that of witnesses who stated their belief that Mr. Ross was of sound and disposing mind at the time of the testamentary act. Some of these witnesses were old friends who had known Mr. Ross long and intimately. Some of them visited him frequently during his last illness, and they testified that his mind was unusually bright and vigorous for one of his age, in spite of his great physical weakness. One witness was a nurse (not the one mentioned in the opinion on the former appeal), who gave it as her unqualified belief that before and at the time of the preparation and execution of the will her patient was of sound and disposing mind. Upon cross-examination, this witness (Mrs. Shinn) was asked about a written statement produced by counsel for contestants and purporting to have her signature at the end thereof. While admitting that she had signed a statement, she refused to admit without reservation that the name written on the document exhibited was her own, because, as she said, some of the letters did not look like her writing. She also expressed the belief that the statement shown to her in court contained more pages than the one to which her signature had been appended. Counsel who prepared the statement from Mrs. Shinn's dictation testified that the document offered by him was the very statement signed by the nurse. The last sentence of that writing, appearing just above the date and purported signature, was as follows:

> "I do not believe that his mind was clear at all times, and he had spells when I do not think his mind was clear."

In an admittedly genuine letter written after the death of Mr. Ross, Mrs. Shinn (writing of her grandmother whom she was then nursing) used the following expression:

> "Here is another such a case as Mr. Ross, only he seemed to have his right mind part of the time, and grandmother is entirely void of reason, which makes her case a great care."

In explanation of this statement, she testified:

> "When I made reference in the letter that I wrote to Mr. Dignan to Mr. Ross not being right I thought Mr. Ross was in his right mind up to the last few days; I considered him of sound mind. The last two or three days he was kept under opiates. It was that time to which I alluded."

She also testified as follows:

> "There was never any time there when I thought that his mind wandered at all, either night or day. I have never for an instant, either during the time that I was attending him or since his death, doubted at all the soundness of Mr. Ross's mind. I never expressed in conversation with anybody any doubt as to the soundness or unsoundness of Mr. Ross's mind. I often remarked how remarkable it was, how strong his mind was."

The testimony regarding the preparation of the will was given by Mrs. Shinn and by Mr. Van Dyke. From this it appears, in substance, that the testator, of his own motion, asked the nurse to send for Mr. Van Dyke, an attorney at law, who was a kinsman of Mr. Ross. She telephoned to Sacramento and left a message for the lawyer, and, in due course, in response to it, he came to San Leandro and to the home of the sick man. Mr. Ross indicated his wishes to the attorney, and told the nurse where to find certain of his notes, bonds, and other documents. On the first day the patient became very weary with the work of indicating his wishes to his counsel, and it became necessary to postpone further preparation of the testament until the next day, when the work was resumed. Testator did not express his wishes with reference to all of his property, nor did he desire the will to contain a residuary provision, but he stated his willingness to have that part of his estate not described in the will distributed according to statute, in the event that he should not dispose of it by codicil.

[1] From the foregoing, it will appear that the jury reached its verdict after considering sharply conflicting testimony, and a judgment based upon such a verdict will not be reversed unless we find substantial error of law in the trial. Numerous alleged errors are called to our attention, but we need consider only two, both relating to instructions. The court gave many instructions based upon decisions of this court in matters like the present, and these were in the main correct, although appellants assert that too great emphasis was devoted to the matter of the supposed inviolability of a will unless the incapacity of the testator should be well established.

[2-4] One of the instructions offered by contestants was the usual one relating to a witness who may have willfully testified falsely regarding any material fact and the jury's right to disregard the whole of the testimony of such a witness. This was refused, according to a note made upon it by the presiding judge, because the giving of it would be a repetition; yet the record does not disclose the giving of the same instruction, substantially or otherwise, at any place in the charge. This, appellants assert, in view of the contradictions in the testimony of Mrs. Shinn, was most serious error. Our attention is called to an unsuccessful effort made by proponents to show by suggested diminution of the record that the instruction or a similar one was given. Of course, we are bound by the record, and must hold that the omission asserted by appellants really occurred. It is settled law in California that the giving or refusing to give such an instruction does not constitute prejudicial error, unless injury is shown. People v. Russell, 19 Cal. App. 750, 127 Pac. 829; Medlin v. Spazier, 23 Cal. App. 242–245, 137 Pac. 1078; Poor v. W. P. Fuller & Co., 30 Cal. App. 650, 159 Pac. 233. In view of the fact that the testimony regarding the capacity or incapacity of the aged and bedridden testator was, for the most part, that of intimate acquaintances and relatives who radically differed upon the all-important question, and in view of the testimony of the nurse who attended him in his last illness (quotations from which we have made above), we think that the appellants were injured by the failure to give the instruction.

[5, 6] A serious error was committed by the court in giving the following instruction:

> "The law requires that the person upon whom the burden of proving the insanity of a testator rests—in this case the contestant—shall prove it by a preponderance of evidence. By a preponderance of evidence is meant that amount of evidence which produces conviction in an unprejudiced mind, and only such evidence will justify a verdict that Isaac J. Ross was of unsound mind at the time he executed this instrument."

That the giving of a substantially identical instruction upon a similar issue was error this court held in People v. Miller, 171 Cal. 649, 154 Pac. 468. That, to be sure, was a criminal case, but the reasoning applies to the case at bar, because, in effect, the jurors were told that they must uphold the probate of the will unless the ground of contest should be established to their satisfaction beyond a reasonable doubt. See, also, Campbell v. Bradbury, 176 Pac. 685. It is argued that contestants themselves adopted the same false definition in the instructions which they proposed. For example, they requested the court to give an instruction to the effect that, if the jurors were "satisfied" that Isaac J. Ross was not of disposing mind when the will was executed, their verdict must be for the contestants. In other instructions offered, contestants used the expressions "believe and are satisfied, from and by the evidence," and "believe from the preponderance of the evidence." We do not think that these expressions amount to a concurrence in the definition as given. In other words, the rule announced in Ergo v. Merced Falls Gas & Electric Co., 161 Cal. 334–340, 119 Pac. 101, 41 L. R. A. (N. S.) 79, does not find proper application under the facts here disclosed. In that case the defendant had proposed and the court had given an instruction very much more injurious to its cause than the one to which it objected.

No other alleged errors require review or analysis.

The judgment is reversed.

We concur: LENNON, J.; WILBUR, J.

179 Cal. 656

DILLINGHAM et al. v. WELCH, County Tax Collector. (L. A. 5287.)

(Supreme Court of California. Jan. 31, 1919.)

1. STATUTES ⚷184 — CONSTRUCTION — PURPOSE OF LEGISLATURE.

A statute must be read in view of the evident purpose of its enactment.

2. HIGHWAYS ⚷107(1)—IMPROVEMENTS—PROCEEDINGS.

In proceedings under Road District Improvement Act of 1907, failure of specifications to establish grades of streets and avenues not to be improved did not, under section 2, providing that grades shall be specified for all roads, streets, etc., within district, deprive board of supervisors of jurisdiction to pass resolution of intention, in view of fact that specifications are to be for "work," and in view of the purpose of the act as expressed in title and section 1.

3. HIGHWAYS ⚷107(1)—CONSTRUCTION—DETAILS OF CONSTRUCTION—SPECIFICATION.

In proceedings under Road District Improvement Act of 1907, though as general rule specifications must definitely and with certainty describe the manner and extent of the work to be done, details of construction and cost ascertainable only by doing of work must be left to be adjusted by person or board supervising construction.

4. Highways 🔑113(3) — Construction — Validity of Contract.

Contract for improvement of roads under Road District Improvement Act of 1907 was not invalid because of provision that "contractors must grade connections with intersecting roads to the satisfaction of the engineer employed by the commission;" such provision not rendering specifications defective because of indefiniteness.

5. Highways 🔑113(3)—Improvements—Notice for Bids.

In proceedings for improvements under Road District Improvement Act of 1907, where resolution of intention described work as "grading and oiling" of designated portions of certain streets and construction of cement sidewalks, etc., along sides of certain streets, notice inviting bids describing work as "grading, oiling and construction of cement sidewalks, curbs and gutters" along specified sides of certain streets, was not defective, particularly in view of reference therein to specifications on file.

6. Highways 🔑113(4)—Improvement—Validity of Proceedings — Verification of Declaration—Completion of Work.

In proceedings under Road District Improvement Act of 1907, the fact that the declaration of the completion of the work was not verified as required by section 10 was mere irregularity, not affecting jurisdiction of board of supervisors nor validity of assessment tax levied for purpose of meeting bonds issued.

7. Highways 🔑99¼, New, vol. 14 Key-No. Series—Improvement—Transfer of Money from County Roads Fund.

In proceedings under Road District Improvement Act of 1907 the transfer of money from county road funds to special fund for payment of bonds was discretionary with board of supervisors, though it had announced its decision to do so in resolution of intention.

8. Highways 🔑148—Improvement—Assessment—Injunction.

In action to enjoin collection of special assessment tax levied to meet bonds issued under Road District Improvement Act of 1907, court will not interfere with board of supervisors' levy of assessment on ground that assessment is excessive, where it does not appear that plaintiff landowners were denied a hearing before board of supervisors.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by W. C. Dillingham and others against W. O. Welch, County Tax Collector of the County of Los Angeles. Judgment for plaintiffs, and defendant appeals. Reversed.

A. J. Hill, County Counsel, and Edward T. Bishop, Deputy County Counsel, both of Los Angeles (Arthur M. Ellis, of Los Angeles, of counsel), for appellant.

Albert J. Sherer, Robert Young, and Hahn & Hahn, all of Los Angeles (Clarence J. Walker, of Los Angeles, of counsel), amici curiæ.

W. S. Knott and J. L. Fleming, both of Los Angeles, for respondents.

MELVIN, J. Defendant appeals from a judgment whereby he is enjoined from collecting or enforcing a special assessment tax levied for the purpose of meeting bonds issued under the Road District Improvement Act of 1907.

The plaintiffs attacked upon several grounds the proceedings for the improvement of the roads which formed the basis and gave the alleged reason for the levy of the special assessment tax.

It was successfully contended by plaintiffs in the superior court that the board of supervisors had no jurisdiction to pass the resolution of intention to do the work, because the specifications did not designate grades for all streets and avenues within the district. Section 2 of the Road District Improvement Act of 1907 (Stats. 1907, p. 807) provides as follows:

> "Before passing any resolution of intention under this act, specifications for work substantially the same as that described in the resolution of intention and for a district substantially the same as that described in the resolution of intention shall be furnished by some competent person who shall have been designated by the board of supervisors for that purpose by a resolution to be entered by the clerk upon the minutes of said board, and, except where there is already an official grade thereof, as a part of such specifications, grades shall be specified for all roads, streets, avenues, boulevards, lanes and alleys within the described district so far as the same are within such district."

[1, 2] In the proceeding with which we are now concerned the specifications designated the grades of all roads within the district upon which work was to be done, but did not fix grades for other roads. This, according to the theory of respondents, was an omission fatal to the acquirement of jurisdiction by the board of supervisors. There is no merit in this contention, as will readily appear from a study of the statute. It will be noticed that the specifications are to be for "work" within the designated district. The fixing of the grades of streets to be improved (or if they had been previously fixed the ascertainment of their locations) would be a part of the work to be done. The establishing of the grades upon streets not to be improved under the proceedings would not be a part of the work. It is true that the statute does provide that as part of the specifica-

tions grades shall be designated for "all roads," etc., within the described district, but the statute, read as a whole, does not justify the interpretation which respondents seek to give to its language. The statute, like all statutes, must be read in view of the evident purpose of the Legislature in its enactment. That purpose was to insure the pre-existence of rational and proper grades when the physical work upon the roads to be improved should be actually undertaken. It was no part of the necessary work to fix or confirm grades upon roads not to be subject to the contemplated improvement. By the terms of the act itself, the establishment of grades is incidental to the work to be done. The title of the act of 1907, which we are here considering, is, in part, as follows:

> "An act to provide for work upon public roads, streets, avenues, boulevards, lanes and alleys not within the territory of incorporated cities or towns; for the incidental establishment of grades thereof."

Section 1 vests in the board of supervisors power to do many acts for the improvement of roads; to establish districts; and "as incidental to the exercise" of these powers to establish official grades within said districts. The fixing of proper grades for streets or roads not contemplated in the work of improvement clearly would not be incidental to that work nor to the power of the board of supervisors in ordering it. A requirement for the fixing of grades for roads not to be improved would be utterly purposeless. The failure to establish such grades, therefore, did not deprive the board of supervisors of jurisdiction.

[3] Respondents insist that there is another defect disclosed by the record which is fatal to the validity of the proceedings. The specifications contain a provision that:

> "The contractor shall without extra compensation grade according to the engineer's directions, a safe, proper and workmanlike connection with all intersecting public or private roads or driveways."

[4] It is contended that not only is this an unwarranted delegation of discretion by the board of supervisors to the engineer, but that it places him in a position to require a more onerous compliance with the specifications by one contractor than by another less favored. It is true that, as a general rule, specifications must definitely and with certainty describe the manner and extent of the work to be done. Such certainty is necessary for the benefit of the property owners in enabling them to determine whether or not they will themselves undertake the work, and also for the benefit of the bidders who, knowing just what may be required of them if successful, may compete intelligently for contracts. But the rule requiring definiteness of specification has an important exception which was stated as follows by Mr. Justice Shaw in the opinion in the case of City Street Improvement Co. v. Kroh, 158 Cal. 308, at page 317, 110 Pac. 933, at page 937:

> "There is a well-recognized exception to this rule in the case of details of construction which do not appear and cannot with reasonable diligence and cost be ascertained in advance, or which will be disclosed only by the doing of the work; or any contingency which reasonable care and consideration would not foresee. Such things may occur in every work of any considerable magnitude, and they must be left to be adjusted in accordance with general provisions of the contract, or by the discretion of the person or board supervising its performance. Examples of such details, and of lawful provisions for their determination, were considered in Haughawout v. Hubbard, 131 Cal. 679 (63 Pac. 1078), Belser v. Allman, 134 Cal. 400 (66 Pac. 492), Banaz v. Smith, 133 Cal. 106 (65 Pac. 309); Haughawout v. Raymond, 148 Cal. 311 (83 Pac. 53), Chase v. Scheerer, 136 Cal. 251 (66 Pac. 768), and McCaleb v. Dreyfus, 156 Cal. 204 (103 Pac. 924). Of the provisions objected to in this case, the following come within this class and do not invalidate the contract. The contractor must grade the connections with intersecting roads to the satisfaction of the engineer employed by the commission."

This quoted exception well applies to the problem before us, and is a sufficient answer to the contention of respondents with reference to the specifications which they attack. In addition to the authorities cited in the above quotation, appellant aptly refers to Thoits v. Byxbee, 34 Cal. App. 226, 232, 167 Pac. 166; Stanwood v. Carson, 169 Cal. 640, 649, 147 Pac. 562; Burnham v. Abrahamson, 21 Cal. App. 248, 258, 131 Pac. 338.

[5] Respondents also assert that there was no sufficient notice inviting bids. This is based upon the fact that while the resolution of intention and the resolution ordering the work done described it as "grading and oiling" of designated portions of certain streets and "the construction of cement sidewalks five feet in width, cement curbs and cement gutters" along specified sides of certain streets, the notice inviting sealed bids described the contemplated work as "the grading, oiling and construction of cement sidewalks, curbs and gutters on certain streets near the town of Bairdstown." It is asserted that this notice limited the work to sidewalks, curbs, and gutters, did not embrace grading and oiling of streets, and, therefore, was misleading to intending bidders. Such construction of the notice involves a forced interpretation of its language, but any ambiguity that may have inhered in the language taken by itself would disappear in view of the facts that the notice specifically announced that the work was to be done "according to the specifications on file therefor," that said specifications were by reference made a part of the notice, and that

they were on file at the office of the board and "open to inspection of bidders."

[6] Another of the contentions of the respondents was that the tax and bonds are invalid because the declaration of the completion of the work was not verified. Section 10 of the Road District Improvement Act of 1907 provides that as soon as it may be done in good faith, there shall be filed with the clerk of the board of supervisors a declaration that the work has been completed according to contract. There is a provision that this shall be signed and verified by the superintendent of the work, and by the contractor or by some person who knows the facts, signing on the latter's behalf. There is a further provision that:

> "Either signer may except from his signature and verification any amount or item to which he does not assent."

While, of course, orderly procedure should have been followed, and while it is desirable that the superintendent and the contractor should be made to assume the responsibility of certifying to the facts, by verified writings, their failure so to do amounts to an irregularity which does not affect the jurisdiction of the board of supervisors, nor the substantial rights of the parties to this controversy. The very fact that under the law either may omit verification as to any item emphasizes the directory character of the provision. Cake v. City of Los Angeles, 164 Cal. 705, 130 Pac. 723. In Petaluma Rock Co. v. Smith, 23 Cal. App. 100, 137 Pac. 290, it was held that, under the more liberal rules now operating with reference to street work and similar public improvements, the fact that the superintendent of streets did not sign the assessment for street improvements did not deprive the contractor of his right to a lien. Upon like principles we are constrained to hold against the respondents on this point. There is nothing in the opinion in Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296, which conflicts with this conclusion. In that case it was held that as a condition precedent to the power of a bidder to enter into a contract he must attach to his bid an affidavit that it is not a sham offer, and that he intends no fraud nor collusion. In the case at bar there was nothing in the requirement for an affidavit which went at all to the jurisdiction of the board. The affidavit is not even made prima facie evidence at the hearing upon all matters regarding the work which follows the declaration of completion.

[7] Complaint is made that the board of supervisors failed to transfer any money from the county road funds to the special funds for the payment of the bonds, although in the resolution of intention the board had announced the decision so to do. Appellant aptly answers this complaint by saying that the bondholders cannot exercise the discretion of the board, and should not be made responsible for any failure to transfer funds. The transfer or failure to transfer money from the general road fund is purely within the board's discretion, because that body is given power and it is made the duty of said board "in any event" to levy a special tax to meet the principal and interest of the bonds. This contemplates a situation in which the board should, in the exercise of its judgment, decline to transfer moneys from the general road funds.

[8] Respondents assert that the assessment is so grossly excessive as to amount to confiscation of the property in the district. The contract for the work was let in 1911. The bonds were issued in November, 1914, and were payable in five years. It appears that the assessed value of the real property in the road district for 1915 was $28,420. The aggregate amount for which the bonds were issued was $24,258.43, and the argument is made that if the other roads in the district were improved at the same cost per linear foot the total indebtedness would far exceed the value of the land assessed. This argument goes into the realm of speculation whither we may not follow. The act of 1907 has been held to be constitutional. Under that act the right of the owners of real property to a hearing before the board of supervisors is protected. The ad valorem system of assessment is also upheld. Thomas v. Pridham, 171 Cal. 98, 153 Pac. 933. It is not shown by the pleadings or otherwise that a hearing was denied plaintiffs. Under the principles announced in Thomas v. Pridham, supra, and the authorities there cited, we may not interfere with the determination of the board of supervisors in the levying of the assessment.

No other alleged errors require discussion. The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOSS, J.; RICHARDS, Judge pro tem.

179 Cal. 816

CLARK et al. v. WELCH, County Tax Collector. (L. A. 5286.)

(Supreme Court of California. Jan. 31, 1919.)

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Grant Clark and others against W. O. Welch, County Tax Collector of the County of Los Angeles. From the judgment rendered, defendant appeals. Reversed.

A. J. Hill, County Counsel, and Edward T. Bishop, Deputy County Counsel, both of Los Angeles, for appellant.

W. S. Knott and John L. Fleming, both of Los Angeles, for respondents.

PER CURIAM. This case presents the same questions as those considered in Dillingham v. Welch (L. A. No. 5287), 178 Pac. 512. An opinion has been filed this day in that case, and upon the authority thereof the judgment herein is reversed.

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179 Cal. 648

ARMSTRONG v. SACRAMENTO VALLEY REALTY CO. et al. (QUATMAN, Intervener). (Sac. 2883, 2884.)

(Supreme Court of California. Jan. 30, 1919. Rehearing Denied Feb. 27, 1919.)

1. COMPROMISE AND SETTLEMENT 🔑2—CONTRACT.

A contract, purporting to be an arrangement whereby, in consideration of recognition and readjustment of the relative contractual rights and obligations, the pre-existing legal controversies involving such rights and obligations, and resulting in a judgment, are definitely settled, is one of compromise.

2. COMPROMISE AND SETTLEMENT 🔑20(1)—EFFECT OF PARTIAL PERFORMANCE.

Partial performance of an agreement of compromise makes the agreement an effective extinguishment of the antecedent obligation; the only thing remaining to be done being capable of performance and merely relating to an incidental provision as to appraisement of land to be conveyed.

In Bank.

Appeals from Superior Court, Glenn County; William M. Finch, Judge.

Action by W. S. Armstrong against the Sacramento Valley Realty Company and others, Letitia Barreta Quatman intervening. Judgment for plaintiff, and defendants and intervener appeal. On motion to dismiss appeals. Appeals dismissed.

W. T. Belieu, of Willow, for appellants.

Frank Freeman and George R. Freeman, both of Willow, for respondent.

LENNON, J. From the record before us upon two motions to dismiss pending and independent appeals of the defendants and intervener in the above-entitled action the following uncontroverted facts appear: By the action plaintiff sought and secured a judgment against the defendants in the sum of $827.20. The intervener claimed to have some interest in the money in suit, but the trial court found to the contrary, and entered judgment accordingly. The plaintiff's cause of action arose out of a written contract of purchase and sale, whereby the defendants, as parties of the first part, agreed to pay in designated installments to plaintiff, as party of the second part, certain moneys aggregating $25,000 as part payment of the purchase price of plaintiff's right, title, and interest in and to certain described real property situate in the counties of Glenn and Colusa. The action was one of 20 similar suits instituted against the defendants for the recovery of the several installments of the purchase price of the said property. The judgment appealed from was entered on the 8th day of October, 1915. The intervener and defendants gave their notices of appeal respectively on the 15th and 23d days of November, 1915. Thereafter, to wit, on April 27, 1917, and while proceedings for the settlement of a bill of exceptions were pending in the court below, the plaintiff, as the party of the first part, and the defendants and the intervener, as parties of the second part, entered into another contract in writing, which, after reciting the fact of the rendition and entry of the judgment appealed from, and that the parties thereto had agreed upon the sum of $17,796.01, to be paid to plaintiff in settlement of the controversy involved in the judgment and the other actions arising out of the original contract of purchase and sale, proceeded to provide, in consideration of such agreed settlement, that of the sum total agreed upon the defendants and intervener would pay the sum of $5,000 in cash immediately upon the execution by the plaintiff of the contract of settlement and the balance of $12,796.01 in land which was to be selected and taken from certain designated and described parcels of land. The contract further provided that within five days after the payment by the defendants of the $5,000 in cash the parties were to submit a list of the names of 15 persons from whom, according to a formula prescribed in the contract, three persons were to be selected as the appraisers of the land which was to be conveyed pursuant to the terms of the contract. The plaintiff executed the contract, and in keeping with its terms and within the time designated therein, the defendants made the $5,000 payment in cash. Subsequently, in keeping with the procedure provided in the contract, three appraisers were selected to value the lands which were to be conveyed in satisfaction of the remainder of the obligation due to the plaintiff. Ultimately, and before any appraisement was made or attempted, one of the appraisers refused to act, and it appears that since then the defendants and intervener are unwilling to join with plaintiff in the selection of a third appraiser. Because of this halt in the making of the required appraisement, and the consequent failure to fully perform the contract, the plaintiff has instituted an action for the specific performance of the second agreement, and here urges as one of the grounds of the motion to dismiss the appeals that by the contract in controversy the pre-existing dispute involved in the judgments appealed from was superseded and extinguished, and that as a consequence no question remains in the pending appeals for determination by this court.

[1, 2] We have not been furnished by any of the parties with points and authorities, but our own research satisfies us that the plaintiff's contention is well taken, and must result in a dismissal of the appeals on the grounds stated. The law favors and encourages compromises and settlements of controversies made in or out of court, and the contract in question here clearly comes within the definition of an agreement of compromise, for it plainly purports to be an arrangement whereby, in consideration of the recognition and readjustment of the relative contractual rights and obligations of the parties, the pre-existing legal controversy involving such rights and obligations and ultimately resulting in a judgment for the plaintiff was definitely settled. Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162; Bandman v. Finn, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134. In other words, "It was a new contract (Civ. Code, secs. 1531, 1679) for which the original contract or the performance thereof by the defendants furnished the consideration (Auzerais v. Naglee, 74 Cal. 60 [15 Pac. 371]), and became in the absence of legal impeachment in itself an agreement conclusive upon both parties," and one which operated as a merger and bar of all included claims and pre-existing causes of action (Griswold v. Pieratt, 110 Cal. 259, 42 Pac. 820; Whipple v. Baker, 85 Ark. 441, 108 S. W. 830) and as a consequence settled and ended the previous dispute between the parties evidenced by and merged in the judgment appealed from. The agreement in question, being a voluntary settlement of the controversy made during the pendency of an appeal from a judgment embodying the controversy, it became as binding and effective upon all of the parties as the judgment itself would have been had it become final (Oglesby v. Attrill, 105 U. S. 605, 26 L. Ed. 1186; State ex rel., etc., v. Superior Court, 60 Wash. 187, 110 Pac. 808; Adle v. Prudhomme, 16 La. Ann. 343), and therefore it must be held that the agreement of compromise and settlement extinguished the judgment, and that any subsequent remedy of the parties with reference to the matters included therein must be based upon the compromise agreement alone. And this is so, notwithstanding the fact that the agreement in question was only partially performed by the defendants and interveners. The partial performance of an agreement of compromise, which is an integral part of the agreement, will suffice to make the agreement an effective extinguishment of the antecedent obligation upon which it was founded, where, as here, the only thing remaining to be done is capable of performance and relates merely to an incidental provision of the agreement covering the appraisement of land designated in the agreement to be conveyed in keeping with the terms of the settlement. Cogswell et al. v. Cogswell, 70 Wash. 178, 126 Pac. 431.

The appeals are dismissed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOSS, J.; MELVIN, J.; RICHARDS, Judge pro tem.

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179 Cal. 621

PEOPLE v. H. JEVNE CO. et al. (Cr. 2203.)

(Supreme Court of California. Jan. 28, 1919.)

1. MONOPOLIES 🔑29 — OFFENSES — FIXING PRICE OF BREAD—"CONSPIRACY AGAINST TRADE."

It was a "conspiracy against trade" under St. 1907, p. 984, for wholesale bakers to enter into an agreement, whereby they fixed the retail price of bread to be sold by them to retailers, and agreed not to sell to any retailer who did not maintain such price.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Conspiracy against Trade.]

2. MONOPOLIES 🔑31 — OFFENSES — INDICTMENT.

An indictment for conspiracy against trade under St. 1907, p. 984, as amended by St. 1909, p. 593, need not allege that a combination or agreement did not come within the permissive scope of the proviso in the amendment of 1909.

3. MONOPOLIES 🔑31—OFFENSES—BURDEN OF PROOF.

In prosecution for conspiracy against trade under St. 1907, p. 984, as amended by St. 1909, p. 593, where state showed that defendants, wholesale bakers, had entered into agreement whereby they fixed retail price of bread to be sold by them to retailers and agreed that they would not sell bread to retailers who did not maintain such price, to come under the permissive clause of the proviso of 1909, the burden was on defendants to show that maintenance of a fixed retail price would have a tendency to so stabilize trade conditions as to better enable the wholesalers to realize a fair profit on their own transactions.

4. CRIMINAL LAW ⚷683(1)—EVIDENCE—REBUTTAL.

In a prosecution under St. 1907, p. 984, as amended by St. 1909, p. 593, against wholesale bakers for conspiracy against trade, where defendants introduced evidence to show the cost of manufacturing to excuse themselves under the proviso of the amendment of 1909, it was not error to permit the prosecution on rebuttal to show that the cost of production of other bakers under more or less parallel conditions was less than the figures shown by the defendant.

5. CRIMINAL LAW ⚷396(1)—EVIDENCE MADE COMPETENT BY ADVERSARY'S EVIDENCE.

Where an accused introduced evidence as to an immaterial matter, he could not preclude the prosecution from meeting the showing voluntarily made.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

The H. Jevne Company and others were convicted of a conspiracy against trade. From a judgment of conviction and an order denying their motion for new trial, they appeal. Affirmed.

E. R. Young and Goodwin & Morgrage, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

SLOSS, J. The defendants appeal from a judgment convicting them of a "conspiracy against trade," as defined by the statute of 1907, commonly known as the Cartwright Act. Stats. 1907, p. 984; amended, Stats. 1909, p. 593. They also appeal from an order denying their motion for a new trial.

Section 1 of the act, as originally enacted, reads as follows:

> "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:
>
> "1. To create or carry out restrictions in trade or commerce.
>
> "2. To limit or reduce the production, or increase or reduce the price of merchandise or of any commodity.
>
> "3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.
>
> "4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.
>
> "5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

The changes made by the amendment of 1909 included the addition to section 1 of the following:

> "Provided that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed."

The indictment was in three counts, by means of which the pleader undertook to set up different statements of the same offense. Briefly stated, the charge was that the defendants, who were severally engaged, in the business of baking bread and selling the same at wholesale to retail dealers in the county of Los Angeles, made and entered into a trust, combination, and conspiracy with each other and with other persons, to fix the price at which retail bread dealers should sell 24-ounce loaves of bread to consumers, such price being fixed at 15 cents per loaf, and to require and force the retail dealers to whom bread was sold by them to sell to the public at a price of not less than 15 cents for each 24-ounce loaf; and that said defendants further agreed that they would refuse to sell any bread to any retail dealer who refused to maintain said price. The indictment sets forth the commission of various acts in furtherance of such agreement.

The present appeals were first heard in the District Court of Appeal for the Second Appellate District, and the judgment and order appealed from were there affirmed. An order was subsequently made transferring the cause to this court for hearing and determination.

In the argument before the Court of Appeal, counsel for the defendants directed their efforts, in large part, to an attack upon the constitutionality of the act under which the prosecution was had. That court gave full consideration to the points made in this regard, and answered them to such effect that the appellants, in seeking a hearing in this court, abandoned their former position and conceded the validity of the statute. We may therefore omit any discussion of this question, which was one of the principal points of contention on the earlier presentation of the appeal.

[1] It is also unnecessary, for the purposes of the present case, to follow counsel into another field of debate which is treated with some elaboration in the briefs. Much is there said regarding the proper construction of the act. But the act, however it be interpreted, does undoubtedly prohibit, subject, of course, to the provisos of the amendment of 1909, any combination of capital, skill, or acts by two or more persons for the purpose of increasing the price of any commodity (section 1, subd. 2), or fixing at any figure, whereby its price to the consumer shall be controlled, any article intended for sale or consumption (section 1, subd. 4), or to make or carry out any agreements by which they shall bind themselves to keep the price of such article at a fixed or graduated figure (section 1, subd. 5). Nor will it be doubted that all or, at least, some of these prohibitions are violated by an agreement between wholesale bakers, whereby they fix the retail price of bread to be sold by them to retailers at 15 cents per loaf, and agree that they will not sell bread to any retailer who does not maintain such price. The making and carrying out of such a combination was clearly and directly charged in the indictment, and it is not claimed that there was a lack of evidence to support the accusation.

With the elimination of the questions to which we have referred, little remains to be considered, except the effect of the above-quoted proviso added to section 1 by the amendment of 1909. That proviso declares that no agreement, combination, or association shall be deemed to be unlawful "the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed."

[2] The appellants contend that the indictment was defective, and that their demurrer thereto should have been sustained, for the want of an allegation that the combination or agreement set forth did not come within the permissive scope of this proviso. There is no uncertainty in the law governing the necessity of alleging, in an indictment or information, that the accused does not come within exceptions or provisos contained in the statute authorizing the prosecution. As is frequently the case, the difficulty lies rather in the application than in the enunciation of the rule. The question was carefully considered, and clearly expounded, in Ex parte Hornef, 154 Cal. 355, 97 Pac. 891. It was there said:

> "Such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely, they are to be relied on in defense."

Hornef had been prosecuted for practicing dentistry without the license required by the act of 1901. Stats. 1901, p. 564. By a proviso in section 1 of that act it was declared that the requirement of a license was not to apply to dentists who had the right to practice at the time of the passage of the act. The holding was that it was not necessary to allege in the complaint that the accused was not within the class so excepted. Similarly, it has been held that an indictment for bigamy need not negative the existence of facts making applicable a proviso that the statute shall not extend to a person marrying without knowledge that a former husband or wife, who has been absent from the state for a given number of years is still alive (State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754; State v. Gallagher, 20 R. I. 266, 38 Atl. 655; People v. Priestley, 17 Cal. App. 171, 118 Pac. 965); that an indictment for unlawful sale of certain drugs need not negative an exception in favor of druggists selling on a physician's prescription (State v. Ah Chew, 16 Nev. 50, 40 Am. Rep. 488); and that it is not necessary to exclude the exception in an accusation under a statute making it an offense to engage in labor on Sunday, with the proviso that the act shall not extend to those who conscientiously observe the seventh day of the week as the Sabbath. Billigheimer v. State, 32 Ohio St. 435. These cases, and others of like purport, are cited and discussed in Ex parte Hornef, supra. On the other hand, it is essential, in a charge of rape, to allege that the female upon whom the act was accomplished was not the wife of the perpetrator (People v. Miles, 9 Cal. App. 312, 101 Pac. 525), or, in a charge of the offense described in section 288 of the Penal Code, to aver that the act was not one of those "constituting other crimes provided for in part two of this Code" (People v. Grinnell, 9 Cal. App. 238, 98 Pac. 681). In each of the last two cases the exception manifestly formed a part of the definition of the offense. Whether a particular accusation falls within this class or that illustrated by Ex parte Hornef is often a nice question. In the present instance, we agree with the District Court of Appeal in the view that the proviso under discussion does not go to the definition of the offense, but that it creates rather an exception, exempting from the operation of the general terms of the statute persons who have committed the prohibited act for a specified purpose. The existence of such purpose affords, therefore, "matter of excuse merely," and is to be relied on in defense.

[3] The appellants contend, further, that the evidence is insufficient to support the implied finding that the combination or agreement charged was not one of those excluded from the purview of the act by the proviso of 1909. This issue was presented to the jury under instructions directing them to return a verdict of not guilty if they should find that the combination or agreement charged had been made with one or the other of the objects specified in the amendment. The record shows that the defendants fixed a wholesale price of 12 cents per loaf. This left to the retailers, selling at 15 cents, a profit of 3 cents per loaf, or 20 per cent. of their selling price. Much evidence was presented by the defendants to show that this rate of profit is little, if at all, more than the actual expense of conducting the retail trade, and that the profit to the retailer could not, accordingly, have been an unreasonable one. If we assume, as the appellants contend, that the evidence on this point was without conflict, the showing still fails to meet the requirements of the case. It is to be remembered that the defendants are wholesale dealers in bread. They are charged with combining to fix, not the price which they, as such wholesalers, were to receive for their product, but that to be obtained from the ultimate consumer by the retailers to whom they sold. The proviso added to the statute authorizes an agreement or combination with the object of conducting its operations at a reasonable profit, or marketing certain products at a reasonable profit. This provision manifestly contemplates a profit sought by the persons entering into the combination, not the profit of their customers or vendees. As applied to the case at bar, the amendment goes no further than to authorize wholesale dealers in bread to combine for the purpose of realizing a reasonable profit in their own dealings. It does not assume to legalize a combination or agreement entered into by them with the object of securing a reasonable profit to the retailers who may buy from them. It may be that the maintenance of a fixed retail price will have a tendency to so stabilize trade conditions as to better enable the wholesalers to realize a fair profit on their own transactions. But if such an inference may be drawn, the evidence in this case does not compel it. It cannot be said that the testimony shows conclusively that the fixing of a retail price of 15 cents per loaf was a necessary or proper step in accomplishing the purpose of securing a reasonable profit to the wholesalers as such.

[4, 5] There is no occasion to consider whether the evidence warrants the conclusion that the price of 12 cents, fixed by the defendants as the charge to be made by them to retailers, afforded any more than a reasonable profit on their wholesale transactions. As we have pointed out, the indictment was not based upon the fixing of a price at which they were to sell at wholesale, but upon the establishment of a retail price of 15 cents to which their customers were to be compelled to conform. It may have been proper, however, for the defendants to show the cost of manufacture, as one of the elements which the jury might consider in determining the ultimate question of the purpose of the combination or agreement charged. The defendants went into this matter very fully in their defense. It was not error, therefore, to permit the prosecution, on rebuttal, to show that the cost of production of other bakers, under more or less parallel conditions, was less than the figure shown by the testimony of the defendants. If this inquiry was immaterial, it was opened up by the defendants themselves, and they could not preclude the prosecution from meeting the showing which they had voluntarily made. 4 C. J. 703, 704. At any rate, the rulings complained of could not, in view of the nature of the charge, have worked any substantial prejudice.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

192 Cal. 773

HANSON v. BRININSTOOL et al.

(L. A. 4163.)

(Supreme Court of California. March 29, 1918.)

1. JUDGMENT ⚷106(8)—DEFAULT—FAILURE TO PLEAD.

Where plaintiff, an employé of a corporation, purchased stock from main stockholders, and gave his notes therefor, and later sued to recover part of stock paid for, an answer, designated as defense "by way of a counterclaim and cross-complaint," and setting up that all the stock purchased was to be held as security for payment of the notes, recovery on which was sought, was a counterclaim, and not a cross-complaint, and default was improperly entered against plaintiff, as he would be deemed to have denied the answer.

2. CORPORATIONS ⚷120 — TRANSFER OF SHARES—OPTION TO REPURCHASE.

Where the principal stockholders of a corporation sold shares to an employé under agreement that, if employé died or left the service, shares not paid for should revert to sellers, and that sellers should have the option to repur-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

chase shares paid for, the reversion took place on termination of employment without exercise of option.

3. CORPORATIONS ⚷116 — TRANSFER OF SHARES—PURCHASE PRICE OF STOCK.

Where a contract provided for the sale of 4,720 shares of stock at a price of $3,750, the price paid per share was 80 cents, notwithstanding that the par value was $1 a share, and that a former superseded agreement named a purchase price of $1 a share.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Frederick C. Hanson against Ellen S. Brininstool and another. Judgment for plaintiff, and from judgment and order denying new trial, defendants appeal. Reversed.

George W. McDill, of Los Angeles, for appellants.

Robt. T. Linney and Gordon L. Finley, both of Los Angeles, for respondent.

SLOSS, J. The plaintiff brought this action to compel the defendants to transfer to him 2,096 shares of the capital stock of the Brininstool Company, a corporation, or to pay him their value, and to surrender two promissory notes executed by plaintiffs to defendants. We shall, for the purpose of simplifying the discussion, treat the defendants as jointly interested to the extent of the entire matter in controversy, although the complaint did not seek the same relief against each.

Prior to January, 1912, the defendants had been conducting business as partners. The plaintiff had been in the employ of the firm, receiving a salary and 5 per cent. of the net profits. It was decided to form a corporation to carry on the business, and an understanding was reached for the acquisition by plaintiff of an interest in the new corporation. Subsequently, the plaintiff and the defendants executed a written agreement, dated November 19, 1912, providing for the sale, by defendants to plaintiff, on terms which we shall have occasion to set forth hereinafter, of a number of shares of the capital stock of the Brininstool Company, a corporation to be organized. This agreement was superseded by a second one, dated January 31, 1913. This second contract, which is annexed to the complaint, and is made the basis of the present action, provided that the defendants should sell and the plaintiff buy 4,720 shares of the stock, at the agreed price of $3,750. The plaintiff was to pay to the defendants, by order upon the corporation, all moneys due and owing by the corporation to him on January 31, 1913, as part payment, and the balance was to be paid by all dividends earned and payable on said 4,720 shares, and by the payment of all salary, over and above $150 per month, paid to the plaintiff by the corporation. It was agreed that the 4,720 shares should be delivered to the defendants as security for the payment of the purchase price, and held by them until payment was made in full. But the agreement further provided that if Hanson should leave the service of the corporation, or should die, before the purchase price was fully paid, the defendants should have a 60 days' option to purchase such number of shares as might then have been fully paid for—

> "at the inventory price * * * obtaining at the last fiscal period; and, further, that any and all stock not then fully paid for shall immediately revert to, and become the property of, the said second parties [defendants] * * * without cost or expense, and this agreement, ipso facto, shall then terminate, and there shall be no further claim against the said second parties; * * * it being understood * * * that part of the consideration for this agreement, during its existence, shall be the continuous and faithful performance of personal service to the corporation hereinbefore mentioned on the part of the said first party [the plaintiff] herein."

The complaint, to which a copy of this agreement was annexed, alleged that at the time the contract was made the plaintiff paid to the defendants on account of the purchase price the sum of $970 in the manner specified in the contract, and that, on February 15, 1913, he paid them in like manner the sum of $1,126. On the last-named date, he executed his promissory notes to the defendants for $2,624, which, it will be observed, was the difference between $3,750, the purchase price specified in the agreement, and $1,126, the amount of the payment made on February 15th. It was further alleged that the plaintiff had left the employment of the corporation, and that the defendants had not exercised their option to purchase the stock for which he had paid. He demanded of them the surrender of his notes and the transfer of 2,096 shares of stock, which demand was refused.

It will not be necessary to set forth the denials and averments made by the defendants in their pleading. The court made findings in substantial accord with the contentions of the plaintiff, and entered judgment, requiring the defendants to turn over to him 2,175 shares of the stock and the notes.

On motion for a new trial the court made a conditional order, pursuant to which the plaintiff consented to have the number of shares which he was to receive under the judgment reduced to 2,000. Thereupon the motion for a new trial was denied. The defendants appeal from the judgment and from the order denying their motion for a new trial.

The appellants make a number of points, but the important questions are but two.

[1] First. The defendants argue that, under the terms of the agreement, they were entitled to hold all of the stock as security for the purchase price, and the plaintiff was not entitled to any shares until said price was paid in full. By two subdivisions of their pleading, each of which is designated as a further and separate defense "and by way of a counterclaim and cross-complaint," the defendants assert this position, and seek to recover on the notes given to them by the plaintiff. On this pleading the defendants had plaintiff's default entered. But we think the matter so pleaded was properly treated by the court as a counterclaim, and not as a cross-complaint. In this aspect its allegations were deemed denied, and the default had no effect.

[2] The right of the defendants to hold all of the stock as security turns upon the construction of the written agreement. On behalf of the defendants it is argued that the obligation to pay for all of the stock continued, notwithstanding the termination of plaintiff's connection with the corporation. They interpret the contract to mean that the provision that all stock not paid for should revert to and become the property of the defendants was to be applicable only in the event that defendants exercised their option to repurchase the shares which had been paid for. If this be the correct view, the plaintiff still remained bound to pay the balance due on the stock, and the defendants had a right to hold all the shares as security for such balance. But we do not so read the agreement. In the event of the termination of plaintiff's relations with the corporation, the contract gives to the defendants the option of acquiring "at inventory price" the shares already paid for by the plaintiff. The further provision that the shares not then paid for shall become the property of the defendants is absolute. It is not made dependent upon the exercise of any option. The whole agreement, and particularly the last clause quoted above, shows that one of the reasons for allowing the plaintiff to acquire the stock was the expectation and belief that he would continue in the service of the corporation. Accordingly, it was provided that if he should leave such service, or should die, he should not be entitled to receive any shares beyond those for which he had made payment, and that the defendants might, if they desired, repurchase even those. Their failure to exercise the option did not affect the independent provision that the plaintiff's right to acquire further shares should cease, and that the shares which he had contracted to buy, but had not yet paid for, should revert to the defendants. With such reversion, the obligation to pay the purchase price, of course, fell and the notes given for such unpaid purchase price ceased to be binding.

[3] Second. The other disputed question turns on the sufficiency of the evidence to support the findings with reference to the amount which plaintiff had paid on the contract at the time he left the employ of the corporation. The plaintiff's theory, embodied in his complaint, was that the contract was for the purchase of 4,720 shares at the agreed price of $1 per share; that $970, due him at the time the contract was made, was then credited as a part payment, leaving a balance of $3,750 to be paid. It was conceded that $1,126, was paid thereafter. The defendants' claim, on the other hand, was that the contract was one for the sale of 4,720 shares at a total price of $3,750 (or about 80 cents per share), and that there was not any payment of $970, as alleged by the plaintiff and found by the court. The claim of the appellants seems to be in precise accord with the terms of the writing, which declares expressly that Hanson agrees to buy and the Brininstools agree to sell 4,720 shares at the agreed price of $3,750. Both the agreement of January 31, 1913, and the agreement of November, 1912, are vague and confused in phraseology. So, too, the evidence on which plaintiff relies is far from clear. Without undertaking to state or to analyze in detail the elaborate terms of the two contracts, we may summarize our understanding of the situation disclosed by the record, as follows: The plan of incorporating the business and giving Hanson an interest in it was first broached in 1911. No written contract was made at that time, but the understanding apparently was that a company should be formed at the beginning of 1912 with such number of shares, of the par value of $1 each, as would represent the actual value of the net assets. Hanson was to purchase 5 per cent. of such shares. For some reason, the consummation of the plan was delayed. The first written agreement was made in November, 1912, and the corporation was not formed until January, 1913. The first writing provided for the sale to Hanson of 3,750 shares, "more or less," and was based upon an estimated value of the corporate assets of $75,000, as of January 1, 1912. Five per cent. of this would be $3,750, and this represented the amount of the capital stock which Hanson was to receive. The corporation not having yet been formed, however, provision was made in the contract of November, 1912, for protecting Hanson's 5 per cent. interest in the profits of the partnership during the year elapsing before the incorporation. It was

therefore provided that he was to receive, for the $3,750, such additional number of shares as would be represented by 5 per cent. of the net profits of the corporation during the year 1912. These profits were not divided, but were turned over to the corporation when formed, as a part of its capital. Its net capital at the time of its organization in January, 1913, amounted to some $98,000. The corporation was formed with a capital stock of 100,000 shares, of the par value of $1 each. The second agreement gave to Hanson the right to purchase 4,720 shares, which, assuming the stock to be worth par, represented, approximately, a 5 per cent. interest in the corporation, as it stood on January 1, 1913. This interest he was still to purchase for $3,750, so that the second agreement followed out, substantially, the plan of the first, the only difference being that while the first prescribed the method for determining the additional number of shares which should come to him by reason of the profits of the year 1912, the second agreement was made after these profits had been ascertained, and it had thus become possible to determine and specify the number of shares. The first agreement states that the stock is to be bought at $1 per share. The second does not contain this provision. But, in fact, neither agreement, when all its terms are considered, contemplates a purchase at that price. Each provides for a purchase of such number of shares as shall represent a 5 per cent. interest in the property of the corporation on January 1, 1913, for the sum of $3,750. In so far, then, as any profits were turned over to the corporation as a part of its capital, and remained undivided among the stockholders, Hanson obtained his interest in them by being permitted to purchase an additional number of shares in the corporation without further payment of money. Under the second agreement, payment for the stock was to be made to the defendants out of dividends payable on the 4,720 shares, and from the salary of Hanson, by orders on the corporation. It is not claimed that the $970 in dispute was ever paid to defendants. It remained in the corporation as a part of its assets. We are unable to see, therefore, how a finding that anything had been paid on the stock, except the $1,126 above referred to, can be upheld. This being so, there is no sufficient foundation for the original judgment, awarding to plaintiff 2,175 shares, nor yet for the modified judgment for 2,000 shares. It also follows from the foregoing discussion that finding 4, to the effect that plaintiff purchased these shares of the defendants at the agreed price of $1 per share, cannot stand.

The other points made by the appellants are of minor importance, and do not affect the substantial merits of the controversy.

The judgment and the order denying a new trial are reversed.

We concur: RICHARDS, Judge pro tem.; SHAW, J.

179 Cal. 634

HAMMAN et al. v. MILNE et al.

(L. A. 4465.)

(Supreme Court of California. Jan. 30, 1919.)

1. Public Lands 🔑117 — Patents — Collateral Attack.

Defendant in action to quiet title cannot set up as a defense the invalidity of a patent under which plaintiff claimed, as patents to land can be attacked only on direct proceeding.

2. Pleading 🔑349—Judgment on Pleadings—Admissions.

In action to quiet title, since the invalidity of a patent could not be set up as a defense, judgment was properly rendered for plaintiffs on the pleadings, where a specific denial of plaintiffs' ownership was accompanied in the same answer by admissions and allegations which made it plain that if a patent set up by plaintiffs was valid, they were the owners of the property in question.

Department 2.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by Josephine M. Hamman and others against Charles Milne and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Stutsman & Stutsman, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Wm. A. Barnhill, all of Los Angeles, for respondents.

LENNON, J. This is an action to quiet title. The appeal, based on the judgment roll alone, is from a judgment on the pleadings in plaintiffs' favor after an order sustaining plaintiffs' demurrer to defendants' amended answer without leave to amend further. The action involved certain lands in Orange county, plaintiffs' title to which, it was alleged in the second count of the complaint, was deraigned from patents issued by the state of California in 1882 and 1887 to one Shanklin, wherein the lands are declared to be nonmineral. Appellants by their answer make no attack on the validity of plaintiffs' title as deraigned from the Shanklin grant. They sought rather to defeat it by an assault on the validity of the patents themselves, alleging that the lands at the time of the grants were known to be mineral lands within the limits of a mining district, and that therefore they were not subject to selection as lieu lands. With the alleged invalidity of the patents as a basis the answer further pleaded a purported defense framed upon the theory that the lands in suit were still open to entry, and that the appellants had acquired a mining title thereto by virtue of an alleged mining location under the mining laws of the United States.

[1] The lower court upon demurrer correctly held defendants' allegations, in the particulars stated, to be unavailing as a defense, in that they sought singly and collectively to collaterally attack the patents, and that the patents were not rightfully subject to such an attack, and could be attacked only on direct proceedings and by proper parties. The reasons behind and supporting this view are clearly set forth in the case of Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527.

[2] Although the sufficiency of the pleaded defense was asserted and attempted to be upheld in the briefs filed upon behalf of appellants, still when the appeal came on for oral argument it was conceded by counsel for appellants that the case of Burke v. Southern Pacific R. R. Co., supra, which was decided subsequent to the institution of the action and the interposition of the answer, finally foreclosed all doubt and discussion of the correctness of the trial court's ruling upon the demurrer. This being so, there remains for discussion and decision the point which counsel for appellants at the oral argument expressly stated was the only one which could be urged in support of the appeal, viz. "that the court erred in sustaining the motion for judgment upon the pleadings." In this behalf appellants contend that a material issue was raised by their answer to the first count of the plaintiffs' complaint which precluded a judgment on the pleadings. This contention is rested upon the assumption that such answer unqualifiedly denied the allegation of the first count of the plaintiffs' complaint which, in the formula usual in actions to quiet title, averred that the plaintiffs for a long time prior to and at the time of the commencement of the action, through a common source of title, were the owners of and collectively in the possession of the entire tract of land in suit. Respondents, on the other hand, insist, and we think correctly, that the effect of the defendants' general denial of the plaintiffs' allegations of ownership and possession as set forth in the answer to the first count of the complaint was nullified by the fact that subsequent averments of the defendants' answer to the first count of the plaintiffs' complaint admits the plaintiffs' ownership of and title to the land in suit. In this behalf it will be noted that the plaintiffs' chain of title was specifically pleaded in the second count of the complaint, which chain of title commenced with the sovereign source of the title and ran to and rested in the plaintiffs at the time of the commencement of the action. It is affirmatively alleged, however, in each answer to the two counts of the complaint that the selection of the land in question by the state of California as lieu lands and the issuance of a patent therefor was void for the reason that the land was mineral land and known to be such by the state and government officials making and consenting to such selection. Upon this hypothesis it was further alleged in the answer to the first count of the complaint that the patent in question was void. Defendants further set up the fact in the same answer that they had located the land in question as mineral land, and were proceeding with development work with a view to discovering petroleum upon the premises in question. It is true that in the answer to the first count of the complaint there is a specific denial of plaintiffs' ownership, but this denial is accompanied in the same answer by admissions and allegations which make it plain that if the patent in question is valid plaintiffs are the owners of the property in question. Without attempting to analyze in detail the various allegations and admissions, express and implied, in the answer, we may take as a fair construction of that answer a statement by appellants in their opening brief as follows:

> "A careful reading of the amended answer interposed by the defendants will disclose * * * that this is not an effort to defeat a grant covered by patent because of conditions subsequently arising. Under the issues presented by the pleadings, defendants offered to show that the patents themselves were void, not voidable. * * * It will appear from a reading of the amended answer that the claim of the defendants rests upon the theory that the land involved is now and always has been public mineral land of the United States, and was not within the limits of the grant by Congress of the United States to the state of California."

Taking as we do appellants' statement of the substance and effect of their answer to be correct, it is clear that if they are not in any event in a position to attack the patent upon which plaintiffs' title was based, their answer is without merit, and presents no issue. A fair analysis of the two counts of the complaint and their respective answers leads solely to the conclusion that the only issue attempted to be raised between the parties by the answer concerned merely the validity of the basic patents upon which plaintiffs' title rested, and inasmuch as this was not an issuable fact, there was nothing for the court to try, and therefore judgment on the pleadings was not only warranted but proper. In other words, considering the admitted fact that the defendants cannot attack the validity of the patents in question, and that their allegations of invalidity must be disregarded, we have the defendants in their answer to the first count, admitting the issuance of a patent to public lands which they must concede for the purposes of this case to be valid, and which, therefore, as a matter of law, vested title in the patentee, and a conveyance of the right of the patentee to the plaintiffs, which would make them the owners of the land in question. The answer to the second count is merely a restatement by reference of the facts stated in the answer to the first count, and is therefore a new and express admission of the issuance of the patent and the acquisition of the rights of the patentees by mesne conveyances by the plaintiffs. It is therefore apparent that the only issue between the parties presented by the pleadings was the validity of the patent which it is conceded defendants cannot successfully raise and avail themselves of in this action.

The judgment is affirmed.

We concur: WILBUR, J.; MELVIN, J.

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179 Cal. 638

BROOME v. BROOME et al.

(L. A. 4434, 4435.)

(Supreme Court of California. Jan. 30, 1919. Rehearing Denied Feb. 27, 1919.)

1. EXECUTORS AND ADMINISTRATORS 🔑315(6)—DECREE OF DISTRIBUTION—EFFECT—MUNIMENT OF TITLE.

Where a decree of partial distribution became final prior to commencement of partition, and fixed and determined the rights of the distributees thereunder, such decree was, in absence of fraud, available as a muniment of title.

2. EXECUTORS AND ADMINISTRATORS 🔑315(6)—DECREE OF DISTRIBUTION — VALIDITY — FRAUD—EVIDENCE.

In a partition action, evidence *held* sufficient to show that a decree of partial distribution of an estate upon which the respective rights of the parties were based was obtained without fraud, upon hearings after due notice to all concerned.

3. TRIAL 🔑391—FINDING—NECESSITY—CONCLUSION OF LAW.

Whether a partition action was prematurely brought, depending upon whether a decree of partial distribution of an estate upon which the rights of the parties were based had become final, was a question involving a conclusion of law, unnecessary, immaterial, and improper to be found as a fact.

4. COSTS 🔑57—ATTORNEYS' FEES—FINDINGS —FINAL JUDGMENT.

The finding of attorneys' fees has no proper place in an interlocutory decree, since the subject of fees and costs must be left to be determined by the final findings and judgment (Code Civ. Proc. § 796).

5. LIS PENDENS 🔑17—PARTITION 🔑51 — SUMMONS — DESCRIPTION OF PROPERTY — STATUTES.

The statutory direction (Code Civ. Proc. §§ 755, 756), that the summons in partition shall contain "a description of the property sought to be partitioned" and the lis pendens "a description of the property to be affected thereby," does not call for any greater or less particularity in description than in other actions involving title to real estate.

6. PARTITION 🔑55(3)—PLEADING — DESCRIPTION OF LAND—SUFFICIENCY.

In a partition action, only such a general description is required as will lead to an identification of the property upon which the partition prayed for, if granted, will operate, and the description may be aided by extrinsic evidence.

7. PARTITION 🔑55(3)—PLEADING—DESCRIPTION OF PROPERTY—SUFFICIENCY.

The designation of land in a partition complaint "as a tract of land known as the Broome Estate ranch," together with a general description of its extent and location, coupled with the allegation of the complaint, summons, and lis pendens that it was all situate in Ventura county, constituted a prima facie description sufficient under Code Civ. Proc. §§ 755, 756, to support the action, when supplemented by proper parol identification.

Department 2.

Appeal from Superior Court, Ventura County; Robert M. Clarke and Merle J. Rogers, Judges.

Action by Thornhill Francis Broome against Frances Broome and others. From an interlocutory decree of partition of property between the parties according to their respective interests and an order denying a new trial, and from an order appointing a receiver, the named defendant appeals. Decree modified and affirmed, and order appointing receiver affirmed.

Houghton & Houghton, of San Francisco, for appellant.

Charles F. Blackstock, of Oxnard, R. L. Horton, of Los Angeles, and I. W. Stewart, of Oxnard, for respondents.

LENNON, J. This is an action in partition. The property sought to be partitioned is the following described real estate situate in the county of Ventura, state of California:

> "All that tract of land known as the Broome Estate ranch, consisting of the larger part of the rancho Guadalasca, comprising 2,000 acres more or less; the land called the 'Conejo tract,' adjoining the rancho Guadalasca on the east, comprising about 663 acres, and that part of the rancho La Colonia which is situated between the county road known as the Hueneme road, and the northwesterly boundary of said rancho Guadalasca, comprising about 463 acres, to-

gether with the buildings and other improvements thereon."

This description is quoted from the complaint, at the time of the filing of which a summons was issued containing the same description, and a lis pendens also containing it, filed in the office of the county recorder of Ventura county. The defendant Frances Broome, now appellant, demurred to the complaint on general grounds and specifically on the ground that its description of the property is not "proper, legal, sufficient, or adequate." The demurrer being overruled, the court found on the issues of the cause in favor of the plaintiff, Thornhill Francis Broome, and decreed that the property should be partitioned between the parties to the action according to their respective interests therein. There are two appeals, one from the interlocutory decree of partition and from an order denying a new trial, and the other from the order appointing a receiver. The appeals have been consolidated into one, and its four main questions are: (1) Whether the court had jurisdiction to hear and determine the cause, appellant contending in this behalf that neither the complaint nor the lis pendens adequately described the property; (2) whether the trial court erred in finding that the services rendered by plaintiff's counsel were for the common benefit of all the parties to the action; (3) whether the decree of partial distribution entered in the estate of William Francis Broome, deceased, whereunder the plaintiff and the nonappealing defendants, Montague Watson Broome and Amy Lillian Broome, claim as tenants in common an interest in the land subjected to partition can be availed of as muniment of title; and, finally (4) whether the court erred in failing to find upon the issue that the action was prematurely instituted presented by an allegation of the answer to the effect that the partial decree of distribution of the estate of the testator to the parties to the action had not become final before the date of the filing of the complaint in the action.

[1-3] The third ground of the appeal may be dismissed with the observation that, as shown by the record, the decree of partial distribution in the estate of Richard Broome having become final prior to the commencement of this action, fixed and determined the rights of the distributees thereunder, subject only to defeasance as the result of fraud (Rountree v. Montague, 30 Cal. App. 170, 178, 157 Pac. 623), and while as to the fraud alleged to have been perpetrated in the procurement of this decree it would suffice to say that the finding of the trial court that there was none is amply sustained by the evidence, still it may not be amiss to further say that the facts forming the fraud pleaded and relied upon in the answer of the defendant Frances Broome to defeat the finality of the decree of partial distribution in so far as it is claimed to have concerned and controlled the rights of the parties are, in substance, these: The parties had, some ten months prior to the procurement of the decree of partial distribution, agreed in writing, among other things, that—

> The accounts of the defendant Frances Broome, as "the former executrix of the will of William Richard Broome, deceased, of her administration of said estate to be deemed balanced as of the date of the revocation of her letters testamentary and the same shall be allowed accordingly by order of the court. * * * That all of the property of the estate, real and personal, as shown by the final account of the said Frances Broome and now in the possession of said Frances Broome, together with any income received by her from said property since her removal and not reported in said account, to be delivered to the administrator with the will annexed for the purposes of administration and distribution. * * * That the administrator with the will annexed file his final account and petition for final distribution of said estate and proceed diligently to secure the final distribution of said estate to the end that the decree of final distribution of said estate may be made on or before the 1st day of June, 1910; it being understood that this stipulation shall not be considered as a waiver of said Frances Broome's right of appeal from said final decree for the purpose of getting a legal construction of the last will of said Richard Broome, deceased, on file in this proceeding. * * * This stipulation is understood to be a complete and final compromise of all differences between the said heirs and legatees. * * *"

The foregoing agreement was made and dated April 21, 1910, and it is alleged in the complaint that the defendant Frances Broome executed the same as the result of the persuasion and inducement of the plaintiff, Thornhill Francis Broome, and the attorney who was then representing her and the other defendants jointly in the matter of the administration of the estate of said deceased. On the 29th of November, 1910, the plaintiff, Thornhill Francis Broome, filed in the estate of William Richard Broome, deceased, his petition for a partial distribution, praying, among other things, that there be set apart and distributed to him as an heir at law of said deceased two-ninths of the residue remaining of said estate after provision made for the payment of all expenses of administration. Prior to the filing of this petition for partial distribution and prior to the making of the agreement hereinbefore referred to, namely, on August 4, 1909, the defendant Frances Broome, jointly with the defendants Montague Watson Broome and Amy Lillian Broome, presented and filed a petition for the partial distribution of the estate of said deceased wherein they prayed that there be set apart to them and to each of them the proportion of said estate to which they were entitled under the terms and provisions of the last will and testament of the said deceased. On or about December 31, 1910, all of the said petitions for partial distribution came on for hearing, and that of the plaintiff, Thornhill Francis Broome, was granted, but the petitions of the defendant Frances Broome and of the other defendants were denied upon the ground that there was no provision in the last will and testament of the said deceased for distribution to said defendants save in a manner prohibited by law. Thereafter, on January 3, 1911, the plaintiff, Thornhill Francis Broome, represented by his counsel, and the defendants Amy Lillian Broome and Montague Watson Broome represented by their counsel, entered into a written stipulation entitled in the matter of the estate of William Richard Broome wherein it was provided that the submission of the respective petitions of all of the parties, including that of the defendant Frances Broome, for partial distribution, be set aside, and that the decision thereon and theretofore made be vacated, and that the petitioners Montague Watson Broome and Amy Lillian Broome might amend the prayer of their respective petitions by adding thereto and at the end thereof the following clause, to wit:

> "And your petitioners further pray that in the event the court shall so construe said will as not to permit a distribution of said estate according to its terms, the court distribute to said petitioners, and to each of them, the share of the estate to which in the opinion of the court they may be entitled respectively. * * *"

The defendant Frances Broome, although named as a petitioner with the other defendants for partial distribution in the petition as originally filed, refused to become and was not a party to the written stipulation last hereinbefore mentioned. On January 20, 1911, an order apparently in keeping with this last-mentioned stipulation was made by the court in the said estate, which recited the fact of the original filing and hearing of the several petitions for partial distribution, the proceedings had thereon and the determination thereof as above outlined, and that the same were resubmitted for decision on the evidence previously and originally received in support of the petitions; it was alleged that none of the defendants as the petitioners named in the petition for partial distribution as originally filed was represented in the proceedings which culminated in the order for resubmission, and that at no time thereafter did the defendant Frances Broome receive any notice of the making thereof, and that the petitions referred to in the stipulation for resubmission were never at any time after the making of said order actually and formally amended, nor were any amendments ever served upon said defendant Frances Broome. On June 30, 1911, following said resubmission, the court adjudged and decreed that the trust attempted to be created by the terms of the last will and testament of said deceased was void, and that the petition of the defendant Frances Broome therefore must be denied except as to the property specifically bequeathed to her, and that with that exception all of the property of the said estate belonged to the heirs at law of said deceased, and that the plaintiff, Thornhill Francis Broome, and the defendants Montague Watson Broome and Amy Lillian Broome were entitled to partial distribution of the property of said estate as in their respective interests prayed for. With these facts as a basis, it was alleged, as it is argued here, that said decree of partial distribution was obtained by fraud, in this, that it was petitioned for and granted subsequent to and despite the stipulation which purported to compromise the differences of the parties, which reserved unto the defendant Frances Broome the right of appeal from any decree of final distribution which would be ultimately entered in said estate to the end that she might procure a final legal construction of the scope and effect of the last will and testament of said deceased; and that relying upon the terms of said stipulation she was imposed upon and misled to the extent that she did not take or prosecute any appeal from said decree of partial distribution.

Now, then, is it not obvious that all of the foregoing makes much ado about nothing? While the allegations of the answer involving the claim of fraud are extensive, they are not altogether free from equivocation, and embrace but few far-fetched facts which neither singly nor collectively suffice to make a satisfactory showing of fraud which had for its purpose the deluding and deceiving of the defendant Frances Broome into sleeping upon whatever right she may have had for a revocation of the decree of partial distribution. The stipulation of April 21, 1910, which was signed in person by the defendant Frances Broome and which, while purporting to be a compromise of the differences of all of the parties interested in the estate, reserved unto said Frances Broome the right to appeal from the final decree of distribution which might be entered in said estate was, as evidenced by its very terms, entered into primarily for the purpose of initiating and stimulating proceedings looking to an early and final distribution of the estate of deceased, and neither expressly nor by necessary implication is there anything to be found in the stipulation which gave the defendant Frances Broome any assurance that the proceeding for partial distribution would not be instituted prior to an application for final distribution. Nor can we conceive how the defendant Frances Broome, because of anything contained in the stipulation, could have been misled and deceived into foregoing her undoubted right, notwithstanding the stipulation, to appeal from the decree of partial distribution.

The alleged fact that Frances Broome was in no manner made a party to the proceedings for the resubmission of the several petitions for partial distribution, including her own, and which ultimately resulted in the decree complained of, is emphasized as an evidence of the fraud alleged to have been perpetrated in the procurement of the decree, but in response to this it need only be noted that the record is barren of any evidence, or even suggestion, that she did not have notice of that proceeding or that it was instituted and consummated without her knowledge.

In so far as is concerned the knowledge of the defendant Frances Broome of the petitions for partial distribution and the proceedings had thereon from their very inception until the making and entry of the decree, it will be noted further that the decree itself recites that all of the parties were represented in court by their respective counsel, and that due notice of the hearing of the petitions had been given to all of the parties interested, and in this behalf it will be further noted that the answer of the defendant Frances Broome does not allege that the notices required by law of the pendency of the petitions and of the proceedings had thereunder were not given. In the absence of an allegation and a showing to the contrary, the presumption that the notices required by law were given must prevail. Moreover, upon this phase of the case the record shows that the notice required by law on the hearing of all the petitions for partial distribution was given, and in addition the record contains much evidence to the effect that the defendant Frances Broome was in court on every occasion when there was any hearing in reference to the estate of William Richard Broome, deceased. In short, the evidence, direct and presumptive, upon this phase of the case preponderates in favor of the finding of the trial court in this action that the defendant Frances Broome had "notice of all matters pending which culminated in the making of said decree of partial distribution," and that she was not in "any manner imposed upon or misled in connection with the obtaining of said decree of partial distribution or in connection with a reliance upon the finality and conclusiveness of the same, or imposed upon or misled at all." This view compels the conclusion that the decree of partial distribution constituted a sufficient muniment of title, and disposes of the further contention that the action was prematurely brought. A determination of the latter question involved but a conclusion of law, unnecessary, immaterial, and improper, therefore, to be found as a fact.

[4] It is apparently conceded that the finding of the trial court relative to the allowance of attorneys' fees is not supported by the evidence, but in any event the finding of attorneys' fees had no proper place in the interlocutory decree and therefore the judgment must be modified in that particular, leaving the subject of fees and costs to be determined by the final findings and judgment. Code Civ. Proc. § 796; Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594; 30 Cyc. 301.

[5, 6] Concerning the sufficiency of the description of the property sought to be partitioned to confer jurisdiction upon the court below to hear and determine the action, it is the contention of appellant, concisely stated, that the description of the land contained in the complaint, summons, and lis pendens in a suit in partition must so describe the land sought to be partitioned as to render possible its location by a competent surveyor without the aid of extrinsic evidence. This contention is in effect, rested largely upon the assumption that the statutory direction (Code Civ. Proc. §§ 755, 756), that the summons in partition shall contain "a description of the property sought to be partitioned" and the lis pendens "a description of the property to be affected thereby," calls for more particularity in the description of the property to be partitioned than is ordinarily required in other and different actions involving the title to the real property. No good purpose would be subserved by following the refinements of reasoning which permeate an elaborate and admirable brief presented in support of this contention, and we think it will suffice to say that, having in mind the language of the Code sections under consideration, certainly no greater or less effect need be accorded descriptive words in the pleadings and preliminary process and proceedings in partition than that required to be accorded to descriptions and descriptive phrases in other actions involving the title to real property. "There is, indeed, authority for the position that the description in a complaint in partition may properly be less precise than elsewhere." 30 Cyc. 218. Ordinarily, only reasonable certainty in description of property sought to be partitioned is required in the pleadings and proceedings in an action in partition, and this is primarily for the purpose of showing that the property is within the jurisdiction of the court so as to permit the defendant, if need be, to properly traverse the plaintiff's title and enable the court to definitely determine and define the mode and extent of the partition to be made, and, finally to aid the commissioners upon an interlocutory decree to ascertain the estate ordered to be distributed in keeping with the terms of the partition. Consequently, only such a general description in limine is required as will lead to an identification of the property upon which the partition prayed for, if granted, will operate. Sumner v. Hill, 157 Ala. 230, 47 South. 565; Thruston v. Minke, 32 Md. 571.

In the case of Sumner v. Hill, supra, which was an action for partition, it was held that under the authorities there could be no question but that the designation of the property which was the subject-matter of the action as the "Hancock place" was a sufficient description when supplemented by proper parol identification. To the same effect is the case of Bogan v. Hamilton, 90 Ala. 454, 8 South. 186, which involved the sufficiency of a description which designated the property sought to be subjected to a vendor's lien as "well known as the Shook farm or place on the Coosa river." See also the case of Thruston v. Minke, supra, wherein it was held that the property to be partitioned was sufficiently described when described "of all that piece or parcel of ground situate in the city of Cumberland called and known as the 'St. Nicholas Hotel property.'" While no authorities from California have been cited to us and we have found none bearing directly on the precise question under consideration here, still the two cases of Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, and Houghton v. Kern Valley Bank, 157 Cal. 289, 107 Pac. 113, which deal with the sufficiency of descriptions embodied in actions to enforce street assessments and tax sales, enunciate principles and rules readily applicable, we think, to the question presented in the case before us. The case of Baird v. Monroe, supra, although primarily an action to quiet title, nevertheless had for its basis a proceeding in invitum to the extent that it involved the sufficiency of the description of the property in suit as set forth in an assessment proceeding for the opening and widening of a city street, and there this court said, in effect, that a description "sufficient to identify the land" involved is one which, in conjunction with the knowledge presumptively possessed by property owners of the community in which the land is situated, operates to give notice of the exact property to be assessed, and that therefore "a description of a tract of land by name is prima facie sufficient in an assessment, as it is presumed that the tract [of land] is well known by name * * * and, further, that the question as to whether the description is sufficient to identify the land is a question of fact to be determined from the evidence presented upon that issue." The case of Houghton v. Kern Valley Bank, supra, held that the question of whether or not a description in an assessment for taxes was sufficient was a question of fact to be determined by the trial court upon such evidence as may be presented to show its sufficiency to identify the land.

[7] Surely no greater strictness in description should be required in an action in partition than that applied to descriptions involving the validity of proceedings in invitum, and consequently we think there can be no question but that the designation in the complaint, summons, and lis pendens in the action before us of the land sought to be partitioned "as a tract of land known as the Broome Estate ranch," together with a general description of its extent and location, and coupled with the allegation of the complaint, summons, and lis pendens that it was all situate in the county of Ventura, constituted a prima facie description sufficient, within the meaning of sections 755 and 756 of the Code of Civil Procedure, to warrant and support the institution of the action and which, when ultimately supplemented at the trial of the action, as was done, by proper parol indentification, was amply sufficient to enable the court to hear and determine the merits of the action.

The appeal from the order appointing a receiver is founded in the contention that the trial court was without jurisdiction to entertain the action at all. This appeal is therefore disposed of by our conclusion previously stated concerning the jurisdiction of the trial court.

The decree appealed from is modified by striking therefrom the allowance of attorneys' fees, and, as so modified, the decree and the order appointing a receiver will stand affirmed.

We concur: WILBUR, J.; MELVIN, J.

39 Cal. App. 219

RAISCH v. WARREN et al. (Civ. 2564.)

(District Court of Appeal, First District, Division 1, California. Dec. 19, 1918. Rehearing Denied by Supreme Court, Feb. 17, 1919.)

1. PARTNERSHIP ⚷53 — SUFFICIENCY OF EVIDENCE—EXISTENCE OF PARTNERSHIP.

In action for accounting, evidence *held* to sustain finding that there was no partnership between plaintiff and defendant's intestate.

2. APPEAL AND ERROR ⚷1011(1)—REVIEW—CONFLICTING EVIDENCE.

The weight of conflicting evidence was for the trial court.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. J. Raisch against Charles A. Warren, Jr., administrator, etc., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of San Francisco, of counsel), for appellant.

Thos. B. Dozier, J. E. Pemberton, and Thomas B. Dozier, Jr., all of San Francisco, for respondents.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

STURTEVANT, Judge pro tem. This action was brought by the plaintiff against the administrator of the estate of Charles A. Warren, deceased, and his heirs, for the purpose of securing an accounting arising out of an alleged partnership, and a judgment in plaintiff's favor for such amount as might be found due.

Upon the trial of the case, and when objection was made to plaintiff and another witness, Buckman, being allowed to testify in support of their claim, plaintiff's counsel having concluded that it was not within the power of the court to render a money judgment, waived that petition in the prayer, and the action proceeded merely for an accounting.

It was stipulated that if deceased was found to be a partner, the liability for contribution resting on his estate aggregated the sum of $182,792.14.

Judgment was for defendant, and plaintiff appeals.

[1] It is the claim of plaintiff that Charles A. Warren, A. E. Buckman, and plaintiff entered into and formed a partnership for the purpose of bidding upon and securing certain contracts, among which was one from the United States government relating to what is known as the Truckee-Carson project of Nevada, a scheme for the diversion and conveyance of water from the Truckee river in the state of Nevada to the irrigable lands in the Truckee and Carson valleys, situate in that state. After alleging the creation of the partnership and its purposes, the complaint proceeds to set forth the facts in connection with the submission of bids and of the securing of the contracts desired. It then recites the performance of the work at a substantial loss, and the fact that no accounting between the parties was ever had. At the trial it was shown that the plaintiff and his associate and assignor were for many years engaged in business as contractors, and that they did an extensive business. It was further shown that Charles A. Warren, now deceased, was engaged in the same business. The parties generally acted independently of each other, but occasionally they took contracts as a joint adventure after the manner of partners. Early in 1903 Warren concluded that it would be a more businesslike way in proceeding in their joint adventures to form a corporation for that purpose. Accordingly, one was formed under the name of C. A. Warren & Co., in which each of the parties held one-third of the stock. Shortly after this arrangement was made the United States government solicited bids for certain irrigation work known as "The Truckee-Carson Project." The newly formed corporation bid on this work. One of its bids was accepted, and a contract was entered into by it with the government. Shortly thereafter and before much work was done Warren, for certain reasons, desired to be relieved from the responsibilities connected therewith, and a contract was entered into by him with plaintiff and Buckman with that end in view. This agreement was destroyed in the fire of 1906, and its terms are disputed by the parties. Plaintiff claimed that it provided that since Warren was unable to take the active interest in the work that the importance of the project required, he should be allowed to withdraw from an active participation in connection therewith, and should have as his share of the profits $12,500, to be paid out of the last sums received from the government on the contracts, but that no modification in relation to any losses that the parties might sustain was ever had. Defendants, on the other hand, contended that the agreement expressly exonerated Warren from the duty of making contribution in the event that the parties sustained a loss on their contract. At the time this agreement was made there existed another corporation known as the San Francisco Construction Company, of which Raisch and Buckman owned virtually all the stock, and in which Warren had no interest as partner, stockholder, or otherwise. In consideration of the $12,500 provided for in the agreement to be paid to Warren the contract of the Charles A. Warren Company was assigned to the San Francisco Construction Company. Thereafter this latter company furnished its own credit and all money necessary for a full performance of the contract, and received all payments due thereunder, and carried on all the accounts of the transaction on its own books. Later it entered into two other contracts connected with the same project in its own name. The facts further show that after receiving the assignment of the original contract, plaintiff, on behalf of the company to whom the assignment was made, arranged with the Anglo-California Bank to finance this company. Notes executed by this corporation were given to the bank, and certain collateral owned by plaintiff and Buckman was hypothecated as security for their payment. Advances up to half a million dollars were arranged for, and eventually over $400,000 was actually paid out by the bank on account thereof. Warren never contributed any money to the enterprise, or joined in the execution of any of the notes of the company. The money so borrowed was placed to the credit of the San Francisco Construction Company and was checked out by it. There is also evidence in the record showing that plaintiff had made statements that Warren had no interest in the contracts and was not liable for any of the losses. Under these and other circumstances the trial court was fully justified, as it did, in finding that no partnership existed between the parties, but that the contract was one performed by the

San Francisco Construction Company for its own benefit, in which Charles A. Warren had no interest, either as partner, stockholder, or otherwise.

[2] In addition thereto there is ample evidence to show that the agreement entered into between the parties and heretofore referred to did by its terms release Warren from all liability under the contract. It is true that upon the questions presented there was a conflict of testimony. This, however, was a matter for the determination of the trial court.

From what we have said, it follows that the judgment appealed from should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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39 Cal. App. 223

KING v. HERCULES POWDER CO.

(Civ. 2592.)

(District Court of Appeal, First District, Division 1, California. Dec. 20, 1918. Rehearing Denied by Supreme Court Feb. 17, 1919.)

1. Trial ⚷139(1)—Nonsuit—When Proper.

Defendant's motion for nonsuit was properly granted, where, if it had been denied, and a verdict found for plaintiff, the verdict would have to be set aside as contrary to the evidence.

2. Appeal and Error ⚷927(3)—Review—Motion for Nonsuit.

While, on defendant's motion for nonsuit, every intendment is to be indulged in favor of plaintiff, yet there is no material difference between rule governing court on appeal in consideration of sufficiency of the evidence, where the court below has directed a verdict, from that prevailing where a nonsuit has been granted after the evidence for both parties has been given.

3. Trover and Conversion ⚷40(1) — Evidence—Sufficiency.

In action for conversion of two mares and for injuries inflicted resulting in the death of one and permanent damage to the other, evidence *held* insufficient to justify a verdict or finding for plaintiff.

4. Master and Servant ⚷330(1)—Evidence of Relation—Sufficiency.

In action for conversion of two mares, and for injuries inflicted, resulting in the death of one and permanent damage to the other, evidence that mares were used by servant of an independent contractor was sufficient to overcome presumption that one found performing work for another is prima facie his servant, and defendant's motion for nonsuit was properly granted.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by J. B. King against the Hercules Powder Company and others. Complaint dismissed as to all but named defendant. After all the evidence was in, motion of defendant named for nonsuit was granted, and plaintiff appeals. Affirmed.

McPike & Murray, for appellant.

Pillsbury, Madison & Sutro, M. R. Jones, and Creed, Jones & Dall, all of San Francisco, for respondent.

LENNON, P. J. This is an appeal by the plaintiff from a judgment for a nonsuit. The action was brought for conversion of two Percheron mares, and for injuries inflicted, resulting in the death of one and permanent damage to the other. The action was originally brought against the present defendant and against the Hercules Water Company, J. O'Neill, J. Fassler, and certain fictitious defendants. None of the defendants, other than the Hercules Powder Company, were ever served, and at the time of the trial plaintiff dismissed as to all the other defendants. The defendant Hercules Powder Company filed an answer denying that it had ever taken and used the mares, or in any way injured them. At the conclusion of plaintiff's case, defendant moved for a nonsuit, which motion was denied. After all the evidence was in, the defendant again moved for a nonsuit, which was this time granted, on the ground that, if the horses were used, they were used by one O'Neill, or his agents, and that O'Neill was an independent contractor.

[1] The appellant contends that the case should have been submitted to the jury, and that the granting of the nonsuit was error. We think the motion was properly granted. It is settled law in this state that such a motion can be granted at the end of all of the testimony in a case. Geary v. Simmons, 39 Cal. 224; Estate of Morey, 147 Cal. 495, 82 Pac. 57.

The rule is expressed in Geary v. Simmons, supra, where it is said that a court is justified in granting defendant's motion for nonsuit after the evidence on both sides has been heard in a case, where, if the motion had been denied, and a verdict found for plaintiff, it would have been set aside, as not supported by, but contrary to, the evidence. Indeed, in the case of Estate of Caspar, 172 Cal. 147, 155 Pac. 631, relied upon by the appellant, the court expresses the same idea in the converse of the proposition by saying that, if the contestant did present evidence of so substantial a character as that, notwithstanding the conflict raised by proponent's evidence, it would support a verdict in favor of contestant, it would have been error for the court to have granted a motion for a nonsuit.

[2] We therefore come to a consideration of the evidence. While it is true that every

intendment is to be indulged favoring any reasonable inference that can be drawn for the plaintiff, yet the law on the subject is clearly stated in the Estate of Morey, 147 Cal. 495, 82 Pac. 57, where it is said:

> "There is, however, no material difference between the rule governing this court, in the consideration of the sufficiency of the evidence where the court below has directed a verdict, from that prevailing where a nonsuit is granted on motion made after the evidence for both parties has been given. In Lacey v. Porter, 103 Cal. 605, 37 Pac. 637, which is the only California case on the subject, the court says: 'To justify the court in directing a verdict it is not necessary that there should be no conflict in the evidence; but where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had. But in either case the decision of the court below will be sustained, unless the appellate court can clearly see that its conclusion is wrong upon the facts.'"

[3, 4] Upon an examination of the evidence, we are satisfied that it fails to prove a sufficient case to justify a verdict or finding in favor of the plaintiff. While it is true, as contended by appellant, that the fact that one is found performing work and labor for another is prima facie evidence of an employment, and such person is presumed to be the servant and employé of that other in the absence of evidence to the contrary, yet it has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that, when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply overcome and is dispelled. Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922. The presumption in the present case was certainly overcome by an abundance of positive evidence in the case offered by the defendant, which showed, beyond doubt, we think, that the horses were used by the agents or servants of O'Neill, and that O'Neill was an independent contractor. Under such facts, the motion for a nonsuit was properly granted, for, if the verdict had been for the plaintiff, the trial court would have been compelled, we think, to set it aside as contrary to the evidence.

Appellant also contends that defendant was estopped from introducing evidence to show that O'Neill was an independent contractor, or did the work in question, because of certain denials contained in its answer, which appellant construes as denials of these facts. The paragraph of the answer relied upon was a denial upon information and belief, and was "in regard to the actions of defendants Hercules Water Company and J. Fassler," and we think it cannot be fairly construed to relate to the actions of any other of the defendants.

The other points raised by appellant seem to us to be without merit.

The judgment is affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

39 Cal. App. 200

GNARINI v. BANCA SVIZZERA AMERICANA. (Civ. 2607.)

(District Court of Appeal, First District, Division 1. California. Dec. 18, 1918.)

BANKS AND BANKING ⟹134(1) — NOTE OF PARTNERSHIP—SECURITY BY MORTGAGE—EVIDENCE.

Evidence *held* sufficient to justify trial court's finding that second note for balance due on original note executed by partnership whose business was subsequently incorporated under same name was not note of company, but was one of original firm, and secured by mortgage when payee bank endeavored to apply to its payment deposit of corporation.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by A. A. Gnarini, as trustee, etc., wherein James A. Harrold was substituted as plaintiff, against the Banca Svizzera Americana, also known as the Swiss American Bank of Locarno. From judgment for plaintiff, defendant appeals. Affirmed.

W. H. Metson, F. A. Denicke, and H. S. Young, all of San Francisco, for appellant.

Robert B. Gaylord and Charles A. Shurtleff, both of San Francisco, for respondent.

STURTEVANT, Judge pro tem. This is an appeal by defendant from a judgment in favor of plaintiff on the second trial of this action. On the first appeal a judgment in favor of defendant was reversed by the Supreme Court on rehearing, after disagreement in this court. Upon the second trial the court below rendered judgment in favor of plaintiff, and this appeal is from such judgment.

Briefly stated, the facts involved are as follows: On February 2, 1903, the firm of Cain, Boyd & Corriea executed to the defendant bank a note in the sum of $2,000, upon which the sum of $100 was subsequently paid. The payment of this note was secured by a mortgage given by Cain, a member of the firm, to the defendant bank. This mortgage also secured an individual note of

Cain's. The mortgage contained a clause that it was given as security for the repayment of all other and further advances that might be made to the firm of Cain, Boyd & Corriea. The bank made the $2,000 loan to the firm upon the faith in this clause in the mortgage. On December 11, 1903, a corporation by the name "Cain, Boyd & Corriea" was formed, of which corporation Cain was president. On June 4, 1904, a new note was executed to the bank for the sum of $1,900, balance. This note was signed and delivered by Cain to the bank, but there is nothing on its face to indicate that it was a corporate note, the signature being identical with the original note. On the 15th day of June a petition was filed for an adjudication that the corporation was bankrupt, and on July 1, 1904, it was so declared.

Six days after the execution of this note, and five days before the filing of the bankruptcy petition, the corporation had on deposit with defendant bank the sum of $1,843.60, and at this time the bank purported to apply this deposit on account of the note. The note was stamped "Paid" and returned to Cain, Boyd & Corriea. The original note of February 2, 1903, was also stamped "Paid" by the bank and returned to the makers.

Upon the former appeal the Supreme Court adopted the opinion of Mr. Justice Kerrigan, holding that the mortgage secured the indebtedness and not the note; that the indebtedness continued to be secured by the mortgage notwithstanding the execution of the renewal note; and that the bank had no right to apply the deposit to the payment of the second note. See Gnarini v. Swiss American Bank, 162 Cal. 181, 121 Pac. 726.

With two exceptions, the evidence presented to the superior court upon the second trial is identical with the evidence which was considered by the Supreme Court upon the former appeal. This evidence was presented to show that it was intended by the exchange of notes to release the old indebtedness and the mortgage security, thus making the renewal note one of the corporation, and enabling the bank to apply the deposit, which it did, to the payment of the note. The "new evidence" relates to the bank's bookkeeping methods, and also to certain conversations had between Cain and an officer of the bank. With reference to evidence relative to the bookkeeping, it is claimed by appellant that the ledger account shows that after the organization of the corporation the account was changed to read "Cain, Boyd & Corriea, Inc.," and, further, that in the notebook of the bank under the heading of "Indorser" the original entry "secured by property" was changed after the execution of the second note to read "personal security."

There is no proof in the record as to the exact date when the word "Inc." was inserted in the ledger. The person making the entry was not produced by the bank. In relation to the conversations had between Cain and the officer of the bank, the record shows that they merely referred to the effect of an incorporation on the firm's business, and in no manner indicated that any novation was intended.

We do not deem it necessary to comment upon or discuss the evidence further than to say that it is sufficient to justify the finding of the trial court that the second note was not a corporation one, but that it was one of the original partnership, and was secured by a mortgage when the bank endeavored to apply the deposit of the corporation to its payment. This being so, the decision on the former appeal is controlling.

Judgment affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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39 Cal. App. 266

KUCK v. McCONNELL. (Civ. 2636.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1918. Rehearing Denied by Supreme Court Feb. 20, 1919.)

1. APPEAL AND ERROR ⚷1011(1)—FINDINGS UPON CONFLICTING EVIDENCE—CONCLUSIVENESS.

In an action to rescind a contract for fraud, a finding for plaintiff on conflicting evidence, there being some evidence on which finding could be predicated, will not be disturbed on appeal.

2. APPEAL AND ERROR ⚷684(2)—RECORD—SUFFICIENCY.

The contention that the court abused its discretion by denying defendant a continuance to produce evidence to meet trial amendments to plaintiff's original complaint cannot be heard, where the record does not contain the original complaint or show in what the amendments consisted.

3. CONTINUANCE ⚷33 — ABSENCE OF WITNESSES—STIPULATION AS TO THEIR TESTIMONY.

Where plaintiff amended his complaint upon trial, it was not an abuse of discretion to refuse defendant a continuance to secure witnesses, where plaintiff's attorney stipulated that defendant's witnesses would testify, as stated by defendant's counsel.

4. APPEAL AND ERROR ⚷1043(7)—REFUSAL OF CONTINUANCE—HARMLESS ERROR.

In action to set aside land contract where the trial court made findings of several distinct misrepresentations by defendant, any one of which would have been sufficient to support judgment, some of which were alleged in the complaint before amendment, defendant was not prejudiced by denial of a continuance to secure witnesses to meet issues raised by such amendment.

5. VENDOR AND PURCHASER ⚷105(1) — RESCISSION OF CONTRACT—REIMBURSEMENT.

The objection that the decree rescinding for fraud a contract selling land should have provided that plaintiff reimburse defendants for expenses for upkeep of the property is without merit, where the defendant showed no evidence of such expenses and had the use of the $16,000 ranch for more than three years; the value of the use being probably greater than the upkeep.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Henry Kuck against E. W. McConnell. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise & O'Connor, of San Francisco, for appellant.

Elliot Johnson, of San Francisco, for respondent.

STURTEVANT, Judge pro tem. This is an appeal from a judgment for the plaintiff. The facts of the case are, in brief, as follows:

On February 17, 1915, the plaintiff and defendant entered into a written agreement by which the plaintiff was to convey to defendant certain real property situated in Glenn county, Cal., and defendant was to pay therefor the sum of $5,000 cash and 1,500 shares of preferred stock and 1,500 shares of common stock of Consolidated Concessions Company, a corporation. Pursuant to this agreement on March 17, 1916, a deed was executed by plaintiff, and defendant delivered to him the sum of $5,000 and the stock provided for in the agreement. Later, the plaintiff attempted to rescind the contract because of certain alleged false representations alleged to have been made by defendant, and brought this action for the recovery of the consideration paid by him under the contract.

The trial court found that the contract was procured through fraud and misrepresentation, and a decree was entered accordingly, directing a restoration of the consideration from each party to the other.

[1] The appellant contends first that the findings with respect to the misrepresentations made by defendant to plaintiff are not supported by the evidence. The record shows conflicting evidence, but it discloses some evidence upon which the findings can reasonably be predicated, and under such circumstances this court may not inquire into the weight of the evidence.

Upon the question of whether the plaintiff relied and acted upon the false representations made to his agents, or whether he sought independent advice on these subjects, there is also conflict in the evidence, which conflict the trial court has resolved in favor of the plaintiff by its finding that he acted upon said false representations to his damage. This finding also may not be disturbed on appeal.

[2, 3] Appellant next contends that the trial court was guilty of an abuse of discretion in denying the motion for a continuance to produce evidence to meet the allegations which plaintiff made by way of amendment to his complaint at the time of trial. The appellant has failed to include in the record a copy of the original complaint. The second amended complaint is before the court, but we are unable to determine whether the amendment raised new issues or not, without a copy of the original complaint for the purpose of comparison. But apart from this, we think this contention is without merit for the reason that the record discloses that the attorney for plaintiff stipulated at the trial that the defendant's witnesses, if called, would testify as stated by counsel for defendant. We think this stipulation was sufficient to warrant a denial of the continuance, and that defendant could not have been prejudiced by such ruling under the circumstances. The matter was within the discretion of the trial court, and the facts do not suggest an abuse of discretion.

[4] Also, the trial court made findings of several distinct misrepresentations made by defendant to plaintiff, any one of which would have been sufficient to have supported the judgment, and some of which, it is admitted by defendant, were alleged in the complaint before the amendment complained of, and on account of which the continuance was requested. We therefore think that, upon an examination of the entire record, there can be no doubt that justice has been done between the parties.

[5] The tender of restoration made by the plaintiff, in exercising his right of rescission of the contract, was made in the language of the statute. He offered to restore to the defendant "everything of value or otherwise" received from defendant, which offer was refused by defendant. The contention that the trial court should have provided in its decree that the plaintiff reimburse the defendant for any expenses to which he might have been put in the upkeep of the property is also without merit. Defendant did not introduce any evidence that he had been put to any expense, and he has had the value of the use and occupation of a ranch valued at $16,000 for more than three years. The value of the use and occupation of this property is probably greater than the expense of its upkeep, plus the interest on the $5,000 received by plaintiff; and, if none of these items were taken into consideration by the trial court, this fact would seem to be in favor of the defendant. At any rate, if defendant had any complaint upon this ground, he

should have introduced evidence upon this point. In the absence of any information in the record concerning his expenditures, the decree is certainly an equitable one.

The judgment is affirmed.

I concur: BEASLY, Judge pro tem.

39 Cal. App. 195

SHULER v. CORL. (Civ. 2592.)

(District Court of Appeal, Second District, Division 1. California. Dec. 18, 1918.)

1. Limitation of Actions 🔑202(2)—Presumptions—Record on Appeal.

Where it cannot be determined from record when complaint was filed, but it appears that second amended complaint was filed on certain date, it will be assumed as affecting limitations that date of filing of second amended complaint was date of commencement of action.

2. Limitation of Actions 🔑50(2)—Master and Servant 🔑8(3)—Contracts of Employment—Accrual of Cause of Action.

A contract of employment "for as long a period as plaintiff should choose to work for defendant, whether a month or years," at $30 per month, was a contract from month to month, and the various sums of money which would become due to plaintiff would accrue at end of each month, at which time limitations would begin to run.

3. Limitation of Actions 🔑178—Mutual and Open Account.

In action for personal services based on a contract executed out of the state, allegations of complaint *held* not to sufficiently show course of reciprocal transactions between the parties such as would bring plaintiff's claim under the four-year statute of limitations (Code Civ. Proc. § 337) and relieve it from bar of two-year statute (section 339).

4. Limitation of Actions 🔑178—Mutual Account—Pleading.

In action for personal services based on a writing made out of the state, where it was alleged in complaint that defendant "allowed plaintiff, or caused to be paid to plaintiff, or suffered to be collected by plaintiff, certain sums of money," it must be assumed, in absence of any positive allegation regarding the same, that such sums were applied as payment for services rendered, and not that reciprocal demands arose which would relieve the main claim of plaintiff from bar of two-year statute of limitations (Code Civ. Proc. § 339), and bring it within four-year statute (section 337).

5. Limitation of Actions 🔑54(2)—"Mutual Account"—Payments of Money.

A payment, whether it be of money or of any article of personal property of stipulated value, made on account, would not make the account a "mutual account," within the meaning of four-year statute of limitations. Code Civ. Proc. § 337.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual Accounts.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Evalina Shuler against John Y. Corl. Judgment for defendant, and plaintiff appeals. Affirmed.

George M. Harker, of Los Angeles, for appellant.

Ernest B. Coil, of Los Angeles, for respondent.

JAMES, J. Plaintiff sued to recover a sum of money in excess of $5,000 as compensation for services alleged to have been rendered to the defendant. A demurrer was sustained to the second amended complaint, and plaintiff declining to amend further, judgment followed in favor of the defendant, from which judgment this appeal is taken.

[1] By the demurrer the defendant particularly urged that the alleged causes of action set out in the amended complaint were barred by both the two-year and four-year limitation. Sections 337, 339, Code Civ. Proc. It was further urged that the contract as claimed by the plaintiff was void under the statute of frauds as being one which was not to be performed within a year from the making thereof. It cannot be determined from the record presented when the original complaint was filed in the action, but it does appear that the second amended complaint was filed on the 7th day of November 1914. In the absence of a different showing made by appellant, we must assume, for the purpose of considering the question relating to the statute of limitations, that this was the date of the commencement of the action. The amended complaint may not be exhibited as an example of concise pleading; its allegations extend to much detail, containing many matters of recital and disjunctive assertions. After alleging the residence of the parties to be in the county of Los Angeles, paragraph II of said complaint proceeds as follows:

> "That, to wit, within one (1) month before the 1st of May, 1900, the plaintiff, then working for a drug company at a salary of thirty ($30.00) dollars per month at the city of Amsterdam, state of New York, received through the United States mail a written offer from the defendant, then residing at Spencer, state of South Dakota, to engage the plaintiff's labor and services in general housework for as long a period as the plaintiff should choose to work for defendant, whether a month or years, and in said letter defendant promised to pay plaintiff for said work a reasonable sum, and specifically promised to pay her in excess of what she

was receiving at that time, to wit, thirty ($30.00) dollars per month, exclusive of her lodging and board, which reasonable value for said work, throughout all times mentioned in this complaint, the plaintiff has claimed and still alleges to be forty ($40.00) dollars per month, exclusive of her said room and board."

The next allegation recites that the plaintiff accepted the offer of the defendant and went, on the 1st day of May, 1900, to the place of residence of the defendant, then in South Dakota, and entered upon the performance of the services, and that she continued to work for the defendant up to May 31, 1912, except during the months of February and April of that year; she then alleges that defendant changed his residence several times after she entered upon her work with him; that he resided in South Dakota until September 1, 1900; that he resided at Minneapolis from September 1, 1900, to October 1, 1903; that he resided at Fairmont, Los Angeles county, from October 1, 1903, to May 31, 1912. It is then alleged that—

> "There was never any specific understanding or agreement between the plaintiff and defendant as to just when said services were to be paid for, except that she was to have her pay in full upon quitting his services; that from as early as the first year of her said employment plaintiff requested defendant to pay, at odd times, the specific times she cannot now recall, what he was able to pay, and plaintiff has since said first year, throughout all the years aforesaid, times too numerous to mention and the dates and places of which she cannot specifically recall, demanded of defendant the amounts above set out, or any amount he was able to pay at said various times, on account; but he (the defendant) did invariably promise that he could not pay then, but that he could and would pay her up in full for all her services later on, not mentioning any particular time; and particularly in the month of December, 1911, a more specific date plaintiff cannot recall, at the said Fairmont residence, this county and state, said defendant did again promise to pay her in full for all her services, not mentioning any particular amount, but that, defendant not having kept his promises, nor any part of them, plaintiff, in said month of May, to wit, May 31, 1912, finally quit said employment and terminated her services for the defendant then and there, at said Fairmont, Cal."

It will be noticed that more than two years elapsed from the date when the plaintiff quit the services of defendant to the date of the commencement of her suit. An attempt is made further by the plaintiff to show a course of mutual dealing between plaintiff and defendant so as to bring the account within the characterization of "open, mutual, and current."

[2] Before considering the question last suggested, it may be stated that, in our opinion, the contract as made with the defendant was a contract from month to month, notwithstanding she has alleged that the offer was to engage her "for as long a period as the plaintiff should choose to work for defendant, whether a month or years." Literally considered, the plaintiff's employment under the contract, as she alleges it, was for life, unless she chose sooner to terminate it; the defendant had no option in that matter. Such contracts, where the engagement has been asserted to be that for "permanent" employment, are held to mean that it is to continue so long as both parties agree and that either one may terminate it. Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82; Christensen v. Pacific Coast Borax Co., 26 Or. 302, 38 Pac. 127; Speeder Cycle Co. v. Teeter, 18 Ind. App. 474, 48 N. E. 595. We are of the opinion that it should be held, under the contract here alleged, that the various sums of money which would become due to plaintiff would accrue at the end of each month during the period of her employment. The "written request" by which the engagement of employment was proposed was made out of the state. The two-year statute of limitation had fully run as against the claims for monthly compensation. The second and third counts in the complaint are statements of the same alleged cause of action framed in general to answer the requirements of common count pleading. For the reason we have given, the same statute of limitation would apply in bar of those causes of action.

[3-5] The second question presented is as to whether, under the allegations of the amended complaint, it may be said that a mutual, open, and current account is shown to have existed between plaintiff and defendant, so as to make applicable the four-year statute. Section 337, Code Civ. Proc. We have examined the cases cited by appellant in support of the contention that a mutual account is shown, among them Santa Rosa National Bank v. Barnett, 125 Cal. 407, 58 Pac. 85, and Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70. In this case plaintiff first alleged, as showing her indebtedness to the defendant, as follows:

> "That throughout the time the plaintiff worked for defendant as aforesaid, the defendant has allowed the plaintiff, or caused to be paid to the plaintiff, or suffered to be collected by the plaintiff, certain sums of money specifically set out in Exhibit A, made a part of this complaint, to the amount of $748.30, but whether the defendant intended said sums to apply on what the defendant owes and did owe the plaintiff, the plaintiff is unable to state, because there has never been any specific understanding or agreement concerning the same."

This allegation follows:

> "That on the other hand, plaintiff had loaned and advanced to the defendant small amounts of money at odd times, at defendant's then place of residence, wherever it was, as above set out, between the years January 1, 1907, to August 1, 1912, as specifically set out in Exhibit A, and the plaintiff has also transferred and set over to defendant, at defendant's request, vari-

ous furniture and kitchen utensils belonging to plaintiff, the reasonable value of which was $50, as specifically set out in Exhibit A, the total amount of said open account due from defendant to plaintiff, for money loaned and goods, wares and merchandise as aforesaid, being $170, none of which has ever been paid by defendant to plaintiff."

As to the sum of money alleged to have been received by the plaintiff, the allegations are in the disjunctive as to how that money was received, but the allegation is positive that there never was any specific understanding or agreement concerning the application of the same. Construing that allegation most strongly against the pleader, where she herself makes no positive allegation regarding the same, we must assume that it was applied as payment and if so applied, on amounts which had previously accrued in her favor; and if this was done no reciprocal demand would arise. As said in Norton v. Larco, supra:

> "A payment, whether it be of money or of any article of personal property of a stipulated value, made on account, would not make the account a mutual account consisting of reciprocal demands. * * *"

We have quoted the allegation respecting the other matters alleged to constitute items showing the account to be mutual, open, and current. In our opinion, they do not sufficiently show a course of reciprocal transactions had between the parties within the rule of the cases, and did not relieve the main claim of the plaintiff from the bar of the statute.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

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39 Cal. App. 253

CARO v. MATTEI. (Civ. 2604.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1918. Rehearing Denied by Supreme Court Feb. 20, 1919.)

1. Principal and Agent 🔑81(4)—Right to Commissions—Construction of Contract.

Contract for commissions on all sales of liquor made in designated territory construed to entitle agent to commissions on sales, where his customers made particular purchases at the principal's winery, not in such district; delivery being made in the agent's district.

2. Customs and Usages 🔑10—Trade Usage.

In an agent's action on a contract for commissions on all sales of wine and brandy within designated district, evidence was admissible of a trade usage whereby an agent is allowed commission on sales made to customers in the agent's territory, directly by the principal.

3. Appeal and Error 🔑1071(1)—Review—Harmless Error.

In action for commissions for sale of wines and brandy under a contract requiring commissions to be calculated on a minimum price, that referee took as the minimum the lowest price at which any grade of brandy or wine was sold during any six-month period, if error, *held* harmless, where court took testimony independent of report, and it did not appear that the court acted upon the referee's tabulation.

4. Appeal and Error 🔑931(5)—Review—Presumptions.

The court on appeal will not assume that the lower court ignored the evidence.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by A. Caro against A. Mattei. From the judgment and from order denying motion for new trial, defendant appeals. Affirmed.

Barbour & Cashin, Alva E. Snow, and G. C. Freeman, all of Fresno, for appellant.

Everts & Ewing, of Fresno, for respondent.

PER CURIAM. This is an appeal by defendant from a judgment and from an order denying his motion for a new trial in an action for commissions upon sales of wine and brandy, of which the defendant was a manufacturer. By a contract dated January 2, 1912, he employed the plaintiff "as his sole representative for the sale of wines and brandies in the United States except the state of California, for the term of two years," subject to the terms and conditions contained in said contract. Defendant agreed to pay plaintiff "as compensation for his services * * * a commission on all sales of the first party's wines and brandies made in the representative's territory of seven and one-half per cent. on the minimum price per gallon f. o. b. wineries and distilleries" of defendant, "and a commission of twelve and one-half per cent. on all wines and brandies sold at eight cents or more above the minimum price." The contract further provided that the defendant should have the right to fix all prices.

[1, 2] The court, we think, correctly included in its judgment commission claimed on a number of sales for delivery outside the limits of California in cases where the purchasers were customers of the plaintiff conducting their business in plaintiff's territory, although such customers made these particular purchases at the winery of the defendant within this state. The defendant himself had so construed the contract. In at least one case, that of a sale and delivery of goods made in plaintiff's territory, in which the negotiations were not conducted personally, either through the

plaintiff or defendant, the latter, recognizing that the purchaser was a customer of the plaintiff, credited him with commission upon the sale. Evidence was also admitted, and properly, we think, tending to show that there was in California a well-established trade usage, according to which an agent is allowed commission on sales made in the agent's territory. Technically, it might be said that since the defendant reserved the right to reject any order taken by plaintiff, no sale was in fact made until approved by defendant, so that no sale could be made outside the limits of California. But if such a construction were adopted it would leave the plaintiff entitled to no commission upon any sales. We think that under a fair construction of the contract, and according to the interpretation placed upon its terms by the defendant himself, the plaintiff was entitled to commission on such sales made for delivery in his territory. This case differs from Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606, cited by appellant. In that case the selling agent was given the exclusive agency in certain territory for the sale of certain products, and the contract provided that it should have a commission on such sales, but in the case at bar the respondent was not only given the exclusive agency in the territory set out in the contract, but the language of the contract further provides that he shall be paid a commission upon all sales of appellant's wines and brandies made in respondent's territory. In the case cited, the language of the contract could not be construed as creating an obligation to pay commissions except upon sales made by the agent.

[3] We need not determine in this case what is meant by the expression used in the contract "minimum price," for, assuming that the defendant's definition of that phrase is correct, and that he is also correct in his contention that the commission should be calculated according to the dates of certain schedules established by him, still we are unable to say that the court committed any error in this regard. It is true that the referee, in making up his report, divided the time covered by the contract into six-month periods, and took as the minimum in arriving at plaintiff's commission the lowest price at which any grade of wine or brandy was sold during those respective periods, but testimony independent of the report was heard by the court; and assuming, contrary to the claim of plaintiff, that the method adopted was not consented to by defendant, still, as there is nothing in the record to indicate that the court acted upon the referee's tabulation so made up in six-month periods, we cannot, for the reason here assigned, reverse the judgment.

[4] The only other point relied upon by the defendant upon this appeal is the claim that the court admitted evidence showing certain sales made prior to the operation of the contract, but of which shipment was made during such operation. It is true that if commissions were in fact allowed on those sales the judgment ought to be modified to the extent thereof. As some deliveries were made after January 2, 1912, the date when plaintiff's employment under the contract commenced, of orders taken by plaintiff in 1911, it was doubtless deemed advisable that the referee's report, under a separate and proper heading, should distinguish between such sales and those made during the contract period—the latter forming the basis of the litigation—in the same way that the report segregated sales made before the expiration of the contract, but of which delivery was made after such expiration. In fact, it was stipulated in so many words that the referee's report should embrace the very matter now objected to. And there is nothing in the record to indicate that the judgment rendered by the court included commission on any sales made prior to January 2, 1912, when the contract went into effect. The testimony in the record without conflict is to the effect that those matters were fully adjusted by the parties, and we cannot assume that the court ignored that evidence. Moreover, from the findings of the court we think it appears that the court based its conclusion as to the amount of money due plaintiff only upon sales made under the contract and took into consideration no prior sales.

The judgment and order are affirmed.

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39 Cal. App. 235

DEASY v. TAYLOR et al. (Civ. 2563.)

(District Court of Appeal, First District, Division 1, California. Dec. 21, 1918. Rehearing Denied Jan. 20, 1919; Denied by Supreme Court Feb. 17, 1919.)

1. APPEAL AND ERROR ⚷1011(1)—FINDINGS OF FACT.

Where the evidence is conflicting, findings of the trial court will not be disturbed.

2. CONTRACTS ⚷94(1)—CONSTRUCTIVE FRAUD.

One obtaining signature of one sick and intoxicated and wholly bereft of reason or understanding, with knowledge of such condition, was guilty of constructive fraud.

3. CONTRACTS ⚷92—VALIDITY—OBTAINING SIGNATURE OF INTOXICATED PERSON.

Contract obtained from one sick and intoxicated, and wholly bereft of reason or understanding, is not void, but only voidable.

4. CONTRACTS ⚷270(2)—RESCISSION—STATUTES.

Plaintiff was not guilty of laches, under Civ. Code, § 1691, relating to rescission of con-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tracts, in failing to rescind until almost a year after discovery of fraud, where no rights of third persons intervened, and plaintiff had received no consideration.

5. Contracts 🔑266(1) — Rescission — Returning Property Received.

One rescinding a contract need not offer to return anything received, under Civ. Code, § 1691, subd. 2, where he received nothing of value.

6. Contracts 🔑269—Rescission—Fraud of One of Several Jointly Interested.

Where one of a group of jointly interested persons fraudulently obtained conveyances of property, grantor could rescind against all of them, under Civ. Code, § 1689.

Appeal from Superior Court, Alameda County; Wm. M. Conley, Judge.

Action by Matilda G. Deasy against Charles H. Taylor and others. From a judgment in favor of plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Hennessy & Peterson, of Grass Valley, and Chas. W. Kitts and Chas. M. Bufford, both of San Francisco, for appellants.

Snook & Church, of Oakland, for respondent.

LENNON, P. J. This is an appeal by the defendants, Charles H. Taylor, Edward F. Taylor, Joseph E. Taylor, John McKenna, also known as Jas. F. McKenna, Cornelius I. Harkins, Catherine Harkins, Matilda Harkins, G. S. Stevenson, as administrator of the estate of Cecelia Stevenson, deceased, and George S. Stevenson, from a judgment of the superior court of Alameda county, adjudging and decreeing certain agreements and transfers executed by the plaintiff in favor of the defendants to be null and void, and also from the order denying the said defendants' motion for a new trial.

[1] Appellants' first contention is that certain findings of the trial court are not sustained by the evidence. We have carefully read the discussion in appellants' brief upon this subject. That discussion, however, is, upon the whole, a discussion of the weight of the evidence. The objections are to seven different findings. It would serve no useful purpose to go into a discussion of the evidence, and to point out in detail the support for each of these findings separately. The objection to many of them is the same. Suffice it to say that an examination of the record discloses to us that the evidence on these matters is conflicting, and the findings of the trial court may not, therefore, be disturbed by this court.

[2] There seems to us to be only one point in the various contentions of the appellants against these findings which needs to be specifically noticed here. It is this: Appellants in their brief set out the following findings:

> "Cecelia McFadden Stevenson and said defendant George S. Stevenson, well knowing she (plaintiff) was sick and intoxicated, and unable to transact any business, fraudulently procured and caused her to sign. * * *
>
> "Said George S. Stevenson, well knowing her (plaintiff's) condition, and that she was sick and intoxicated, and incapable of knowing or understanding any business whatever, or to understand the nature, purport, or effect of any paper or document she might sign or execute, and by means of his influence and control of plaintiff's mind and will did fraudulently procure and cause the plaintiff to sign. * * *"

The appellant argues that there is "not in the transcript one word with respect to any fraudulent practice or representation on the part of either Stevenson or his wife, and not one word with any implication of that sort," and argues therefrom that the insertion in the findings of the statement that Stevenson acted fraudulently gives a false color to the whole case. The answer to the objection seems very obvious. The trial court found—and it is our view that such findings are supported by the evidence—"that at the time of the execution of the instruments involved in this action the plaintiff was unable to transact any business, or understand or comprehend what she was doing, and her mind was wholly bereft of reason or understanding;" that Cecelia McFadden Stevenson and George S. Stevenson, well knowing plaintiff's incapacity as aforesaid, procured her signature to said papers; that said George S. Stevenson, at the time mentioned in the complaint, represented and acted as the agent of the said plaintiff, and pretended to and did claim to act as and for the plaintiff, and also had the confidence and trust of the plaintiff, and had a great and controlling influence during all said times over the mind and will of the plaintiff, and did during all of the said times control and influence her mind in accordance with his wishes and desires, etc.

These findings certainly make the actions of the defendant George S. Stevenson amount to a constructive fraud upon the plaintiff. The most that can be said for the appellants' objection is that the finding of fraudulent conduct upon the part of the said George S. Stevenson should have been embodied in the conclusion of law based upon the findings, rather than in the findings themselves. Knowing plaintiff's physical and mental condition, it was certainly a fraud upon her for Stevenson to secure her signature to the assignments and agreements.

[3] The appellants rightly state that the contracts, even under the findings of the trial court, were not void but only voidable.

This brings the case to a point where it was necessary for the plaintiff to rescind the contracts. The Civil Code (section 1691) prescribes the essential elements of a valid rescission. We think the plaintiff has complied therewith. The relevant portions of that section are as follows:

> "1. He must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,
>
> "2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

[4] In the first place, appellants contend that the record shows that plaintiff had knowledge of the assignments as early as January 21, 1913, and that the present action was not begun until December 9, 1913, and that the plaintiff is therefore guilty of laches. There is also a conflict in the evidence on the question of when plaintiff discovered the facts, and the trial court must have passed upon the question of laches in rendering its judgment. As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of this doctrine. Suhr v. Lauterbach, 164 Cal. 591, 130 Pac. 2. The section of the Code above quoted says that a party desiring to rescind must do so promptly upon discovering the facts and becoming aware of his right to rescind. We are pointed to no evidence of when the plaintiff became aware of her right to rescind. Even taking appellants' view of the evidence, action was brought in less than a year after the facts were discovered by the plaintiff. The court found that the plaintiff had received no consideration for the assignments in question; and the case of Suhr v. Lauterbach, supra, in effect holds that where such is the case, and third parties cannot be prejudiced by the delay of the party seeking to rescind, such party may commence an action to rescind the contract or cancel the instrument at any time within the period allowed by the statute of limitations. In other words, before the doctrine of laches intervenes, some person must be shown to have been injured by the plaintiff's delay. Obviously, if appellants' have parted with no consideration, they cannot be injured by plaintiff's delay, which we consider not to be an unreasonable one under all the circumstances of the case.

[5] As to the second requirement of the section of the Code above quoted, the court found that the plaintiff had received no consideration from the defendants. At any rate, it is clear from the evidence that the plaintiff received nothing of value, and therefore there is nothing that she is required to return.

[6] Appellants make the point that as the trial court found that Stevenson did not act as the agent of the other defendants in the action, and that said other defendants did not confederate with him, nor was there any conspiracy among them to defraud plaintiff, the plaintiff is not entitled to rescission as against the defendants other than said Stevenson. Appellants rely for support of this proposition upon section 1689 of the Civil Code, which provides:

> "1. If the consent of the party rescinding * * * was obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party * * *."

The trial court found that "Cecelia McFadden Stevenson and George S. Stevenson * * * fraudulently procured and caused plaintiff to sign" the instruments. Cecelia McFadden Stevenson was jointly interested with the other defendants in the subject-matter of these contracts; i. e., the estate of her deceased aunt, Matilda A. Quinn. We think, therefore, that a finding that she had been guilty of fraud in procuring the contracts would entitle plaintiff to rescind against the other defendants jointly interested with her, under the terms of the section of the Code last above quoted.

The judgment and order are affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

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39 Cal. App. 226

MERCHANTS' & INSURERS' REPORTING CO. v. YOUTZ et al. (Civ. 2601.)

(District Court of Appeal, Second District, Division 1, California. Dec. 20, 1918.)

1. Appeal and Error ⟹867(3)—Questions Reviewable—Decision on Demurrer—New Trial.

That a demurrer to the complaint should have been sustained for want of a sufficient statement of facts cannot be considered on an appeal from an order granting a new trial.

2. Corporations ⟹60—"Capital Stock"—Profits and Dividends—Proceeds of Sale of Stock.

The entire proceeds of sales by a corporation of its own stock, even when sold for more than par value, are part of its capital stock, and therefore cannot be profits earned through the conduct of its business out of which dividends may be paid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital Stock.]

3. CORPORATIONS 🔑60—"CAPITAL STOCK"—DIMINUTION.

The phrase "capital stock," as used in Civ. Code, § 309, means not the shares of which the nominal capital is composed, but the actual capital, contributed by shareholders; that is, assets with which to carry on its corporate business.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by the Merchants' & Insurers' Reporting Company, a corporation, against Joshua E. Youtz and another. Judgment for defendants, and from an order granting a new trial, defendants appeal. Affirmed.

Henry W. Nisbet, Harriman, Ryckman & Tuttle, and Newmire & Morris, all of Los Angeles, for appellants.

Slosson & Mitchell and Leonard B. Slosson, all of Los Angeles, for respondent.

CONREY, P. J. The plaintiff is a corporation organized and existing under the laws of the state of California. It was charged by the complaint in this action that during the years 1911 and 1912, while the defendants were members of the board of directors of the plaintiff, and with the knowledge and consent of the defendants, the said board of directors declared and paid to the stockholders of the corporation eight quarterly dividends, amounting in all to the sum of $34,000; that said dividends were not made from the surplus profits arising from the business of the corporation, but were paid out of the proceeds of the sale of its capital stock; that the corporation has never at any time during its existence engaged in any business from which it derived a profit, and that it did not have, during said years of 1911 and 1912, a surplus on hand out of which to pay dividends. Judgment was demanded against the defendants, and each of them, for the amount of dividends so paid. The liability sought to be imposed upon the defendants arises from the provisions of section 309 of the Civil Code. According to that section, where directors of a corporation are guilty of the acts there denounced, they are jointly and severally liable to the corporation "to the full amount of the capital stock so divided, withdrawn, paid out, or reduced. * * *" At the trial of this action, the court made findings that the dividends were declared in a sum stated, which was slightly less than the aggregate amount named in the complaint, of which a stated amount was paid in cash and the remainder was credited to certain stockholders upon interest due and unpaid by them upon promissory notes given by them to the corporation as the purchase price of their stock; that the dividends paid in cash were paid from the surplus profits arising from the business of the corporation, and that no dividend declared or paid was paid out of the capital stock of the corporation. The court found, also, that the plaintiff, down to the close of the year 1912, engaged in business, and that it did, during the years 1911 and 1912, have a surplus in its treasury out of which to pay dividends; that the capital stock of the plaintiff was not impaired, nor were its assets dissipated by the payment of said dividends. Judgment was entered in favor of the defendants. Thereafter the plaintiff moved for a new trial, which motion was granted. The defendants appeal from the order granting the motion for a new trial.

[1] The contention presented on behalf of appellants to the effect that their demurrer to the plaintiff's complaint should have been sustained for want of a sufficient statement of facts cannot be considered on this appeal, this being an appeal from an order granting a new trial. Rauer v. Fay, 128 Cal. 523, 61 Pac. 90.

The facts concerning the income and expenses of the corporation appear, without conflict, from the evidence. Prior to June, 1910, the corporation had no income except from sales of shares of stock; during that time it expended $30,429.91, of which $3,658.09 was for general expenses, and the remainder was paid out as commissions for sales of stock. Between June 1, 1910, and December 31, 1912, the sales of capital stock amounted to $128,169.17, of which "only a part" was received in cash. During the period last named, the corporation also received on account of interest on its investments, on its promissory notes and on its bank deposits, the sum of $5,971.98, paid out for office expenses $4,117.68, and as commissions on sales of stock the sum of $32,782.47. Without further detail of items shown, suffice it to say that the corporation never had any surplus profits out of which any dividends could have been paid, unless the moneys received as "premiums" above the par value of stock sold might be segregated from the assets of the corporation and treated as profits of its business.

[2, 3] We are satisfied that the entire proceeds of sales by a corporation of its own stock, even when sold for more than par value, are part of its original assets or capital stock, and therefore cannot be profits earned through the conduct of its business. The phrase "capital stock," as used in section 309 of the Civil Code, means "not the shares of which the nominal capital is composed, but the actual capital; i. e., assets, with which the corporation carries on its corporate business." Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 468, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013. The sole purpose of selling stock is to acquire assets with which to carry on that business. This is equally true, whether the

stock be sold at par, or below par, or above par. The capital stock referred to in said section 309 "is the actual property of the corporation contributed by the shareholders." Tapscott v. Mexican Colorado, etc., Co., 153 Cal. 664, 96 Pac. 271; Excelsior, etc., Co. v. Pierce, 90 Cal. 131, 140, 27 Pac. 44. It is, in brief, the "capital" of the corporation.

The conclusion necessarily follows that the evidence was insufficient to sustain the findings of the court.

The order granting a new trial is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

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39 Cal. App. 229

MARYLAND CASUALTY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2691.)

(District Court of Appeal, Second District, Division 1, California. Dec. 20, 1918.)

1. MASTER AND SERVANT ⚷375(1) — WORKMEN'S COMPENSATION ACT—"COURSE OF EMPLOYMENT."

Where an employé, while driving an automobile with which he was not familiar and which was owned by a fellow employé, who accompanied him on business for his employer, was killed in a collision with an electric car, no injunction being laid upon them by their employer as to who should operate the machine or what kind should be used, he was acting within the course of his employment within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. MASTER AND SERVANT ⚷380—WORKMEN'S COMPENSATION ACT — "WILLFUL MISCONDUCT."

Where an employé on his master's business was killed in collision with an electric car, while driving an automobile, his unfamiliarity with that particular kind of machine constituted negligence on his part only, and not willful misconduct so as to defeat an award of compensation under the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

Proceedings under the Workmen's Compensation Law (St. 1917, p. 831) by Mrs. Dora E. Showalter and Roland L. Showalter, a minor, by his guardian ad litem and trustee, Mrs. Dora E. Showalter, claimants, to recover for the death of F. R. Showalter, employé, opposed by the Maryland Casualty Company, insurer, and the Union Hardware & Metal Company, employer. From an award of the Industrial Accident Commission in favor of claimant, the insurer and employer bring certiorari. Award affirmed.

H. W. Kidd, of Los Angeles, for petitioners.

Christopher M. Bradley, of San Francisco, for respondents.

JAMES, J. Certiorari to review proceedings and determination made by the Industrial Accident Commission under which there was an award of compensation to the widow of F. R. Showalter. Showalter was an employé of petitioner Union Hardware & Metal Company. He died as a result of injuries received by collision between an interurban electric car and an automobile which he was driving. There is no dispute as to Showalter having been in the employ of the company mentioned on the day when the injuries were received, or that he was at the time traveling from the city of Los Angeles to the city of San Pedro on business of his employer. Petitioners contend, however, that under the evidence no award should have been made, because of the willful misconduct of the deceased, and because Showalter, at the time he suffered the injuries, was not performing an act in the course of or growing out of his employment. The testimony heard by the commission showed that Showalter and one MacKenzie were employed at the large mercantile establishment of the petitioner Union Hardware & Metal Company; that they were subject to the orders of the secretary; that the secretary desired them to go to the city of San Pedro and make the acquaintance of certain agents of a shipbuilding plant. This for the purpose of facilitating sales between the company and the shipbuilders. The secretary designated the day on which the men were to go, and the two employés started on the morning of the day mentioned to make the journey. MacKenzie owned a small automobile which he was in the habit of using on the business of the company, and for the use of which compensation was made to him—at least he was reimbursed for the fuel used. Showalter also owned an automobile of a different kind. The secretary of the corporation testified that after arranging for the trip of the two men, he heard talk between them to the effect that they would take Showalter's machine. They did not do this, but started on the trip in the small machine owned by MacKenzie. No dispute is made but that, in so far as the choice of an automobile was concerned, it was immaterial to the company what machine was used, and that whatever selection was made in that regard the company approved of it. It appeared that Showalter was an experienced driver of an automobile. He was not, however, accustomed to the use of the kind of machine used for the particular trip which was undertaken on the day in question. After leaving the more congested portion of the city, MacKenzie, who had operated the machine up to that point, exchanged seats with Showalter, and Showalter proceeded from then on to guide and control the machine. The men had proceeded to a point on South Main street, where an interurban car line crossed that thoroughfare, and at that point the automobile was struck by a trolley car. MacKenzie testified at the hearing before the commission, and was asked to state the circumstances. We quote portions of his testimony:

> "We saw the car, and we kind of slowed down, and Mr. Showalter was not used to driving a Ford car, and we never realized any danger when we first saw the car."

MacKenzie further stated that the car was from 150 to 200 feet away when they saw it. The following further testimony was given by this witness:

> "Q. Was it coming at a good rate of speed? A. Apparently it was, from the way it struck the machine. Q. What kind of a driver was Mr. Showalter? A. He was a very careful man. Q. In your opinion, was he exercising due care and caution at this particular time? A. Absolutely. Q. Then what, in your opinion, was responsible for the accident? A. His lack of knowledge of the machine. That is the only thing that I can account for it. * * * Q. You were showing him how to operate a Ford car when this accident happened? A. Yes, sir. I showed him different points on it. Q. And isn't it further a fact that it was at his request that you let him drive the car? A. Yes, sir. Q. Didn't he say to you in substance that he wanted to learn how to drive a Ford car? A. Yes, he said he would like to learn. Q. And it was at that time that you let him take the wheel of the car? A. No, we talked machines quite a long time going down there. He was quite enthusiastic about mechanics and so forth, and we were talking of different machines, and he was asking me different points on the machine and so forth, and he seemed to understand parts of it, and other parts he did not understand, and I tried to explain to him what he didn't understand. * * * Q. What, if any, change was there in the speed of your automobile from the time you first saw the car until the accident occurred? A. As I say, the car kind of slowed down at first. Q. The automobile? A. Yes. Q. Did you say anything to Mr. Showalter about slowing up? A. Yes, I called his attention to it. I said, 'There is a car, Rolly; I think we had better slow down a little bit.' Q. What, if anything, did he say to you in reply? A. He slowed the car down. Q. What do you think was the cause of the accident? A. I think the cause of the accident was simply his not being familiar with the machine. * * * Q. Didn't the car suddenly shoot ahead just before the accident happened—the automobile, I mean? A. It seems to me that it did; as far as I can remember, it did. * * * Q. And it was the first time he had ever driven a Ford car? A. Yes."

The motorman of the electric car which collided with the automobile testified that he saw MacKenzie immediately after the accident, and that MacKenzie came up to him and told him that he had told Showalter to "go ahead; he could make it." MacKenzie testified that he had no recollection one way or the other about having made that statement.

[1, 2] In our opinion, this evidence fails to sustain the contention of petitioners that at the time Showalter suffered his injuries he was not engaged in an act arising out of his employment, or that he was guilty of willful misconduct. It was conceded that the men had the right to travel by an automobile of their own choosing, and the employer laid no injunction upon them as to who should operate the machine. No doubt, by the conduct of Showalter, the risk of injury was enhanced because of his lack of familiarity with the machine he was engaged in driving, but contributory negligence constituted no defense. The case is not unlike that shown in Rideout Co. v. Pillsbury et al., 173 Cal. 132, 159 Pac. 435. There a deck hand working on a barge fell from the deck of the same and was drowned. It was shown that his duties consisted only of helping to unload the barge; that the loading had been done and the barge was on its way from San Francisco to Oakland, at which latter place it was to be unloaded. The deck hand had no duties to perform during the voyage. There was a house provided for the men to remain in while crossing the bay, and they were free to amuse themselves there if they chose. The deck hand did not remain in the house, but was observed by another employé outside on the deck, leaning against a post, apparently asleep. This employé took hold of the deck hand's clothing and aroused him saying: "Frank, you crazy? Come on inside." The deck hand answered: "No; leave me alone." He was left there, and later his body was found floating in the waters of the bay. An award was made by the commission and affirmed by the Supreme Court. In that case it is plain that the employé was negligent in leaving the safe place provided by his employer for his accommodation and remaining upon deck and going to sleep in a place where he was likely to be thrown overboard. Assuredly he greatly added to the risks of his employment, but such act on his part constituted negligence only, which was no bar to a recovery under the statute. In Elk Grove Union High School Dist. v. Industrial Accident Commission, 34 Cal. App. 589, 168 Pac. 392, it is said:

> "A person is not to be denied compensation under the Compensation Act merely because his injury has been superinduced by mismanaging the duties of his employment, unless such mismanagement amounts to willful misconduct."

Had orders been given by the employer of Showalter forbidding him to operate any particular automobile which might be used on the business of the company, then perhaps a violation of that injunction might amount to willful misconduct. U. S. Fidelity, etc., Co. v. Industrial Accident Com'n, 174 Cal. 616, at page 621, 163 Pac. 1013. As we have before stated, however, no such instructions were given to Showalter or MacKenzie; the men had freedom of choice as to the automobile to be used, and so also apparently as to the driver who might operate it. And so we conclude that the act of Showalter in driving the automobile at the time in question was, in view of his inexperience in the handling of that particular machine, a mere act of negligence which was the proximate cause of the injury, but which act in no way interposed as a bar to prevent an award of compensation being made.

The total award made by the commission to the widow, for herself and a minor child, was the sum of $5,004.98. Assuming that the reasonableness of an award is subject to review in this proceeding, we are not prepared to agree with petitioners that the award as made was for an unreasonable amount. Its amount was within the limit fixed by the statute. We think that there was substantial evidence to sustain the findings of the commission, and, this being true, it is the duty of the court to affirm the award. Southern Pac. Co. v. Industrial Accident Com'n (Sup.) 170 Pac. 822.

The award is affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

(39 Cal. App. 106)

BORGMEYER v. SOLOMON. (Civ. 2776.)

(District Court of Appeal, Second District, Division 1, California. Dec. 10, 1918.)

1. Courts 🔑85(3)—Rules of Court—Briefs—Filing.

Rules of court requiring briefs on appeal to be filed within the time specified confer rights which may be enforced by litigants.

2. Appeal and Error 🔑771—Briefs—Failure to File Within Time Required—Relief from Default.

In view of Code Civ. Proc. § 473, appellant failing to file brief within required time will be relieved from default upon a proper showing that default was due to mistake, inadvertence, or excusable neglect.

3. Appeal and Error 🔑771—Filing of Brief—Relief from Default—Inadvertence of Law Clerk.

Where clerk employed by appellant's counsel was charged with the duty of notifying counsel when briefs were required to be filed, and through inadvertence neglected to so do, appellant, having good ground for appeal, will be relieved from default in view of Code Civ. Proc. § 473, for failure to file brief within required time.

Action by E. G. Borgmeyer against J. B. Solomon. Judgment for plaintiff, and defendant appeals. On plaintiff's motion to dismiss defendant's appeal, and on defendant's motion to be relieved from default for failure to file brief within required time, and for leave to file brief. Motion to dismiss appeal denied, and defendant's motion to file brief granted.

Haas & Dunnigan, of Los Angeles, for appellant.

Philip Cohen, of Los Angeles, for respondent.

MYERS, Judge pro tem. This case comes up on respondent's motion to dismiss the appeal for appellant's failure to file brief in time, and appellant's motion to be relieved from his default on the ground of inadvertence and excusable neglect, and for leave to file his brief tendered therewith.

The time for filing appellant's brief, as extended pursuant to stipulation, expired October 22, 1918. Four days thereafter, no brief having been filed, respondent served and filed notice of this motion to dismiss. Appellant's counter motion for relief is based on affidavits from which it appears that appellant's counsel who was charged with the conduct of this litigation relied upon a clerk in his office to keep him advised of the time when briefs in the pending cases were required to be filed; that the employé who was charged with this duty, through inadvertence, neglected to so inform him respecting this case; and that he was wholly unaware that the time for filing this brief had expired or was about to expire until the notice of motion to dismiss was served. Other facts are stated from which it sufficiently appears that appellant was proceeding in good faith with the prosecution of this appeal. There are also affidavits, both by appellant and his counsel, showing that appellant was advised by his counsel and in good faith believes that good grounds for the appeal exist.

[1, 2] The rules of court requiring briefs on appeal to be filed within the time specified undoubtedly confer rights which may be enforced by litigants. (See opinion of this court in Wood v. Mesmer, Civil No. 2750, 178 Pac. 314, filed December 10, 1918, and cases there cited.) It is equally certain, however, that the rights so conferred are subject to the right and power of the court, upon a proper showing, to relieve a party from his default on the ground of mistake, inadvertence, or excusable neglect. Brooks v. Union Trust Co., 146 Cal. 134, 138, 79 Pac. 843; Santa Paula Waterworks v. Peralta, 5 Cal. Unrep., 779, 42 Pac. 239; Estate of Lakemeyer, 6 Cal. Unrep. 695, 65 Pac. 475, 110 Pac. at page 112. As was said by the Supreme Court in Estate of Keating, 158 Cal. at page 115:

"There can be no doubt that where such default is made under circumstances which would show good cause for relief under the decisions on that subject in applications under section 473 of the Code of Civil Procedure, whether that section be applicable to the Supreme Court or not, this court should grant similar relief, allow the transcript to be filed after the time fixed by the rule, and retain the appeal."

[3] The showing made by the affidavits presented by appellant in support of his motion brings this case fairly within the rule thus laid down.

Respondent's motion to dismiss the appeal is denied and appellant's motion for leave to file his brief tendered therewith is granted.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 269

BLAIR v. WESSINGER et al. (Civ. 2560.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1918. Rehearing Denied Jan. 23, 1919. Denied by Supreme Court Feb. 20, 1919.)

1. EVIDENCE 🔑452 — PAROL — EXTRINSIC AMBIGUITY—GUARANTY FOR RENT.

In an action against guarantors of the payment of rent under a lease which failed clearly to describe the property leased, oral evidence was competent to explain an extrinsic ambiguity, within Code Civ. Proc. § 1856, against an objection that it constituted a variance of the written lease.

2. EVIDENCE 🔑460(5)—GUARANTY FOR RENT—PROPERTY INCLUDED.

In an action against guarantors for the payment of rent under a lease which failed clearly to describe the property, evidence identifying the property leased was admissible, in view of Civ. Code, § 1647, and Code Civ. Proc. § 1860, to show what property was included.

3. LANDLORD AND TENANT 🔑122—EVIDENCE—PROPERTY INCLUDED—SUFFICIENCY.

In an action against guarantors of the payment of rent under a lease which did not clearly identify the property leased, evidence *held* to sustain a finding that a small store in the rear of the store occupied by lessees was not included in the lease.

4. PRINCIPAL AND AGENT 🔑177(3)—KNOWLEDGE OF AGENT — PROPERTY INCLUDED WITHIN LEASE.

The knowledge of the responsible agent of the guarantors of payment of rent under a lease as to what property is included is binding upon the guarantors in a subsequent action against them on the guaranty.

5. APPEAL AND ERROR 🔑1170(3) — REVERSIBLE ERROR—RULINGS AS TO PLEADINGS.

In an action against guarantors for the payment of rent, an amendment of pleadings which did not modify or diminish force of original pleading is no ground for setting aside judgment, where no miscarriage of justice has resulted, in view of Const. art. 6, § 4½.

6. ABATEMENT AND REVIVAL 🔑5—ACTIONS AGAINST GUARANTORS FOR RENT—PENDENCY OF SUIT.

The pendency of an action between a lessor and his lessees for rent is no bar against an independent action by the lessor against the guarantors of the payment of rent under the lease.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Jennie M. Blair against Paul Wessinger and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John T. Williams and Sterling Carr, both of San Francisco, for appellants.

Mastick & Partridge, of San Francisco (Alan C. Van Fleet, of San Francisco, of counsel), for respondent.

PER CURIAM. This is an action upon a contract by which defendants guaranteed the payment of certain rent of premises hereinafter described and let by the plaintiff to Ryan and Long.

The most important question in this case is the construction to be placed upon the description of the demised premises found in the lease. The description is as follows:

> "The corner store situate in the four-story building at the northwest corner of Mason and Ellis streets, said store having a frontage of 15 feet on Ellis street and a uniform depth of 75 feet, and more particularly known and designated as No. 200 Ellis street, San Francisco, together with that portion of the basement thereunder which has been partitioned off for the use of said store."

This seems clear enough, but when the subject-matter of the lease is disclosed, a problem arises which is not so simple. On May 1, 1911, the plaintiff was the owner of the building on the northwest corner of Ellis and Mason streets, in the city of San Francisco, which had a front of 60 feet on Mason street and of 97 feet 6 inches on Ellis street. In the southeast corner of this building was a store with a frontage of 15 feet on Ellis street and a depth of 45 feet on Mason street, the entrance being on Ellis and the store being No. 200 Ellis street. In the rear of this store was a small store having a frontage of 15 feet on Mason street by a depth of 15 feet on Latham place, which ran parallel to Ellis street and bounded the building on the north side. The entrance to this small store was on Mason street, and it was known as No. 209 Mason street.

On the date mentioned, Ryan and Long hired the store No. 200 Ellis street for a period of five years, and the description in the lease is that above quoted. The question in this case is whether that description designating the property leased as No. 200 Ellis street, and also describing it as having a "uniform depth of 75 feet," covered only the store 15 by 45 feet in size and known as No. 200 Ellis street, or whether it covered the two stores above referred to.

Ryan and Long refused to pay further rent after having paid rent for three years. The appellants contend that the lease, by reason of the description of the property as having a depth of 75 feet, covered both stores. Ryan and Long never occupied the smaller store, but only the larger one (200 Ellis street) and the basement, but they and their guarantors, the appellants, claim that they were to have possession of the smaller store also as soon as the tenant thereof, known as the "Hasty Messenger Service," should vacate it, and that, not having been given possession thereof, Ryan and Long were in so far evicted, and, further, that the consent of Ryan and Long to occupy only the larger store and not the smaller store constituted a modification of the lease without the consent of the guarantors, which exonerated them.

The Hasty Messenger Service vacated the smaller store on August 31, 1913. The court admitted evidence of the situation of the property and enough correspondence between agents of the parties to acquaint the trial judge with the subject-matter of the lease and the situation of the parties in regard thereto, and thereupon it was seen that there was in the description of the property contained in the lease what was formerly called a "latent" or "hidden" ambiguity, and which is now in our Code denominated an "extrinsic" ambiguity. Code Civ. Proc. § 1856. It consists in this: That the store, 200 Ellis street, did not have a depth of 75 feet, but only a depth of 45 feet. The court thereupon found that the demised premises consisted of the store No. 200 Ellis street, and that it had a depth of 45 feet on Mason street, and did not embrace the smaller store No. 209 Mason street.

[1, 2] The appellant claims that the evidence admitted to show these facts was incompetent because varying the terms of the written lease by parol, and that the finding is against the evidence. The evidence which was admitted was competent as tending to explain an extrinsic ambiguity (Code Civ. Proc. § 1856), and also because it came within the rule permitting evidence of the circumstances under which the lease was made and the subject-matter thereof, so that the judge might be placed in the position of those whose language he was to interpret (Civ. Code, § 1647; Code Civ. Proc. § 1860).

There certainly was a conflict in the evidence as to whether it was the intention of the parties to include the smaller store in the lease. Ryan and Long both testified that they were to have the smaller store as soon as it was vacated by the Hasty Messenger Service. They also testified that pending the vacating of the smaller store by that tenant, they were to occupy a room 20 by 18 feet in size connected with No. 202 Ellis street, another store contained in plaintiff's building.

On September 29, 1911, Ryan and Long entered into a lease with one Bueneman, the tenant of 202 Ellis street, for this room 'n the rear of 202 Ellis street, at a rental of $20 per month, and they continued to occupy it from May 1, 1911, until July 1, 1914, regularly paying the rent from September 29, 1911, until July 1, 1914, nearly a year after the Hasty Messenger Service had vacated 209 Mason street. This is quite inconsistent with their claim that they were to have the use of this small room in the rear of 202 Ellis street in lieu of 209 Mason street while the latter place was occupied by the Hasty Messenger Service.

It also appears that one Buttner was the agent of the defendants in the negotiations for the lease, and that Sterling Carr was their attorney, and that George Starr was the agent of the plaintiff in that transaction. Certain correspondence between these parties was received in evidence, and in one of the letters from Starr to Carr, the latter was directly informed that the subject-matter of the lease was the "store for a saloon at the northwest corner of Mason and Ellis streets, not including the small store." Buttner testified as follows on this subject:

> "Q. At that time you thought the words 'not to include the small store' meant the little store which we are denominating 200 Ellis street? A. Absolutely so; yes, sir.
>
> "Q. If you had known that the plaintiff didn't intend to give Ryan & Long possession of what was known as 209 Mason street, the messenger office, you would not have secured the bond or entered into these negotiations? A. Not at that date."

[3] It is thus evident that Buttner knew of this letter. But it was the province of the trial court to place a construction upon all of this evidence, and it seems to us that this finding that the small store at 209 Mason street was not included in the lease was justified, and that it correctly resolved the extrinsic ambiguity in the language of the lease. There was no change in the terms of the lease. This is especially apparent when the description contained in the guarantee is taken into consideration. The premises were therein described as "that certain store known as 200 Ellis street, together with the basement thereunder," and when we consider that Buttner and Carr, the agents of defendants, both knew of Starr's letter expressly excluding the store at 209 Mason street—if we are to accept the court's construction of that instrument—it is evident that no real change was made in the lease. The court simply construed the lease in the light of the

evidence before it. No reformation thereof was necessary.

[4] The point that the defendants understood they were guaranteeing the payment of rent for both stores, and that the lease embraced both stores, is disposed of by the letter from Starr to Buttner and Carr. The knowledge of Buttner, the responsible agent conducting the negotiations, as to what property was being leased, was the knowledge of his principals, the defendants.

The amended complaint was demurred to on the ground that the cause of action for reformation of the lease was barred by the statute of limitations. Conceding this to be true, in the view we take of the matter those allegations were unnecessary to the sufficiency of the complaint and they may be disregarded in the decision of the case.

[5] As the defendants were bound under their guaranty to pay this rent when Ryan and Long defaulted, we think this a proper case for the application of the rule of section 4½, article 6, of the Constitution—and that as the amendment offered did not modify or take away the force of the original pleading in the case (which was a direct action upon a guaranty), the defendants suffered no miscarriage of justice from the introduction of the amendment.

This ruling also disposes of other exceptions taken at the trial and based upon the theory that the reformation of the instrument was necessary in order to sustain a judgment thereon.

[6] It is further contended by appellant that the action was prematurely brought because of the pendency of another action between plaintiff on the one hand and Ryan and Long on the other for the unpaid rent. The defendants were not parties to that action, and that action is no bar to an action against them on the guaranty.

We think this covers substantially all the points made for the reversal in this case.

Judgment is affirmed.

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39 Cal. App. 205

TAYLOR v. HAMMEL, Sheriff, et al. (Civ. 2610.)

(District Court of Appeal, Second District, Division 1, California. Dec. 19, 1918.)

1. Sales 🔑126(1)—Rescission—Restoration of Consideration.

A suit to cancel for fraud a deed given by plaintiff to defendants in consideration of a contract of sale of certain vacuum clothes washers could not be maintained where no offer was made to restore to defendants the property received under the contract until more than a year after discovery of the fraud, in view of Civ. Code, § 1691.

2. Sales 🔑124—Rescission—Restoration of Consideration.

A suit to rescind on the ground of fraud a contract for certain vacuum clothes washers and for the cancellation of a deed to property given in consideration cannot be maintained where by transferring the title to the washers to a third party plaintiffs have placed it beyond their power to offer restoration.

3. Contracts 🔑139—Rescission—Contracts Contrary to Public Policy.

If contracts of sale were void as against public policy to the knowledge of the parties, they will not be rescinded on the ground of fraud, but, if the parties seeking the cancellation are innocent of any wrongful purpose, they may maintain a suit for rescission in the same manner as though the contracts were valid and enforceable.

4. Sales 🔑124—Rescission—Conditions Precedent—Ignorance as Excuse.

That plaintiffs in a suit to rescind a contract of sale for fraud are not aware of the necessity of restoring the consideration received as a condition precedent to bringing suit does not excuse them; they being chargeable with notice of the requirements of the Code.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by William H. Taylor, individually and as administrator of the estate of Lottie R. Taylor, deceased, against W. A. Hammel and others. From a judgment for defendants, plaintiff appeals. Affirmed.

George L. Keefer and Ben W. Utter, both of Los Angeles, for appellant.

R. C. Noleman and Davis, Kemp & Post, all of Los Angeles, for respondents.

MYERS, Judge pro tem. Plaintiffs appeal from two judgments dismissing their action as to defendants Hammel and Barrett and as to the Domestic Utilities Manufacturing Company, after orders sustaining the demurrers of said defendants to plaintiffs' complaint, plaintiffs having declined to amend.

The complaint is very long, somewhat involved, and contains various ambiguities and uncertainties, which, however, are not attacked by the demurrers. From it we gather the following facts: In August, 1910, plaintiffs received from the defendant corporation two certain contracts of sale for specified lots of so-called "vacuum clothes washers." For one of these contracts plaintiffs paid the sum of $150; for the other they deeded to one of the defendants the real property described in the complaint. Plaintiffs were induced thereto by various false representations and devices so grossly fraudulent as to impel the courts to make every effort within the law to afford relief therefrom. The defendants Hammel and Barrett are in no way charged with actual participation in the frauds.

After receiving the contracts and parting with their property and before discovery of the fraud, plaintiffs were further induced by defendants to transfer to defendant Hellman (an agent of and coconspirator with other defendants), their interest in the washers covered by the second contract and accepted in exchange therefor a conveyance from Hellman of certain other real property.

On November 4, 1910, the property which had been theretofore conveyed by plaintiffs was mortgaged to defendant Barrett, who thereafter foreclosed, became the purchaser at the sale thereunder, and eventually received a sheriff's deed pursuant thereto. Defendant Hammel's only connection with the case was through acting as sheriff in making the sale under foreclosure and executing the sheriff's deed.

Plaintiffs discovered the fraud on or about November 4, 1910, and immediately commenced an action in the superior court to rescind their various transactions with defendants. They did not, however, restore or offer to restore to defendants anything which they had received as the fruits of said transactions. Thereafter, on December 6, 1911, they tendered to defendants the washers which they had received under the first contract, and then dismissed their action and filed two new actions for the same purpose. On December 11, 1911, plaintiffs quitclaimed back to defendant Hellman the real property they had received from her. On March 21, 1912, plaintiffs delivered back to defendants the contracts which they had received from them, together with a relinquishment of all their rights and claims thereunder. They then dismissed their two actions then pending and filed two new ones for the same purpose. These were later dismissed at the time of filing the present suit, April 14, 1914. The prayer in this action is for the cancellation of plaintiffs' deed to defendants, the mesne conveyances and the sheriff's deed to Barrett, and for general relief.

[1] The gist and substance of the relief here sought is a rescission of plaintiffs' contracts with defendants and the restoration of plaintiffs' property. We are therefore constrained to the conclusion that this case is ruled by the case of Brown v. Domestic Utilities Manufacturing Co., 172 Cal. 733, 159 Pac. 163, and that the plaintiffs must be denied relief because of their failure to act with the promptness and diligence which the law requires of those who seek to avail themselves of this equitable remedy. As this court said in that case:

> "The failure of the plaintiffs to act promptly upon discovery of the fraud is fatal to an action to enforce rescission."

A party seeking to rescind must do two things with "reasonable diligence." He must give prompt notice of his election to rescind the contract, and he must restore or offer to restore everything of value which he has received thereunder. Civ. Code, § 1691. In the case cited the plaintiffs had received nothing of value, and were therefore relieved from the second of these requirements, but they were none the less required to act promptly in giving notice of their election to rescind. In the instant case they gave prompt notice of their election to rescind by commencing an action therefor, but they wholly failed to comply with the second requirement, viz. to make restoration.

[2] Plaintiffs had received delivery of 50 washers under the first contract, and had taken title to 1,667 washers under the second contract. These articles admittedly possessed some substantial value; yet the plaintiffs made no offer to restore them until more than a year after discovery of the fraud. In fact, they could not restore the title to the 1,667 washers, because they had already transferred it to defendant Hellman. Such a situation has been held a complete bar to an action for rescission. Bailey v. Fox, 78 Cal. 389, 397, 20 Pac. 868; Kelley v. Owens, 120 Cal. 502, 512, 47 Pac. 369, 52 Pac. 797. Under the circumstances of this case, it might be held a sufficient compliance if plaintiffs had offered to reconvey the real property which they had received from Hellman in exchange for the washers; but even this they did not do until more than a year had elapsed.

[3] It is alleged in the complaint that the contracts in question were never intended by the defendants to be performed according to their terms; that they were mere shams, designed and used by the defendants as devises in the conduct of a so-called "endless chain" lottery fraud; and that they were therefore absolutely void. It does not clearly appear whether or not at the time plaintiffs accepted the contracts they were aware of this ulterior purpose. If they were, and shared in it, it follows that the contracts were void as against public policy. In such case it would also follow that a court would not afford relief to either of the parties to such contracts, but would leave them where it found them. Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Martin v. Wade, 37 Cal. 168. On the other hand, if plaintiffs were innocent of this unlawful purpose, then it follows that the contracts, which were fair upon their face, and imported legal rights and obligations in favor of the plaintiffs, were enforceable by them as against the defendants, or were voidable by them at their election. But it also follows that, in order to avoid such contracts, plaintiffs must rescind in the manner prescribed by law, and this, as we have seen, they failed to do.

[4] To excuse their failure in not offering to restore what they had received as the fruits of these contracts, plaintiffs allege that they were not aware of the necessity for

so doing. This cannot be regarded as a valid excuse. Parties seeking to avail themselves of the remedy afforded by this chapter of the Code are chargeable with notice of the requirements thereof. The plaintiffs must be held to have known that "one cannot eat his pudding and have it."

The conclusion we have reached upon the questions here discussed renders it unnecessary to consider the questions arising under the statutes of limitations and the question of the rights of a mortgagee without actual notice as against parties in possession of the premises mortgaged.

The judgments appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 172

STENSLAND v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SAN DIEGO COUNTY, et al. (Civ. 2799.)

(District Court of Appeal, Second District, Division 1, California. Dec. 13, 1918.)

1. CERTIORARI ⚷5(1) — REMEDY — RIGHT TO APPEAL.

Where a party can appeal from an order made in excess of jurisdiction, he cannot, under Code Civ. Proc. § 1068, have the same reviewed by certiorari.

2. APPEAL AND ERROR ⚷82(1)—ORDERS AFTER JUDGMENT.

Under Code Civ. Proc. § 963, a party to the record may appeal from any special order made after final judgment.

Petition by Elizabeth G. Stensland for a writ of review against the Superior Court of the State of California, in and for the County of San Diego, Hon. W. A. Sloane, Judge of Department 3 thereof, and J. B. McLees, Esq., Ex Officio Clerk. Demurrer sustained to the petition, and same denied.

Theodore Stensland, of San Diego, for petitioner.

George & McCoy and Jesse George, all of San Diego, for respondents.

CONREY, P. J. After notice duly given, the petitioner herein has applied for a writ of review. Respondents demurred upon the ground that the petition does not state facts sufficient to constitute a cause of action, or to authorize the issuance of a writ of review.

In a certain action in the superior court of the county of San Diego, wherein Jesse George et al. were plaintiffs and the petitioner herein was defendant, judgment for a stated sum was rendered against the defendant. Execution was issued, and notice of garnishment served on J. B. McLees. Thereafter supplemental proceedings were instituted under section 717 et seq., Code of Civil Procedure, whereby McLees was brought before the court to answer concerning property of the judgment debtor in his hands. On order of the court made at the hearing of said matter, McLees delivered to the sheriff a certain sum of money, and the same was used in satisfaction of the judgment. Thereafter the petitioner, as defendant in that action, duly presented her motion to said court for an order vacating and annulling said order in supplemental proceeds on the ground, among others, that said court was without jurisdiction to make said order; but her said motion was denied. She now demands a review and annulment of the same order.

[1, 2] It is well established that—

> "If a party has the right of appeal from an order made in excess of jurisdiction he cannot have such order reviewed in certiorari proceedings. Such is the express provision of our statute (Code Civ. Proc. § 1068), and it has been uniformly so held by this court" (Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 755, 96 Pac. 803).

Petitioner, in the action of George et al. against her, had the right of appeal from the order which she seeks to have reviewed, as well as from the order denying her motion to set aside that order. A party to the record may appeal from any special order made after final judgment in an action. Code Civ. Proc. § 963; Elliott v. Superior Court, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102.

Other questions of law are presented by counsel, arising upon facts which appear in the petition, additional to those above stated. These are matters which need not be discussed ot this time, since we are of opinion that they may not be reviewed in this proceeding.

It is ordered that the demurrer be sustained, upon the ground above stated; and that the petition for a writ of review be, and the same hereby is, denied.

We concur: JAMES, J.; MYERS, Judge pro tem.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

39 Cal. App. 209

HEBERT v. BYRON JACKSON IRON WORKS. (Civ. 2609.)

(District Court of Appeal, Second District, Division 1, California. Dec. 19, 1918.)

1. Limitation of Actions 🔑127(6) — Amendment of Pleading—New Cause of Action.

In an action by the father and widow of decedent brought under Code Civ. Proc. § 377, the elimination by amendment, after limitations had run, of the father as a plaintiff, and the substitution of the widow as administratrix, was not the introduction of a new cause of action, in view of Civ. Code, § 1970, providing that an action for death of a servant shall be brought by the personal representative, and that there shall be but a single action for such death.

2. Negligence 🔑97 — Comparative Negligence Rule—Effect.

Under the Roseberry Act, the comparative negligence rule is adopted, and applies to all actions for injuries from negligence.

3. Master and Servant 🔑106(1) — Liability of Master—Appliances Furnished by Third Person.

Where an employer contracting to dig a well used a hoisting apparatus furnished by the owner for use of its employés in descending into the well, it could not avoid liability for death of its employé, arising from defects in the hoisting apparatus.

4. Master and Servant 🔑265(8)—Defective Machinery—Prima Facie Evidence—Res Ipsa Loquitur.

In an action for death of one who was killed while descending into a well in a heavy bucket with another employé and six timbers, the method of loading which caused a small and insecure piece of wire covering the open part of the hook to become displaced so as to allow the bail of the bucket to slip out from the hook, the circumstances of the accident were such as to constitute prima facie evidence of negligence.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Laura Hebert, as administratrix of the estate of Roy L. Hebert, deceased, against the Byron Jackson Iron Works, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry A. Hollzer and Hickcox & Crenshaw, all of Los Angeles, for appellant.

John W. Murphy, of Globe, Ariz., and C. W. Byrer, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff, and from an order denying defendant's motion for a new trial.

The action was brought to recover damages alleged to have been suffered by reason of the death of the husband of Laura Hebert, which, in the complaint, it was asserted, was caused by the negligent omission of the defendant to supply safe means and utensils to its servant, who was killed. The accident, which caused the death of Roy L. Hebert, occurred while deceased was in the employ of the defendant and engaged in the work of installing a pump in a well pit. A bucket attached to a hoist was being used to lower men and material into the well, and while Hebert and another man were in the act of being lowered on the bucket into the pit, the bucket became detached from the hoist and fell to the bottom of the well. Both men were killed. This action was first commenced with Laura Hebert and Eloi Hebert as plaintiffs. Eloi Hebert was the father of the deceased. After evidence had been introduced on behalf of the plaintiffs, defendant made a motion for judgment of nonsuit, one of the grounds of said motion being that plaintiffs were not proper parties, and that there was a misjoinder of parties plaintiff. Counsel for plaintiffs asked leave to file an amended and supplemental complaint, in which the same facts were alleged as to the employment and death of Hebert. In the amended complaint, however, Laura Hebert, as administratrix, was named as the sole plaintiff, supplanting Laura Hebert and Eloi Hebert, named in the caption of the original complaint. Defendant objected to leave being granted to file the amended complaint. The obejction was overruled, and the motion for judgment of nonsuit was denied. It was stipulated that a demurrer pleading the statute of limitations against the amended complaint should be considered as interposed and overruled, and also that the facts pleaded in said amended complaint be deemed denied and the same defenses pleaded as to the original complaint. The trial then proceeded to its close.

Appellant contends that the court erred in allowing the amended complaint to be filed, insisting that by the substitution of parties, as made, the effect was to create a different case from that alleged in the original complaint; that it was not within the scope of legitimate amendment of the pleading to allow that to be done. Defendant also insists that because of this change its plea of the statute of limitations should have been sustained. If we were to agree with appellant that the substitution of the widow as administratrix in the place of the widow named in her own right and the elimination of the father of the deceased as a party made a different suit, then it is clear that the amendment should not have been permitted; and if formally allowed, the bar of the statute would be a good plea thereto. Evidently, when the action was brought, plaintiffs assumed that full authority sustaining the right in the individual plaintiffs was to be found in section 377, Code of Civil Procedure. That section, in brief, provides that when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or against his employer, if he has one. The section is one that has been a part of the Code since 1874. Prior to 1907, in the chapter dealing with the relation of master and servant, section 1970, Civil Code, contained terms limiting the responsibility of the employer when the servant suffered injury through a risk incident to the business or through the negligence of a fellow servant. In 1907 the Legislature made extensive additions to the section, enlarging the liability of the employer. As amended, the section contained the following provision:

> "When death, whether instantaneous or otherwise, results from an injury to an employé received as aforesaid, the personal representative of such employé shall have a right of action therefor against such employer and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery."

The question as to whether the amendment to section 1970 is to be looked to as furnishing the sole authority for the bringing of an action to recover for the death of a person caused by the negligence of his employer has not been directly decided by our Supreme Court. The court did say, in Pritchard v. Whitney Estate Co., 164 Cal. 564, 129 Pac. 989:

> "We do not consider it necessary in this case to determine the precise extent to which section 1970 may prevail over section 377 so far as they respectively authorize actions for injuries causing death. The latter is general, applying to all persons. The former applies only to injuries arising out of the relation of employer and employé. So far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action."

As to persons included within the provisions of the two sections for whom damages are permitted to be recovered, there is a difference—by section 377 the recovery plainly is for the heirs generally. It has been held that, within the meaning of that section, the word "heirs" is used in a common-law sense, and includes all persons capable of inheriting from a deceased person generally. Redfield v. Oakland C. S. Ry. Co., 110 Cal. 277, at page 290, 42 Pac. 822, 1063. The terms of section 1970, Civil Code, limit the parties plaintiff to the personal representative of the deceased, and limit also the persons who are entitled to share in the damages to "widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated. * * *" Under the latter section, a husband, for instance, would not be entitled to recover damages for the death of his wife. If we are to assume, and the assumption seems consistent with reason, that the Legislature intended to establish the measure of obligation owing by an employer to an employé in cases of injuries suffered by the latter, and also to designate all persons who should be held to have sustained legal damage in case of his resulting death, then section 1970, Civil Code, should be held to work a repeal of section 377, Code of Civil Procedure, in so far as the cause of action looked to the circumstances growing out of the relation of master and servant. The intimation of the Supreme Court made in the paragraph quoted from Pritchard v. Whitney Estate Co., supra, goes in that direction, but does not positively so affirm. However, the questions as to the right of a court to allow such an amendment as was here made, and whether the stopping of the running of the statute of limitations should be fixed at the date of the filing of the original complaint or of the amended complaint, have been directly considered and passed upon in this state, although it may be admitted that there is authority in the decisions of other states which is not in harmony with these cases.

[1] While the subjects in an abstract way seem to present fair ground for debate, we consider that the cases holding against contentions like that made by appellant here furnish a reasonable rule to be adopted in determining those issues. We refer to the case of Cox v. San Joaquin Light, etc., Co., 33 Cal. App. 522, 166 Pac. 578, and the case therein cited, Reardon v. Balaklala Consolidated Copper Co. (C. C.) 193 Fed. 189. The elimination of the father as a party plaintiff could result in no detriment to the appellant. No proof was offered tending to show that the father was dependent upon the deceased son; in fact, the testimony was directly contrary as to the fact. Furthermore, by the express provision of section 1970 but one action could be brought for damages for the cause alleged; hence the prosecution of the suit by the administratrix would bar a similar right of other persons beneficially interested.

[2] The assertion by appellant that one effect of permitting the amendment to be made was to deprive it of the right to interpose the defense of assumption of risk and contributory negligence is hardly pertinent. At the time this accident occurred, what was known as the Roseberry Act (St. 1911, p. 797) was in effect, and under the provisions of that act in all actions of this kind, under whatever section brought, the comparative negligence rule is imposed, and the fellow servant and assumed risk defense entirely

taken away. Reynolds v. Horst, 35 Cal. App. 711, 170 Pac. 1082.

[3] Upon the facts of the case defendant claims that no liability was shown. To give point to this argument two propositions are urged: First, that the evidence showed the instrumentality by reason of the faulty operation of which Hebert was killed was not furnished by defendant; second, assuming that the instrumentality was under the control of defendant, the evidence was insufficient to show any negligent act or omission on its part. The first point may be very briefly disposed of. Defendant contracted to install a pump in a well pit on a ranch owned by one Ford, and there being a hoisting apparatus on the ranch, as a part of its contract with Ford, defendant was to have furnished for its use the hoist, together with a man to operate it. This hoist was so furnished, and while it was being used by the defendant and at the time the accident occurred, it was wholly subject to the direction and control of the defendant. The manager of the ranch testified that it was optional with the defendant to use the hoist or not, as it chose. It would suggest a legal absurdity to say that an employé of defendant, being in the course of his work required by the defendant to make use of a particular instrumentality, could not, in the event of injury by reason of the insufficient character of the instrument, recover from his employer; that the employer could escape liability by saying to its employé:

> "I required you to use the defective tool which has caused you injury; I had the right to make it safe and keep it in repair, but it was loaned to me by another person; therefore I am not responsible."

The bare statement of the proposition seems to furnish its own answer.

[4] Proceeding, then, to appellant's second contention: The evidence in the case showed that a large bucket attached to a cable contrivance was used to carry men and material from the surface of the ground to the bottom of the well, which was between 225 and 230 feet deep. At the cable end over the well was an iron hook, and the bail of the heavy bucket was hung in this hook. Across the open end of the hook a wire contrivance was placed for the evident purpose of keeping the bail of the bucket from being pushed out of the hook. At the time of the accident the bucket was on the surface, and was being loaded with timbers 2 by 6 inches and about 5 feet in length. The bucket was about 2 feet across its top and about 2 feet deep. The timbers were placed endwise and extending upwards from the bottom of the bucket. Hebert, the deceased, was engaged in this work, assisted by one Sanders, his immediate superior, or the "boss" in charge of that shift. The two, after loading the bucket with timbers, about six in number, swung the bucket over the pit, and Sanders, the boss, stepped on one side of it and told the deceased to get on the other side, saying, "Let's go down and finish this up." At that moment the bucket became detached from the hook and fell to the bottom of the well, carrying the two men with it and killing them, as has been before narrated. After the accident, both the bail of the bucket and the hook were found intact, but the piece of galvanized wire (No. 9), which had been tied across from the point of the hook to the back of it, was gone. We think these facts were sufficient to authorize the jury to find that defendant was negligent. It appeared that the wire fastening across the open part of the hook was of small kind—ordinary galvanized wire—and that it was merely tied or twisted into its place. The loading of six timbers, two inches thick and six inches wide, extending five feet above the bottom of the bucket, might reasonably and under careful handling cause the small wire over the hook to become displaced and the hook itself to be pushed off the bail, a happening which would not have occurred had the defendant used a more secure covering over the open part of the hook. That it could have been made perfectly secure without resort to any unusual appliances admits of no doubt from the testimony. We think the case is one proper for the application of the rule that the circumstances of the accident were of such a nature as to constitute prima facie evidence of negligence. Ingalls v. Monte Cristo Oil Co., 23 Cal. App. 652, 662, 139 Pac. 97.

We have carefully examined the instructions as given by the court in its charge to the jury, and think that, taken as a whole, they contained a correct statement of the law applicable to the case under the statutes in existence at the time of the accident governing the responsibility of an employer to his employé.

We find no prejudicial error in the record which would justify a reversal.

The judgment and order are affirmed.

We concur: **CONREY, P. J.; MYERS, Judge pro tem.**

39 Cal. App. 256

ANDERSON v. PALLADINE et al.

(Civ. 2618.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1918. Rehearing Denied by Supreme Court Feb. 20, 1919.)

1. DEEDS 🔑144(1)—"CONDITION."

A "condition" is a qualification annexed to an estate by the grantor upon the happening or breach of which the estate granted is enlarged or defeated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition.]

2. DEEDS 🔑145—CONDITIONS—FORFEITURE.

Conditions in a conveyance, breach of which would work a forfeiture, will be construed as covenants merely when this can be done without violence to the clear intent of the parties.

3. LOGS AND LOGGING 🔑3(7)—TIMBER—CONVEYANCE.

Growing timber is part of the realty, and consequently a deed to growing timber conveys an estate in præsenti.

4. LOGS AND LOGGING 🔑3(9)—DEEDS—CONDITIONS—CONSTRUCTION.

Where a landowner conveyed growing timber, with the right to cut and remove the timber at all times within ten years, together with the right to construct logging roads, etc., *held* that the ten-year provision was a mere covenant, and not a condition subsequent, so that the grantee's estate was not forfeited because the timber was not removed within the ten-year period.

5. EVIDENCE 🔑461(2)—PAROL EVIDENCE—DEED.

Where a deed is absolute on its face, and its terms are unambiguous, parol evidence is inadmissible to show the intent of the parties.

6. APPEAL AND ERROR 🔑1050(1) — REVIEW —HARMLESS ERROR.

Where a deed was absolute on its face, and its terms were unambiguous, the admission of the parol evidence to show the intent of the parties was prejudicial error.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Gustaf Anderson against A. G. Palladine and the Hume-Bennett Lumber Company, Incorporated. From a judgment for plaintiff, defendant last named appeals. Reversed with directions.

F. E. Cook, of Fresno, for appellant.

C. K. Bonestell, Casper N. Torp, and A. W. Carlson, all of Fresno, for respondent.

LENNON, P. J. In this action plaintiff sought and secured a judgment quieting his title to two quarter sections of timber land situated in the county of Fresno. The record before us shows only the answer and appeal of the defendant Hume-Bennett Lumber Company, Incorporated.

The corporation appellant made no claim to the land in suit as distinguished from the timber growing thereon, but its answer, in addition to denying all of the material allegations of the complaint, pleaded several special defenses, only one of which, however, is involved upon this appeal, namely, that defense which interposed the corporation defendant's claim of an existing right and title to the timber in question based upon the fact of the execution of a grant deed by and from plaintiff conveying the timber standing and growing upon one of the quarter sections of the land involved in the suit to certain grantees, who in turn conveyed their title to the timber to the Kings River Lumber Company, which title was, by mesne conveyances, ultimately transferred to the corporation defendant. The deed from plaintiff upon which this defense rested was executed some 28 years prior to the institution of the action, and is as follows:

"Know all men by these presents:

"That I, Gustaf Anderson, of the county of Tulare, state of California, for and in consideration of six hundred and twenty-two dollars, the receipt whereof is hereby acknowledged, do grant to A. D. Moore, of the city and county of San Francisco, an undivided two-thirds, and to H. C. Smith, of the county of San Joaquin, state aforesaid, an undivided one-third of all that real property situate in Fresno county, state of California, bounded and described as follows:

"All the timber now growing and standing on the northeast quarter of section twenty-two, in township thirteen south, range twenty-eight east of the Mount Diablo base and meridian, together with the right and privilege of free and undisturbed ingress and egress in, upon and from said real property at any and all times within ten years from the date of this grant. To cut and remove from said parcel of land the timber hereby granted from time to time as said grantees may elect—and together with the right to construct logging roads, tramways, trails and railroads and such other ways and means as said grantees may require to enable them to cut and remove said timber, and together with all other rights and privileges necessary for the full enjoyment by said grantees of this grant.

"Witness my hand this sixth day of April, A. D. 1887. Gustaf Anderson.

"Signed and executed in the presence
"J. W. Fewel."

The execution of this deed was not disputed, and it was an admitted fact in the case that the timber thereby conveyed had not been cut and removed, nor attempted to be cut and removed, either in whole or in part, by the corporation defendant or any of its predecessors in interest within or without the ten years designated in the deed, and that the plaintiff never at any time made demand for the cutting and removal of the timber.

Briefly stated, the further facts of the case, as revealed by the pleadings and proof, are these: The land upon which the timber in controversy originally stood and is still standing and growing is at an elevation of about 6,000 feet. Because of its elevation and the character of its soil, the land is neither valuable nor profitable for agricultural purposes, and aside from the timber growing thereon, possesses only a slight, if any, value for grazing purposes. The land in question is situated in the mountains some 60 miles removed from the line of the railroad, and not until the year 1911—when at a cost of $500,000 the milling plant of the corporation defendant was erected and in conjunction therewith a flume constructed to carry lumber to the valley below—was there any practical means of marketing the timber in controversy even if it had been theretofore cut and removed from the land upon which it was growing. Ever since the construction of its mill, the corporation defendant has been engaged in cutting timber from lands in the neighborhood of the land in suit and marketing it by means of the millpond and a connecting railway constructed by the corporation defendant, and which, although extending some 18 miles into adjoining timber lands, did not run to nor in the direction of the land in suit, and as a consequence the timber thereon can be marketed practically and profitably only by the installation of considerable additional trackage, and this the corporation defendant contemplated doing "in about four years" (some time in the year 1920), which period of time it claimed would be reasonably necessary to the continuity and completion of the plans which it had inaugurated on a large scale for the marketing of the timber on the land in question and in the adjoining timber lands generally.

It is conceded that the judgment of the court below was in effect a holding that the corporation defendant's title to the timber in controversy was forfeited by the failure to cut and remove the same within the designated ten years. It is also conceded that the correctness of the judgment depends upon whether the deed in question was absolute, or was a conditional grant of the timber. The solution of this question in turn is dependent upon whether or not that clause of the deed which in addition to the granting of the timber gave to the grantees "the right and privilege of free and undisturbed ingress and egress" in and from the land described "at any and all times within ten years from the date of the grant," constituted a condition subsequent as distinguished from a mere covenant the breach of which would operate as a defeasance and forfeiture of the estate originally granted.

At this point, it may not be amiss to note that, notwithstanding the fact that in the clause just quoted a period purports to point a sentence ending with the word "grant"—that clause must be read in conjunction with and construed as a part of the immediately following phrase commencing with the words "to cut and remove," etc. This must be done, we think, for, standing alone, the quoted clause concerning ingress and egress is meaningless, whereas, when closely connected and construed with what follows, it plainly provides the privilege of free and undisturbed ingress and egress during a period of ten years, to and from plaintiff's land, primarily for the purpose of cutting and removing the timber granted.

[1-3] Whether the clause in controversy be a condition the breach of which involves a forfeiture of the estate created, or a mere covenant conveying a privilege which has expired of its own limitation, is a question, we think which may be readily and rightly resolved by a resort to the rudimentary rules which ordinarily govern and control the creation and continuity of estates granted upon condition. A condition is a qualification annexed to an estate by the grantor, upon the happening or breach of which the estate granted is enlarged or defeated. Of course, the breach of a condition upon which an estate is expressly or impliedly granted works a forfeiture of the estate, but it is elementary that the law abhors a forfeiture, and, consequently, in order to avoid one, conditions in a conveyance will be construed as covenants merely when this can be done without doing violence to the clear intent of the parties as expressed or necessarily implied from the language of the conveyance. Growing timber is a part of the realty, and, consequently, the deed under consideration here conveyed to the original grantees an estate in praesenti. While conditions subsequent are commonly created by the use of a familiar formula of words and phrases which, when employed, leaves no doubt as to the character and contingent continuance of the estate created, still no particular or peculiar wording is absolutely essential to the creation of an estate upon condition subsequent, and such an estate will be held to have been created if the language of the conveyance or its import is so clear as to leave no doubt but that the grantor intended to create an estate upon condition subsequent—language which ex proprio vigore imports such a condition. Hawley v. Kafitz, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282.

[4] Measured by the rules related, the deed before us falls far short of showing an intention of the grantor to create an estate upon condition subsequent, for it is utterly devoid of words of forfeiture—those words and phrases which ordinarily and aptly express and which are commonly employed for the purpose of creating a condition calling for a forfeiture; and nowhere within the four cor-

ners of the deed is there to be found any language which, either in whole or in part, remotely suggests that the parties thereto contemplated the creation of a condition subsequent rather than a mere covenant which in no way trenched the title to the timber granted.

Construing, as we must, the clause in controversy as a mere covenant, we are then confronted with the question of the relative rights and responsibilities of the parties in the presence of the admitted fact that the right conveyed by the covenant of free and undisturbed ingress and egress to and from plaintiff's land for the purpose of cutting and removing the timber was not exercised within the ten years' time limited by the covenant. The solution of this question is, we think, found in the application of the principles enunciated in and underlying the decision in each of the two cases of Peterson v. Gibbs, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107, and Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62.

While the case at bar and the two cited cases are not in their facts pointedly the same, nevertheless in their essential features they are closely akin. In the first of them the action, as here, was one to quiet title to land upon which the standing timber had been previously conveyed by an instrument much less formal than the deed before us; and in that case the trial court ruled, and the Supreme Court held, that the instrument constituted an absolute conveyance which vested title to the timber in the grantees free and clear of conditions, notwithstanding the failure of the vendees to take advantage of a concurrent covenant to the effect that they should have the right of ingress and egress to and from the land on which the timber was standing during a period of ten years for the purpose of cutting and removing the timber, which covenant was coupled with the proviso that if the timber was not removed within the time limited, a rental of $200 a year thereafter would be paid for the privilege of entering upon the land and removing the timber, and that the vendees would pay one-half of all taxes levied upon the land from the date of the agreement until all of the timber had been removed. Counsel for the plaintiff in the present case insist that the cited case does no more than decide what, under the particular agreement of the parties in that case, was the effect of the failure to either remove the timber within the time originally limited, or comply with the condition upon which an extension of such time was to be granted, and that the cases, therefore, are to be distinguished.

We are unable to see or make the distinction, and, following the reasoning and the ruling of the cited case, there is no escape, it seems to us, from the conclusion that the deed before us was an absolute grant of the timber in controversy, and that the clause thereof granting the "privilege of free and undisturbed ingress and egress, etc., at any and all times within ten years from the date of this grant to cut and remove * * * the timber * * * granted from time to time as said grantees may elect," etc., cannot be taken as a limitation of the major grant; that is to say, the clause under consideration here, like the covenant construed in the cited case, clearly indicates that the sale of the timber was made in contemplation of its removal, and is not pointed to the purpose of extinguishing the title to the timber conveyed in the event that it was not cut and removed within the designated ten years, but was rather intended to provide a period of time during which the grantees were to have free and undisturbed access to the land for the purpose of cutting and removing the timber thereon, and further contemplated that if the timber was not cut and removed within that time only the right of free and undisturbed access would be lost, leaving the parties in that event to a separate and independent adjustment of new terms and time upon which the right to cut and remove the timber might be exercised. Manifestly, if defendant or its predecessors in interest had commenced to cut and remove the timber within the designated ten years, but had failed to complete the work within that time, it could not be successfully contended that the title to the timber remaining upon the land was thereby forfeited, or that anything more than the mere right of free and undisturbed ingress and egress had been lost.

In addition to what we have said as to the proper construction of the deed here involved, we think its final clause clearly contemplates that there shall be no forfeiture of the right to the timber by mere delay in its removal. We regard the closing language of the deed as very significant. After apt words of grant of the timber and language conferring the right to remove it within ten years, there is the additional provision, "together with all other rights and privileges necessary for the full enjoyment by said grantees of this grant." Here is emphasized the intent of the grantor to confer everything necessary for the full enjoyment of the grant of the timber, and it seems to us that a reasonable construction of this last provision would give to the grantee of the timber additional time within reason for its removal if found necessary. Otherwise he cannot be said to have the full enjoyment of the thing granted.

But, however that may be, our conclusion in this behalf is confirmed by a consideration of the second cited case of Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62, which was an action between the same parties practically involving the same facts, and differing from its companion case in the particular that that was an action to enjoin the defendant as owner of the land from cutting and removing the timber standing thereon. There it was said by the Supreme Court that the opinion in the previous case had disposed of all questions raised as to forfeiture by plaintiffs of any of their rights in regard to such timber, and determined that they were the absolute owners thereof, notwithstanding their failure to take any steps to remove the timber, and notwithstanding their failure to pay any of the taxes for the years 1891 and 1896. The same would be true as to the failure of plaintiffs to pay the $200 per annum specified in the instrument, and, proceeds the opinion:

> "It seems clear that defendant was not warranted in proceeding upon the theory that plaintiff had lost all rights in the timber standing on his land, and that notwithstanding the matters set up in his answer and cross-complaint [referring in part to the failure to pay certain taxes and rent], plaintiffs were entitled to a decree enjoining him from so doing. * * *
>
> "The effect of the former decision * * * clearly is that no delay in the removal of the timber can operate as a forfeiture of plaintiff's rights * * * thereto."

In line with the case last quoted is the case of Ciapusci v. Clark, 12 Cal. App. 44, 106 Pac. 436, where the court refused to read terms of forfeiture into a conveyance of standing timber merely because it gave the right of entry within a designated time for the purpose of removing the timber, coupled with a proviso for an extension of such time in consideration of a stipulated rental. In the latter case the timber was not removed within the time designated, and, as was alleged in Peterson v. Gibbs, supra, the rent stipulated for an extension of time was not paid, and in holding that this fact did not operate as a forfeiture the court said:

> "It would be manifestly improper that mere delay should forfeit both the appellant's money and his timber."

The case of Call v. Jenner Lumber Co., 33 Cal. App. 310, 165 Pac. 23, so strongly relied upon by counsel for respondent, is, we think, clearly distinguishable from the cases previously cited and also from the case at bar in this, that the language of the deed there involved clearly expressed the intention of the parties to pass title only to such timber as was cut and removed, and expressly provided that all title to any timber which was not cut and removed within the time limited, together with the right of entry for the purpose of cutting and removing the timber, should be lost to the purchaser. While, in the present case, the title to the timber was not lost to the corporation defendant by its failure to cut and remove the timber within the designated time, still, as was said in the case of Gibbs v. Peterson, supra, the defendant would not under the circumstances be entitled to perpetually maintain the timber upon plaintiff's land. In the present case the defendant, pursuant to the special defense in that behalf pleaded, prayed for and proffered proof of a reasonable time within which to cut and remove the timber in controversy, and, inasmuch as this is an equitable action, one in which under the issues raised by the pleadings and the evidence all of the rights of the parties might and should have been equitably adjusted in keeping with the procedure outlined in Gibbs v. Peterson, supra, where the situation of the parties was, we think, relatively the same as that of the parties here, the trial court by its judgment should have decreed the title to the fee of the land to be in plaintiff, the title to the timber in the appellant, and then found and fixed a reasonable time within which the appellant should remove its timber from the land, and, provided that if it failed to do so, the plaintiff might remove and sell the same at the expense and for the benefit of the appellant, accounting to it for the net proceeds thereof. Said judgment should further provide that if the timber be not removed within the time fixed, the plaintiff shall be entitled to retain from the proceeds of his sale of the timber such an amount as will reasonably compensate him for his loss of the use and occupation of the soil from the expiration of the period fixed by the court for such removal to the time of the actual removal, such amount to be determined by the court. The judgment given should be interlocutory in its nature, the court retaining jurisdiction of the cause for the purpose of an accounting between the parties in the event that appellant failed to remove the timber within the specified time.

[5, 6] Incidentally it should be noted that the trial court's finding to the effect that the defendant was without any rightful claim of title to the timber in controversy was based in part upon parol testimony, which was received upon the theory that the deed in question was ambiguous in its terms, and did not clearly express the intent of the parties as to what would be the result of a failure to remove the timber within the designated ten years.

The admission of this testimony, we think, was error, and, in view of the finding made, prejudicial error. The deed, as has been previously pointed out, is absolute on its face; its terms are unambiguous and consequently neither require nor permit an inquiry into the surrounding circumstances for the purpose of ascertaining its meaning or the intent of the parties. It is well settled that if there be no ambiguity in the contract, it must speak for itself. Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948; United Iron Works v. Outer Harbor Co., 168 Cal. 81, 141 Pac. 917.

For the reasons stated, the judgment appealed from is reversed, with directions to the lower court to take such further proceedings as it may be advised in keeping with the views herein expressed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

(39 Cal. App. 247)

MACKENZIE v. LOS ANGELES TRUST & SAVINGS BANK et al. (Civ. 2604.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1918.)

1. Limitation of Actions 🔑95(1)—Setting Aside Trust Agreement.

Trustor's heir, who had actual knowledge of trust instrument and delivery of trust property to trustee, could not defeat operation of statute of limitations against action to set aside instrument, on the ground that she did not know whether trustee had taken any steps to execute trust; she being bound to assume that trustee would perform its obligations under instrument.

2. Limitation of Actions 🔑103(1)—Setting Aside Trust—Rule as to Accrual of Rights.

The rule that statute will not begin to run against cestui que trust until trustee repudiates trust relations does not apply to action by heir of trustor to set aside trust instrument.

3. Trusts 🔑53—Inconsistency of Conduct.

Plaintiff, having received the property advanced to her prior to death of trustor and retained the same, was estopped to question validity of trust instrument.

4. Evidence 🔑69—Performance of Trust Agreement—Presumption.

It is always presumed that the trustee in possession of trust property will perform the duties imposed upon him as trustee until he takes a contrary attitude.

5. Trusts 🔑21(2)—Validity of Instrument—Certainty.

Trust instrument, providing that the whole or any part of income should be applied towards education of trustor's grandchildren, was not subject to objection that it was invalid, because such provision did not provide what amount should be devoted to education, and what the character of that education should be.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Mary H. Mackenzie against the Los Angeles Trust & Savings Bank and another. From a judgment denying the relief sought, plaintiff appeals. Affirmed.

Parks & Pease and H. S. Clewett, all of Los Angeles, for appellant.

O'Melveny, Stevens & Millikin and Joseph C. Finch, all of Los Angeles, for respondents.

JAMES, J. This action was brought for the purpose of securing a decree declaring void a trust created by William Mackenzie, deceased. Defendant Trust & Savings Bank was named as the trustee in the instrument of trust executed by said Mackenzie. It was also administrator of his estate. From the judgment denying the plaintiff the relief sought, this appeal is taken.

The facts were agreed upon and presented to the trial judge by written stipulation. It appears that in 1904 William Mackenzie, being the owner of a large amount of property, determined that he would then distribute to his wife and children such proportions thereof as he desired them to have, rather than to leave such distribution to be made by will. Besides his wife, there were then living this plaintiff, a daughter, who was unmarried and then and since resided at Glen Cove, N. Y., William Mackenzie, his son, Teanie Covey, a married daughter, and Sophia Mackenzie, an unmarried daughter. There were nine grandchildren, six being the children of the son, William Mackenzie, and three the children of Mrs. Covey. In that year he made distribution to his wife and children, all of whom accepted the property given to them and all receipted for the same and in the receipt expressed their understanding and assent that the allotment was in full of all their interest, present or future, in the estate of the husband and father, and that it was received as an advancement of their whole and entire interest in and to said estate. Thereafter, on the 31st day of October, 1905, William Mackenzie executed an instrument of trust, naming the defendant trust company as trustee, and contemporaneously therewith delivered to his trustee personal property consisting of various securities of a value in excess of $90,000. In the trust instrument it was provided that the trustee should pay the income from the trust property to the trustor so long as he should live, and that upon his death the trustee should hold the property for the benefit of the grandchildren. On the 11th day of November of the same year Mackenzie died. There was received by the trustee prior to the death of Mackenzie, as income, the product of the trust property, the sum of $1,133.69. This money of course belonged to the estate of the deceased, and in order to distribute the same the trust company defendant was, on the 29th day of January, 1906, appointed administrator of said estate and has continued ever since to act in that capacity. On the 26th day of February, 1906, the administrator filed an inventory in the matter of the estate, showing that it had possession of property belonging to the estate in the amount hereinbefore mentioned, and on the 15th day of June, 1911, filed its first and final account, with petition for distribution. Notice of hearing on the account and petition was duly given, the date set being the 28th of June, 1911. About this time plaintiff employed attorneys to intervene in her behalf, and the hearing on the report and petition of the administrator was continued from time to time. Plaintiff filed objections to the account and the granting of the petition on the ground that the administrator had not charged itself with the property which it had in its capacity as trustee under the trust instrument received from William Mackenzie. This action was brought by the filing of the complaint on March 1, 1913. It will be noted that the complaint was filed more than seven years after the death of William Mackenzie and the issuing of letters of administration in his estate. In the statement of the facts it is recited:

> "That until shortly after the time of the filing of the first and final account, report and petition for distribution in the matter of the estate of said William Mackenzie, deceased, the plaintiff did not have actual knowledge that the defendant had not charged itself with and did not intend to charge itself with and account for the property described in the written instrument, * * * as a part of the estate of said William Mackenzie, deceased, but never made any inquiries of said Los Angeles Trust Company or the defendant concerning the subject. That the plaintiff has not at any time actually known and does not now actually know whether or not the Los Angeles Trust Company or the defendant has taken any action in performance or in attempted performance of the terms, directions and conditions of the written instrument, a copy of which is hereinabove set forth, but has never made any inquiries of either said Los Angeles Trust Company or the defendant concerning the matter."

It appears further in the agreed statement that the trustee did enter upon the performance of the obligations imposed upon it by the trust instrument, and did execute the conditions thereof up to the time that objection was formally raised against the validity of the trust.

[1-4] The court, agreeable to the issue presented by the answer, first determined that the cause of action asserted by the plaintiff was barred by the four-year statute of limitations, and further that by reason of the plaintiff having received the allotment of property advanced to her prior to the death of William Mackenzie, and retained the same, she was estopped from questioning the validity of the trust instrument. The finding on the merits of the main question was that the trust was not void or invalid for "indebtedness, or for or upon any other ground or reason alleged by the plaintiff." While we are of the opinion that both preliminary issues, that of the time limitation and of an estoppel against the plaintiff, were correctly determined, we will enter into no particular discussion of those questions, because we think that the ground upon which plaintiff based claim that the trust is invalid is not well taken, and that the decisions in this state clearly support that view. Before passing to this main question, it may be remarked that the authorities, a number of which are cited by appellant, holding that the statute of limitations does not commence to run against a cestui que trust to have enforced the trust terms until the trustee repudiates the trust relation, have no application in this case. Upon that particular question, the underlying reason, when applied here, operates against rather than in favor of plaintiff. It is always presumed that the trustee in possession of trust property will perform the duties imposed upon him as such trustee until he takes a contrary attitude. Here the plaintiff was bound to assume that the trustee, having accepted its appointment, would perform the obligations imposed upon it, and that the property held by it as such trustee would not be accounted for as property belonging to the estate of William Mackenzie, deceased. By the very terms of the trust instrument all of that property was removed from Mackenzie's estate. The stipulation of facts shows that in the month of November, 1905, the plaintiff had personal knowledge of the execution of the trust instrument and of the delivery of the trust property to the trustee.

[5] The trust created as to the property delivered to the trustee was a valid one. The main contention of appellant revolves about the second clause of the trust instrument, which provides as follows:

> "In trust, after the death of the party of the first part, to apply the whole or any part of the said interest, dividends and annual proceeds toward the education of the grandchildren of said William Mackenzie living at the date of the execution of this instrument, and to pay the same either directly, or to his, her, or their natural guardian or guardians, without being required to see to the application thereof, or to require any accounting of the same, and apply the residue of such income, if any, in augmentation to the said trust fund."

In the paragraphs following, the distribution of the corpus of the property was provided to be made in certain proportions to the grandchildren at their majority. It is argued that the provision as to the application of the interest, dividends, and proceeds of the trust property during the minority of the children is indefinite in that it does not provide as to what amount shall be devoted to the education of the grandchildren, or what the character of that education shall be. That such a provision makes the trust void, appellant contends is sustained by the decision in the matter of the Estate of Sanford, 136 Cal. 97, 68 Pac. 494. Some language is used in that decision which lends strong color to the argument here made. However, the question of the indefiniteness of the income provision considered in the Estate of Sanford was not the real question upon which the decision turned, and we think that later decisions of the Supreme Court have made that proposition clear. Under these later decisions we think it very plain that the remarks of the court in the Sanford Case referring to the matter of income distribution must be considered either as dicta or as having been definitely overruled. In the matter of Estate of Reith, 144 Cal. 314, 77 Pac. 942, the trust provision of a will imposed upon the trustees "the duty of keeping my children in such circumstances as will permit them to have every comfort of dress, etc., and all the needed education which shall fit them for a career in any position of life." It was there argued that the provision was too indefinite to sufficiently define the duty of the trustees, and the court said:

> "It is also claimed that the trust is void for the reason that it leaves it to the discretion of the trustees as to how much income shall be used to support and educate the children, and the Estate of Sanford, 136 Cal. 98 [68 Pac. 494], is claimed to support such contention. In that case the trustees were to receive the rents and profits of the land and apply the net proceeds of the same to the use and benefit of the beneficiaries to such extent and at such time or times as in their judgment shall be proper. What was said in regard to the discretionary clause was not the point on which the case was decided. It was expressly held that the provision of the will creating an express trust to convey was void on the authority of the Fair Case, 132 Cal. 523 [60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70]. In the case at bar, however, the clause is entirely different from that in the Sanford Case. Here it is made the duty of the trustees to keep, clothe, and educate the children. It was not necessary to say that all the income should be used for such purpose. The income may for many reasons vary from time to time. It may be more than necessary for the purposes contemplated in the will. * * * The children must be kept, clothed, and educated. The manner in which they shall be kept, the nature of their education, the kind of clothing they shall wear must depend to a certain extent upon the amount and income of their estate. The trustees will be presumed, acting as the persons in charge of the children, to reasonably and properly care for them. They are under the supervision of the court, and at all times will be held answerable for a failure to perform the duties of their trust in a proper manner, and for any abuse of their powers. The deceased reposed confidence in them, and, having such confidence, she selected them. We will presume that they will perform the duties of their trust faithfully."

Following the expressions of the court in the Reith Case, it may be well said here that it will be presumed that the trustee will perform its duty in good faith. When the trustor directed that "the whole or any part" of the income should be applied toward the education of the minors, he did not mean that the trustee, at its option, could devote any small sum, $1, perhaps, in the furtherance of that object. The intent of the trustor was plainly that the minors should be educated. Not having expressly restricted the kind of education they should receive, the logical presumption to be applied is that he intended them to receive a fitting education, one suitable to their position in life, considering the means available for the purpose. The trustee might expend the whole of the income in that direction; a lesser amount might be sufficient. In the latter case, the excess is to be applied "in augmentation of the said trust fund," which was provided to be later distributed. See, also, Hornung v. Sedgwick, 164 Cal. 629, 130 Pac. 212.

Our conclusion is that the trust is valid and that the court properly denied relief to the plaintiff on that issue, and also properly resolved the questions against her as to the application of the statute of limitations and the estoppel.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

39 Cal. App. 234

PEOPLE v. MELLO. (Cr. 812.)

(District Court of Appeal, First District, Division 1, California. Dec. 20, 1918.)

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Joe Mello was convicted of rape. From an order denying a motion for new trial, and from a judgment of conviction, he appeals. Affirmed.

T. L. Christiansen, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from an order denying defendant's motion for a new trial, and from a judgment of conviction of the crime of rape.

The sole contention in the case is that the evidence fails to establish the elements of the crime charged. There is no merit in this position. The defendant was accorded a fair trial, and the judgment must stand.

It is not necessary to set forth the unpleasant details revealed by the evidence. Suffice it to say that it showed that the offense was committed on repeated occasions by the defendant with his minor sister, and the defendant's guilt was established, not only by her testimony, but by his own confession. The testimony of the prosecutrix was straightforward and consistent, and free from certain elements that appellate courts have frequently referred to as creating a doubt as to the truth of the charge.

The judgment and order are affirmed.

179 Cal. 695

NICHOLS v. ASBECK et al. (L. A. 4756.)

(Supreme Court of California. Feb. 8, 1919.)

1. BILLS AND NOTES 🔑394—PRESENTMENT—NECESSITY FOR.

There is no necessary connection between Civ. Code, §§ 3130 and 3131, as they stood in May, 1910, the latter dealing only with presentment "when necessary," and presentment not being necessary to charge the maker.

2. TENDER 🔑13(4)—PLACE—READINESS—DEPOSIT WITH THIRD PERSON.

Assuming that it was necessary under Civ. Code §§ 3130, 3131, that a note should be presented at place of business or residence of defendant, a finding that money to pay note was deposited with a firm and "that said deposit was made for the purpose of having said funds on hand at the date of maturity of said note, and that defendant A. was able and willing to pay said note at the date of maturity," was insufficient to relieve defendant of interest and damages accruing after date of maturity; there being no finding that the maker resided with the firm or had his place of business there.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Mary J. Nichols against Augustus A. F. Asbeck and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Albert J. Lee, of San Diego, for appellants. Crouch & Chambers, of San Diego, for respondent.

SLOSS, J. Action to foreclose a mortgage of real property given by the defendant Asbeck to secure the payment of a promissory note for $400, dated May 18, 1910, and payable one year after date. By the note the maker promised to pay to the order of Mary J. Nichols, the plaintiff, "at San Diego, California, $400, with interest at the rate of twelve per cent. per annum from date until paid." Subsequent to the making of the note and mortgage, the mortgagor conveyed the property to I. Isaac Irwin.

The note was not paid, and in May, 1915, this action was commenced against Asbeck and Irwin to foreclose the mortgage. The court gave judgment of foreclosure for the amount of the note, together with interest at the agreed rate, attorneys' fees as specified in the note, and costs. The appeal is on the judgment roll alone. Among the findings is one that the note was never presented to the defendant Asbeck for payment, nor has any demand for payment ever been made upon him; that prior to the maturity of the note said Asbeck "deposited with the firm of Irwin & Co., in the city of San Diego, a sum of money sufficient to pay the principal and interest on said note at the date of maturity; that said deposit was made for the purpose of having said funds on hand at the date of maturity of said note; and that the defendant Augustus A. F. Asbeck was able and willing to pay said note at the date of maturity in the city of San Diego, state of California."

[1, 2] The sole point made by the appellants is that the failure of presentment, coupled with the other facts found, affords an answer to any demand for interest from the date of maturity, damages, and costs. Section 3130 of the Civil Code (as it read at the time of the transactions here in question), after declaring that demand of payment need not be made upon the principal debtor in a negotiable instrument in order to charge him, went on to say:

> "But if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part."

The note in question was made payable "at San Diego, California." The succeeding section, 3131, provided that presentment for payment, when necessary, must be made as follows:

> "(3) An instrument which specifies a place for its payment must be presented there; and if the place specified includes more than one house, then at the place of residence, or business, of the principal debtor, if it can be found therein."

The argument of the appellants is that the latter provision must be read into the note, and that the "place of payment" specified in the instrument was therefore the place of residence or business of the maker. There is no necessary connection between sections 3130 and 3131. The latter deals only with presentment "when necessary," and presentment is not necessary to charge the maker of the note. Sections 3131 et seq. apply only to the indorser. Jones v. Nicholl, 82 Cal. 32, 34, 22 Pac. 878. But if we accept the view of appellants, it would seem to follow that they can claim the advantage of the provision of section 3130 only by showing ability and willingness to pay the note at maturity at the specified place, i. e., at the maker's place of business or residence in the city of San Diego. But the finding relied upon does not show this. The court found that money to pay the note was deposited with the firm of Irwin & Co. in the city of San Diego, and there is no finding that the maker resided with the firm of Irwin & Co., or had his place of business there. The general concluding statement that the defendant Asbeck was able and willing to pay the note at maturity in the city of San Diego must be read in connection with the preceding specific language. The whole finding, construed, as it should be, so as to support the judgment, means simply that the maker was able and willing to pay the note by means of the deposit which he had made with the firm of Irwin & Co. in the city of San Diego. If therefore the note is to be taken as specifying as the place of payment the place of business or residence of the maker in the city named, the findings fail to show an ability and willingness to pay at either place.

We do not feel called upon to decide whether a note made payable in a given city is payable at a specified place, within the meaning of section 3130. This inquiry is the more unnecessary, since the Civil Code provisions on the subject have now been superseded and altered by the enactment, as new sections, of the uniform "Negotiable Instruments Law." Stats. 1917, p. 1531.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

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179 Cal. 665

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 8928.)

(Supreme Court of California. Feb. 4, 1919.)

1. COMMERCE ⚷27(5) — WORKMEN'S COMPENSATION ACT—RAILROAD SERVANT—TEST.

Test of whether railroad's brakeman was engaged in interstate commerce when injured, so that Industrial Accident Commission had no jurisdiction to make an award to him, is the nature of the work he was doing at the time.

2. COMMERCE ⚷27(5) — INJURIES TO RAILROAD SERVANT—"INTERSTATE COMMERCE."

Brakeman on railroad's construction train whose duties related to both interstate and intrastate traffic, who, by direction of conductor, dropped off to flag interstate freight train approaching on same track, and fell and was injured, *held* engaged in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Bank.

Petition for writ of review by the Southern Pacific Company against the Industrial Accident Commission, to annul and set aside its award of commission for injuries to Ralph R. Rouse. Award annulled.

Henley C. Booth and Henry Heidelberg, both of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondents.

VICTOR E. SHAW, Judge pro tem. In this proceeding petitioner, by writ of review, seeks to have an award made of compensation for injuries to Ralph R. Rouse by the Industrial Accident Commission annulled and set aside.

It appears from the undisputed facts that petitioner, as a common carrier of both intrastate and interstate commerce, was at the time of the accident engaged in the operation of a steam railroad extending from points outside of the state to and across the same, a branch of which railroad, as a part thereof, and so operated, extended from Davis to Oroville, in California; that on this branch line there was a trestle which it was necessary to keep in repair so that both interstate and intrastate commerce which petitioner was engaged in transporting could be moved; that on January 25, 1918, said trestle was in a condition which rendered the repair thereof necessary, and for such purpose a construction train, consisting of a self-propelled pile driver pushing a flat car in front and pulling one in the rear, was proceeding over said branch road to said trestle; that at said time Rouse, whose duty as brakeman, among other things, was to flag approaching trains so as to prevent collisions with the work train, was riding on the front flat car; that the conductor of said construction train was operating it under orders received at Knight's Landing to proceed eastward to the trestle, but to protect against a regular freight train numbered 232, moving in the same direction, which train was in fact carrying interstate shipments of goods; that thereupon the conductor directed Rouse to drop off at or near the west end of the trestle and protect against train No. 232, which meant for the brakeman to take a position at a point distant from the construction train sufficient to enable him to give signals calculated to prevent an approaching train from colliding with the former; "that the giving of said signals is required in the interest of safe and proper operation of traffic, and is necessary to guard against the danger of collision between trains, their consequent derailment, and also injury to life and property and delay and interference with the commerce being carried on over the railroad line where such signals are given and in the trains so flagged"; that when the construction train had reached the point where Rouse was told to drop off and flag No. 232, he, in attempting to alight from the flat car for the purpose of signalling said train No. 232, missed his footing, fell, and received the injuries for which the award was made; that Rouse was on duty and under pay as a freight brakeman at the time he was injured, and was under the immediate direction and supervision of the conductor of said train, who received said order as aforesaid and transmitted it to Rouse, who, in the performance of such duty as instructed by the conductor, was injured after starting to alight from the flat car to flag the approaching train No. 232, in the performance of the duty so enjoined.

[1, 2] Upon these facts the commission made a finding to the effect that at the time he sustained the injury Rouse was not engaged in the performance of a duty for his employer as a carrier of interstate commerce. If he was so engaged, then it must be conceded the commission was without jurisdiction to make an award; hence petitioner's sole contention is that this finding is unwarranted by the admitted facts. We agree with respondent that the test of whether Rouse was engaged in interstate commerce when injured is "the nature of the work he was doing at the time." Erie R. R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; Southern Pac. Co. v. Industrial Accident Comn., 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262. According to the uncontradicted evidence, a part of Rouse's duty as brakeman on the pile-driving train was, when directed by his superior, to flag approaching trains, and among the trains which he was directed to flag was train No. 232, carrying interstate commerce, which was known to Rouse as a regular train due to approach at about the time when he was injured. His duties related to both intrastate and interstate traffic, and his injury was sustained at the time and while engaged in the act of leaving the flat car of the construction train for the purpose of flagging the interstate train. Other than for the purpose of stopping this interstate train, he would, so far as appears, have remained upon the car on which he was riding. It thus seems clear that when injured Rouse was engaged in the performance of an act which had direct relation to a train carrying interstate commerce; and, conceding that the stopping of the approaching interstate train had for its object the protection also of the intrastate train, the latter fact is immaterial in the determination of the question. Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; Southern Pacific Co. v. Industrial Accident Comn., supra. Moreover, in the case last cited this court said:

> "It is settled by the decisions of the United States Supreme Court, the ultimate authority on such a question as the one before us, that a railroad track used indiscriminately by a carrier in both its interstate and intrastate commerce is an instrumentality of interstate commerce, and that notwithstanding its double use, those 'engaged in its repair or in keeping it in suitable condition for use' are, while so engaged, employed in interstate commerce. Such work, it is said, 'is so closely related to such commerce as to be in practice and in legal contemplation a part of it.' [Citations.] So there can be no question as to the character of the work where an employé is engaged in direct work upon an instrumentality in actual use for purposes of interstate commerce, such as actually repairing the railroad track or doing thereon any work designed to keep it in suitable condition for use."

While Rouse's chief employment was in the performance of duties in connection with the construction train operated in the work of repairing the trestle upon the branch line constituting a part of petitioner's railroad system, it was stipulated that such branch line road was used by petitioner as such common carrier indiscriminately in both interstate and intrastate commerce; "that * * * said defendant company maintained as an essential and necessary part of said line * * * a wooden trestle over which said branch line ran, and which trestle it was necessary from time to time to repair and keep in usable condition so that the interstate and intrastate commerce carried on indiscriminately on said branch line as aforesaid might be moved by rail." And further stipulated that on the day when the injury occurred said work train upon which Rouse was employed was, for the purpose of repairing said trestle, proceeding toward the same. Under this stipulation, and applying the principle announced in the case from which we have quoted, we are constrained to hold that, conceding Rouse was injured while in the performance of his duties upon the train used in repairing the trestle, he was engaged in the performance of a duty "so closely related to such interstate commerce as to be in practice and in legal contemplation a part of it."

The award is annulled.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.

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179 Cal. 663

STODDART v. GOLDEN et al. (L. A. 4543.)

(Supreme Court of California. Feb. 3, 1919.)

1. Bills and Notes 🔑125—Construction—Interest.

A note divided into four installments, stating that first should be payable within a year at 7 per cent. per annum interest, then naming three other installments payable in one, two, and three years, separated from the first and from each other by semicolons, the latter followed by the statement "with interest at the rate of 7 per cent. per annum payable semi-annually," *held* to intend that all installments should bear interest, and not merely the first and the last.

2. Contracts 🔑158—Punctuation.

In the construction of contracts, punctuation is always subordinate to the text and must never be allowed to control its meaning.

3. Contracts 🔑154—Reasonableness of Construction.

Where one construction would make a contract unusual and extraordinary and another construction, equally consistent with the language, would make it reasonable, fair, and just, the latter construction must prevail.

4. Costs 🔑260(4)—Frivolous Appeal—Damages.

Where an appeal is frivolous to the point of precluding the possibility of its having been taken in good faith or any purpose save to delay the satisfaction of the judgment, damages will be awarded against appellant because of the appeal.

Department 2.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by W. K. Stoddart against John Golden and others. Judgment for plaintiff, and defendants appeal from the judgment roll alone. Judgment affirmed.

Eshleman & Swing, of El Centro, for appellants.

U. F. Lewis, of Redlands, and Conkling & Brown, of El Centro, for respondent.

LENNON, J. This is an action to foreclose a mortgage securing a promissory note in words and figures as follows:

"$7,200.00. Redlands, Cal., August 15, 1912.

"In installments, for value received, we or either of us, promise to pay to W. K. Stoddart, or order, the sum of seventy-two hundred dollars ($7,200.00), payable as follows: The sum of $1,000.00 on or before October 27, 1912, with interest at the rate of 7 per cent. per annum, payable at maturity; the sum of $2,000.00 on or before one year; the sum of $2,000.00 on or before two years; the sum of $2,200.00 on or before three years, with interest at the rate of 7 per cent. per annum, payable semiannually. Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, or in any installment of the principal when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States of the present standard. This note is secured by mortgage of even date. John Golden.
"Anna Golden."

The appeal is from a judgment in plaintiff's favor and comes here on the judgment roll alone. The court, in its judgment, allowed interest on the entire sum, which is assigned as error. It is contended by counsel for appellants that the second and third installments mentioned in said note were not to bear any interest. Respondent contends that each of said installments bears interest from the date of the note at the rate of 7 per cent. per annum payable semi-annually.

[1, 2] Although the note is awkwardly drawn, its sense in all respects is easy to determine. It is divided into four installments, the first one being for $1,000, which fell due within a period of six months from the date of the note, and the interest at 7 per cent. per annum is provided to be paid at the maturity of this installment, which makes it apparent why interest was mentioned in connection with this installment separately. The three other installments, payable in one, two, and three years, naturally group themselves as the part of the loan for which interest was to be paid at the rate of 7 per cent. per annum, payable semiannually. If, instead of the semicolons used in the note, commas had been used, we think there could not have been a suggestion that any of the installments were to run without interest, or, if the first semicolon had been used, and, in place of the second and third semicolons, commas, then we think no suggestion of the kind could be made. Aside from the mere matter of punctuation, there is not a circumstance suggested why the second and third installments should not bear interest. Punctuation, at best a most fallible guide, is always subordinate to the text and is never allowed to control its meaning. Holmes v. Phenix Ins. Co., 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308. It would be doing violence to accepted rules of construction to uphold the contention that the parties by their agreement manifestly intended to exclude the installments in question from the payment of interest and intended that only the first and fourth installments should bear interest.

[3] A principle of construction well settled is that where one construction would make a contract unusual and extraordinary, and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. Stein v. Archibald, 151 Cal. 220, 90 Pac. 536.

[4] The appeal is frivolous to the point of precluding the possibility of it having been taken in good faith or for any purpose save to delay the satisfaction of the judgment, and therefore, in addition to affirming the judgment, it is ordered that the plaintiff have and recover from the defendants the sum of $100 damages because of the appeal.

The judgment is affirmed.

We concur: WILBUR, J.; MELVIN, J.

179 Cal. 679

BRYANT v. GRAY. (L. A. 4786.)

(Supreme Court of California. Feb. 6, 1919.)

1. Appeal and Error 🔑934(1)—Review—Presumptions — Judgment of Lower Court.

Every legitimate presumption is in favor of judgment of lower court.

2. Appeal and Error 🔑701(1)—Record — Evidence—Instructions.

Appellate court cannot determine whether instruction was correctly given, where evidence from which alone its applicability can be ascertained is not before the court, though bill of exceptions declared the evidence justified the instruction.

3. Appeal and Error 🔑701(2)—Record — Evidence—Refusal of Instructions.

In absence of record containing the evidence, court on appeal cannot determine whether evidence had any relation to a refused instruction, though bill of exceptions declared refusal of the instruction was justified by the evidence.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Ralph L. Bryant against J. R. Gray. Judgment for defendant, and plaintiff appeals. Affirmed.

William Ellis Lady and Park Godwin, both of Los Angeles, and A. D. Orme, of Pasadena, for appellant.

Shepard & Alm and W. J. Ford, all of Los Angeles, for respondent.

LENNON, J. This was an action for damages for personal injuries resulting from a collision on a public highway in Los Angeles county between a motorcycle driven by plaintiff and an automobile driven by defendant. Although none of the evidence offered and received upon the trial of the case is incorporated in the bill of exceptions upon which the appeal is presented, plaintiff's counsel, as he asserts in his opening brief, "seeks a reversal upon matters of law alone, in this, that the trial court committed error in the giving and refusing to give requested instructions. * * *" In addition to setting out the instructions given and those requested and refused, the bill of exceptions declares that:

> "Evidence was offered and admitted on the trial justifying the giving of every instruction that was given and the refusal of every instruction that was refused. There was sufficient evidence to sustain all the answers to the special interrogatories and general verdict."

As thus made up the bill of exceptions was settled and allowed by the trial judge, and as settled and allowed it was stipulated by counsel for the respective parties to be correct.

[1-3] It has been the rule in this jurisdiction, first enunciated in People v. McCauley, 1 Cal. 379, and continuing on down through a long line of decisions, that the correctness and applicability of instructions cannot be reviewed by this court if the record on appeal does not show what the evidence was. Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929. The only relaxation of the rule is found in a case where an instruction given was held to be erroneous in any conceivable state of the evidence. People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432. Every legitimate presumption is in favor of the judgment of the court below; and, not having before us the evidence adduced at the trial from which alone can be ascertained the applicability of an alleged erroneous instruction, its correctness or incorrectness cannot be determined. 1 Blashfield, Instructions to Juries, p. 974. It is equally well settled that in the absence of a record containing the evidence this court cannot determine whether or not the evidence had any relation to an instruction which the court refused to give and which refusal is assigned as error (Hayne, New Trial and Appeal, § 130), and all this is so, and would have been so, regardless of whether or not the bill of exceptions had declared that the giving and refusal of instructions was justified by the evidence (Carpenter v. Ewing, supra).

The judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

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179 Cal. 678

CHANDLEE v. McCALLA et al. (L. A. 4707.)

(Supreme Court of California. Feb. 6, 1919.)

Appeal and Error 🔑757(2)—Brief—Sufficiency of Complaint.

On appeal from judgment for plaintiff in action for breach of contract, where record is brought up in typewritten form under Code Civ. Proc. § 953a et seq., and appellants' brief contains no part of complaint and but a single disconnected clause from contract, court will not consider whether complaint sufficiently alleged nonperformance; brief being insufficient under section 953c.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Lewis Chandlee against E. E. McCalla and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. F. Campbell, of Los Angeles, for appellants.

A. B. Perdue, of Los Angeles, for respondent.

SLOSS, J. The defendants appeal from a judgment against them for $357.87. The record is brought up in typewritten form under section 953a et seq., of the Code of Civil Procedure.

The appellants have filed a brief covering something less than two printed pages. They state therein that the action was brought to recover damages for the breach of a written contract, and claim that the complaint fails to allege nonperformance of any act which they had undertaken to perform. They do not, however, print any part of the complaint, and content themselves with copying a single disconnected clause of the contract. There is thus a total failure to comply with the requirement of section 953c that the parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." The fragmentary references in appellants' brief are entirely insufficient to enable the court to reach an adequate understanding of the case. Under these circumstances, we are not called upon to consider the point sought to be made. O'Rourke v. Skellenger, 169 Cal. 270, 146 Pac. 633; Miller v. Oliver, 174 Cal. 404, 163 Pac. 357; Estate of Keith, 175 Cal. 26, 165 Pac. 10.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

179 Cal. 683

In re HILL'S ESTATE. (S. F. 8788.)

(Supreme Court of California. Feb. 7, 1919.)

1. STATUTES ⚷82—SPECIAL LAWS — DESCENT AND DISTRIBUTION.

Civ. Code, § 1386, subd. 8, providing that, where widow or widower dies without issue, one-half of the part of the estate which had been common property prior to death of deceased spouse and all that had been separate property of deceased spouse shall descend to designated heirs of deceased spouse as specified, being of general application and operating uniformly on all persons within the same class, is not unconstitutional under Const. art. 4, § 25, subds. 12, 30, 33, being neither local nor special.

2. WILLS ⚷11—RIGHTS OF SURVIVING WIDOW—TESTAMENTARY DISPOSITION OF PROPERTY.

Civ. Code, § 1386, subd. 8, providing that, where widow or widower dies without issue, one-half of the common property and all of the deceased spouse's separate property should descend to designated heirs of deceased, did not preclude widow from making testamentary disposition of the property; such statute being applicable only in case of intestacy.

Department 1.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

In the matter of the estate of Isabella Hill, deceased. From a decree of partial distribution, the administrator and other blood relatives appeal. Decree affirmed.

See, also, 167 Cal. 59, 138 Pac. 690.

Coonan & Kehoe, of Eureka, for appellants.

A. W. Hill, of Eureka, for respondent.

LAWLOR, J. This is an appeal by the administrator of the above-entitled estate and other blood relatives of the decedent from a decree of partial distribution.

Stephen Hill and Isabella Hill were husband and wife. On December 25, 1906, the former died intestate, leaving separate and community property. He left neither issue nor descendants thereof, nor father nor mother. His surviving blood relatives consisted of two brothers, one sister, and the descendants of two predeceased brothers and one predeceased sister. In the estate of Stephen Hill the court decreed that the estate of Isabella Hill was entitled to one-half of the separate and three-quarters of the community property. Sections 1386, 1402, Civ. Code.

The decedent died intestate on December 26, 1907, leaving neither issue nor descendants thereof, nor father nor mother. She left, as surviving blood relatives, the descendants of one predeceased brother and six predeceased sisters. Her estate consisted of the above-indicated share in the estate of Stephen Hill and other property which constituted her separate estate during his lifetime. The decedent remained unmarried after the death of Stephen Hill. She was the administratrix of the estate of Stephen Hill, but at the date of her demise his estate had not been closed. A son of one of Stephen Hill's predeceased brothers died on November 6, 1907. With this exception all of the surviving blood relatives of Stephen Hill survived the decedent.

Other than a daughter of one of the predeceased brothers of Stephen Hill, and the instances in which certain assignments were made, all of the indicated blood relatives of Stephen Hill joined in the petition for partial distribution. The petitioners prayed that there be distributed to them, in proper proportions, one-half of the community property and all of the separate property which had been decreed to the estate of the decedent in the estate of Stephen Hill. The petition was based upon subdivision 8, § 1386, of the Civil Code. No other property, either in the estate of the decedent or of Stephen Hill, was involved by the proceeding. The petition was opposed by the blood relatives of the decedent upon the ground that the blood relatives of Stephen Hill were not entitled to the property, but that on the death of the decedent it descended to her blood

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

relatives. The court granted the petition, and the decree was made accordingly.

Two other appeals have been heard and determined in the estate of Isabella Hill (8 Cal. App. 287, 96 Pac. 918; 167 Cal. 59, 138 Pac. 690). The first involved the question of the right of a statutory heir to administer upon the estate of the decedent, and the second whether certain property belonged to the separate estate of Stephen Hill or was a part of the community.

The present appeal is taken to test the constitutionality of subdivision 8 of section 1386 of the Civil Code, under which the decree was made. That section, as amended in 1907, reads as follows:

> "8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.
>
> "If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."
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> St. 1907, p. 567.

In 1880 section 1386 provided for the first time for the inheritance by the heirs of a deceased spouse of the community property of the widow or widower (St. 1880, p. 14). This original subdivision read:

> "9. If the decedent be a widow or widower, and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father of such deceased spouse, or if he be dead, to the mother. If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse, by right of representation."

The above subdivision, through an error, was designated No. 9. This was corrected in 1905 (St. 1905, p. 607), and the separate property of the deceased spouse which had gone to the widow or widower by descent, devise, or bequest was added to the inheritance of the heirs of such deceased spouse, thus:

> "8. If the decedent is a widow or widower, and leaves no issue, and the estate or any portion thereof was common property of such decedent and his or her deceased spouse, while such spouse was living, or was separate property of his or her deceased spouse, while such spouse was living, such property goes to the children of such deceased spouse and the descendants thereof, and if none, then to the father of such deceased spouse, or if he is dead, to the mother. If there is no father nor mother, then such property goes to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse by right of representation."

It is clear that, Stephen Hill having died intestate, leaving neither issue nor descendants thereof, nor father nor mother, his two surviving brothers and one surviving sister, and the descendants of his two predeceased brothers and of his predeceased sister, were entitled, under the first paragraph of subdivision 8, to one-half of the community property, and, under the second, to all of the separate property, which together constituted the widow's share in the estate of Stephen Hill.

The appellants do not contend that the decree does not conform to the provisions of subdivision 8, as amended in 1907. Their contention is that the subdivision is unconstitutional, and that therefore the property in question should have been decreed to the surviving blood relatives of the decedent under "the general rules of distribution."

The twelfth, thirtieth, and thirty-third subdivisions of article 4, § 25, of the Constitution, are cited in the brief of appellants in support of the claim that the amended subdivision is unconstitutional. Those provisions declare: The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Twelfth: Affecting estates of deceased persons, minors or other persons under legal disabilities. Thirtieth: Changing the law of descent or succession. Thirty-third: In all other cases where the general law can be made applicable.

In the brief of appellants it is argued that the change from leaving "no kindred" to leaving "no issue" is arbitrary, and the effect of the change in the predicate is discussed at length. The point is made that singling out widows and widowers dying without issue is a discrimination against such widow or widower so far as property inherited from the deceased spouse is concerned. The point is also made that under the subdivision the issue of the widow or widower may be begotten by a person other than the "deceased spouse." It is further insisted that the classification "is not such as to require legislation peculiar to such class." "In other words," says the brief, "it is clearly an arbitrary classification and constitutes special legislation."

[1] But the answer to these claims of unconstitutionality is in the nature and scope of the power of the Legislature itself in respect to descents, succession and kindred subjects. The legislation is neither local nor special within the meaning of the Constitution. Section 25, art. 4.

It is of general application and operates uniformly upon all persons within the same class. The subject is one of purely legislative cognizance and control, and we cannot conceive of any theory upon which it can be declared unconstitutional.

It was said in Brenham v. Story, 39 Cal. 185:

> "The right of an heir to his inheritance depends upon positive law, and is not a natural or an absolute right. It is competent for the Legislature to change the rule of inheritance, or to restrict the testamentary power."

To the same effect, quoting from the syllabi in McCaughrey v. Lyall, 152 Cal. 615, 93 Pac. 681:

> "The Legislature had full control of the whole subject of heirships and descents, and the heirs take subject to the conditions imposed by the statutory law, which alone gives them any right at all."

See Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788.

In Estate of Brady, 171 Cal. 3, 151 Pac. 275, a case involving community property within the purview of subdivision 8, it was said:

> "It must have been foreseen by the Legislature that many years would usually elapse between the deaths of the respective spouses. The apparent object of subdivision 8, where both spouses die without lineal descendants, is to provide for the inheritance of the property equally by the respective families of the two spouses by whose efforts it was accumulated."

In Estate of Watts, 175 Pac. 415, the decedent, a widow, left a will disposing of community property. Her husband had died intestate. Neither left issue nor father nor mother. Their respective survivors were brothers and sisters and children of predeceased brothers and sisters. The will bequeathed the property "to my heirs and to be distributed to them according to law." The lower court granted distribution to the blood relatives of the testatrix, refusing to recognize the claims of the blood relatives of the deceased husband. The judgment was reversed on this ground, this court holding that, when the testatrix gave the property to her heirs, she adopted, for the purposes of her testamentary disposition, the statute of succession.

[2] The decedent herein could have made testamentary disposition of the property, for the subdivision is applicable only in cases of intestacy. Estate of Brady, supra; Estate of Wenks, 171 Cal. 607, 154 Pac. 24. This she did not elect to do, and we perceive no reason for holding that the rule of succession presented by subdivision 8 is in any sense unconstitutional.

Decree affirmed.

We concur: SHAW, J.; SLOSS, J.

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179 Cal. 681

ROCKEY et al. v. VIEUX et al. (L. A. 4778.)

(Supreme Court of California. Feb. 7, 1919.)

1. Appeal and Error 🔑2—Lack of Authority for Appeal—Dismissal—Statute.

Where appeal from order denying motion for new trial was not authorized by law in force at time notice was given (Code Civ. Proc. § 963, as amended by St. 1915, p. 209), appeal will be dismissed.

2. Quieting Title 🔑10(1)—Recovery on Strength of Title.

Plaintiff in action to quiet title must show title in himself, and his right to recover must rest on strength of his own title, not weakness of defendant's.

3. Descent and Distribution 🔑71(7)—Decree of Distribution—Conclusiveness.

Under Code Civ. Proc. § 1666, decree distributing lands of decedent is conclusive only as to rights of heirs, legatees, or devisees, in so far as they claim in such capacity, merely determining succession to such title as decedent may have had, not that he had any title to bind third parties in distributee's action to quiet title.

4. Quieting Title 🔑44(4)—Evidence of Title—Deed to Plaintiffs.

Deed from plaintiffs' predecessor to plaintiffs suing to quiet title would not have shown any title in plaintiffs, unless it formed part of a chain traceable back to government, paramount source of title, or to some grantor shown to have been in possession of property.

5. Quieting Title 🔑43—Claim from Common Source—Proof of Grantor's Title.

Where both parties in action to quiet title claim title from common source, it is not necessary to prove title in grantor.

6. Quieting Title 🔑15—Failure to Show Title or Possession.

Where plaintiffs, seeking to quiet title, have failed to show either title or possession in themselves, they cannot complain that defendant, also without title, asserts interest in land, for defendant may always effectually resist decree against himself simply by showing plaintiff is without title.

Department 1.

Appeal from Superior Court, Kern County; M. T. Farmer, Judge.

Action by Grace W. Rockey and others against Andre Vieux and another. From the judgment, and from an order denying their motion for new trial, plaintiffs appeal. Appeal from order denying a new trial dismissed, and judgment affirmed.

John F. Poole, of Los Angeles, for appellants.

Matthew S. Platz, of Bakersfield, for respondents.

SLOSS, J. [1] This is an action to quiet title to a parcel of land in Kern county. The answer set up title and possession in the defendant Andre Vieux. The court found that said defendant was the owner in fee and in possession of the property, and entered judgment quieting his title against the claims of the plaintiffs. The latter appeal from the judgment. They also attempted to appeal from an order denying their motion for a new trial, but such appeal was not authorized by the law in force at the time the notice was given. Code Civ. Proc. § 963, amended 1915 (St. 1915, p. 209).

[2-4] The defendants claimed under a tax deed, and the appellants argue that the tax proceedings were defective and the deed void. But they totally failed to show that they themselves had any title or interest whatever in the property, or that they had ever been in possession of it. Their own evidence consisted simply of a decree of distribution made by the superior court, sitting in probate, in the matter of the estate of one Ferdinand Smith, deceased. By the terms of this decree there was distributed to the plaintiffs, among other property the land in controversy. There was no attempt, however, to show that Smith, the decedent, had any interest in the land. The plaintiff in an action of this kind must show title in himself. His right to recover must rest on the strength of his own title—not the weakness of defendants'. The appellants contend that the decree of distribution is conclusive. Code Civ. Proc. § 1666. But it is conclusive only as to the rights of heirs, legatees, or devisees, in so far as they claim in such capacities. Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081; Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981. It merely determines the succession to such title as the decedent may have had—it does not determine that he had any title. "Nor does it bind third parties who claim an interest adverse to that of the testator or intestate." Archer v. Harvey, 164 Cal. 274, 278, 128 Pac. 410, 412, and cases cited. The effect of the decree here offered was therefore no greater than that to be attributed to a deed from Ferdinand Smith to the appellants. Such a deed would not have shown any title in the plaintiffs, unless it formed part of a chain which could be traced back to the government, the paramount source of title, or to some grantor shown to have been in possession of the property. 10 Am. & Eng. Ency. (2d Ed.) 484; 15 Cyc. 151. There was no evidence offered to show that either the plaintiffs or their alleged predecessor had ever been in possession of the property.

[5, 6] Of course, where both parties claim title from a common source, it is not necessary to prove title in the grantor. McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279. But that was not the situation here. The plaintiffs' claim, as already stated, was under Ferdinand Smith, while the defendants relied upon a patent from the state of California to one Craig, and a subsequent tax deed to one Tyler, who had deeded to the defendants. There is no need, therefore, to consider whether the tax sale and deed were regular and valid. The plaintiffs having failed to show either title or possession in themselves, they "cannot complain that some one else, also without title, asserts an interest in the land. * * * A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title." Williams v. City of San Pedro, 153 Cal. 44, 49, 94 Pac. 234, 236, and cases cited. And, having shown no interest in the land, the plaintiffs are not aggrieved by a judgment declaring some one else to be the owner.

The appeal from the order denying a new trial is dismissed.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

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179 Cal. 697

MATHES v. AGGELER & MUSSER SEED CO. et al. (L. A. 4633.)

(Supreme Court of California. Feb. 8, 1919.)

1. Municipal Corporations ⚷706(1)—Negligent Operation of Motor Vehicles—Pleading.

With respect to allegations of negligence by one operating motorcar or other vehicle, it is sufficient to aver he operated so negligently that vehicle struck plaintiff and injured him, and exact manner of injury need not be described; same rule applying to case of two persons alleged to have been concurrently guilty of negligence in operating vehicles to injury of plaintiff.

2. Damages ⚷46—Personal Injuries—Hospital Services.

In absence of evidence to show gratuitous service, law implies agreement by patient to pay reasonable value of treatment at hospital, so that, in action for injuries, it is proper for plaintiff to introduce evidence as to amount that would be a reasonable charge for hospital services to her.

3. Witnesses 🔑240(2)—Leading Questions—Discretion.

The trial court has a large discretion in allowing leading questions.

4. Municipal Corporations 🔑705(12)—Injuries by Automobiles—Negligence.

If one only of defendants operating their respective automobiles failed to exercise ordinary care in relation to plaintiff, one who exercised care was not liable.

5. Trial 🔑296(3)—Instruction—Construction with Other Instructions.

In action for injuries from negligent operation of automobiles by defendants, erroneous instruction that it was duty of both to use ordinary care, and that if both or either failed to exercise such care "they" were guilty of negligence, *held* harmless to defendants, in view of other instructions.

6. Municipal Corporations 🔑706(8) — Injuries by Automobiles — Instruction — Right of Way.

In action against defendants for injuries to plaintiff through negligent operation of automobiles, one defendant's car having been forced into plaintiff at street intersection, instruction that if one defendant was approaching on one street going northerly, other things equal, she was entitled to right of way as against other defendant, *held* not erroneous as misstating or misapplying statutory rule.

7. Appeal and Error 🔑260(8)—Harmless Error—Refusal of Instruction.

In action for injuries to plaintiff from concurrent negligence of defendants in operating automobiles at street intersection, refusal to one defendant of instruction that statutory provision as to right of way did not apply except when two drivers were approaching crossing simultaneously *held* harmless to defendant, in view of another instruction to same effect.

8. Municipal Corporations 🔑705(4)—Operation of Automobile — Violation of Law—Negligence.

Defendant who operated motor vehicle in violation of express provision of law as to right of way at street intersection was negligent.

9. Trial 🔑192—Instructions—Statement of Testimony and Legal Result.

Where there is no dispute that view was obstructed, instruction, in action for injuries at street intersection from concurrent negligence of defendants in operating automobiles, that if either defendant approached intersection where view was obstructed at more than 10 miles an hour he or she was negligent, was proper; the law fixing 10 miles as the limit in such case.

10. Evidence 🔑598(1)—"Preponderance of the Evidence."

"Preponderance of the evidence" in a civil case means only that the evidence on one side outweighs the evidence on the other, not necessarily in number of witnesses or quantity, but in effect.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preponderance.]

11. Appeal and Error 🔑757(3)—Review—Instructions—Absence of Evidence.

Where there is not enough evidence printed in briefs to enable Supreme Court to determine whether or not instructions offered and refused were applicable to case, court cannot consider objections to instructions.

12. Appeal and Error 🔑1032(1)—Burden to Show Prejudicial Error.

Burden is on defendant appellants to show sufficient prejudicial error to justify reversal.

Department 1.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Ina C. Mathes against the Aggeler & Musser Seed Company and Ruth Purcell. From judgment for plaintiff, defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.

Fredericks & Hanna and E. B. Drake, all of Los Angeles, for respondent.

SHAW, J. In an action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendants, the plaintiff recovered judgment, and the defendants appeal.

The points urged in support of the appeal have no merit and require little discussion.

[1] The allegation of the complaint charging negligence stated that, at a time and place described, the two defendants, each driving an automobile, "so negligently operated their respective automobiles that the same collided one with the other, forcing the automobile of the defendant Ruth Purcell violently over against the plaintiff while she was standing at or near the sidewalk of the said intersection, and injuring her as hereinafter set out." It is the established law in this state, with respect to allegations of negligence by one operating a car or other vehicle, that it is sufficient to aver that he operated the same in a manner so negligent that it struck the plaintiff and injured him, and that the exact manner of the injury need not be otherwise described. Stein v. United Railroads, 159 Cal. 370, 113 Pac. 663. The defendants concede that this may be true where there is but one person and one vehicle involved, but insists that if two persons, in operating their respective vehicles, are concurrently guilty of negligence causing the accident, this rule does not apply. We can see no sound reasons for making any such distinction. The objection is untenable.

[2] One of the items of damage was the expenses of plaintiff's treatment at a hospi-

tal. It appeared that the plaintiff was taken to a hospital and remained there receiving treatment several days, but there was no direct evidence of any contract between the plaintiff and the owners of the hospital that she was to pay for such treatment. The law, of course, in the absence of evidence to show gratuitous service, would imply an agreement by her to pay the reasonable value. It was therefore proper for the plaintiff to introduce evidence as to the amount that would be a reasonable charge for the services. The objection to such evidence was properly overruled.

[3] It is unnecessary to discuss the particulars relating to the objections made by the defendants to leading questions. The trial court has a large discretion in allowing leading questions, and there is nothing to indicate that this discretion was abused.

[4, 5] Instruction No. 7 given by the court contains a palpable error. It declares that it was the duty of both defendants to use ordinary care in operating their automobile at the time and that "if both, or either, fail to exercise such care, then they were guilty of negligence." Of course, it could not be true that the one who did not fail to exercise care would be guilty of negligence. If this instruction stood alone, perhaps it might be of sufficient importance to require a reversal. But a reading of the instructions as a whole shows that the use of the plural in the last part of the quoted clause was a mere inadvertence and that the jury was repeatedly instructed that neither defendant could be charged with damages unless that particular defendant had been guilty of negligence proximately causing the injury. The error could not have prejudiced the defendants.

[6, 7] The accident occurred at the intersection of two streets which one defendant was approaching from the south on one street, and the other from the west on the intersecting street. Dealing with this situation, one instruction stated that, if the defendant Purcell was approaching on the street going northerly toward the intersection, "then, all other things being equal, she was entitled to the right of way" in passing the intersection, as against the other defendant approaching from the west. The statute declares that, where two persons approach an intersection on different streets, the one approaching from the right has the right of way. The complaint is that the expression "all other things being equal" is inaccurate and that the court should have stated merely that the person approaching from the right has the right of way. We do not believe any jury could misunderstand the purport of the language. Practically, it means the same thing as the statute, since the statute positively gave to the defendant Purcell the right of way at the intersection, unless she was so far from the intersection that she would not come within the definition as a person approaching the intersection. The phrase "all other things being equal" would clearly imply that the distance of each from the intersection should be such as to put the statutory rule in operation. In this connection the defendant asked an instruction, which was refused, to the effect that the provision of the statute did not apply except when the two were approaching the crossing simultaneously at or near the same time. The instruction above given, in which the phrase "all other things being equal" was used, was substantially to the same effect as the instruction asked and refused. We do not think the defendants were prejudiced by the ruling of the court in this matter.

[8] There was no error in the instruction of the court informing the jury that one who operated his vehicle in violation of an express provision of the law was guilty of negligence in so doing. The proposition is thoroughly settled.

[9] At the corner of the intersection, and on the angle between the two streets on which the respective defendants were approaching, stood a church which obstructed the view of each defendant by the other as they approached the crossing. There was no dispute in the evidence over this question. The court is allowed to state the testimony on a matter of fact upon which there is no dispute and in proof of which the testimony is unconflicting and substantial. Therefore the court did not err in stating to the jury that, if either defendant approached the intersection at the place in question at a greater speed than 10 miles an hour, such defendant was negligent in operating such vehicle at such speed. The law fixed 10 miles as the utmost limit of speed under such circumstances.

[10] The court defined the meaning of the term "preponderance of evidence," by giving the definition thereof, approved by this court in People v. Miller, 171 Cal. at page 653, 154 Pac. at page 470, taken from the decision in Hoffman v. Loud, 111 Mich. 156, 69 N. W. 231. We can see no objection to this definition and do not desire to retract the approval given in People v. Miller.

[11, 12] Complaint is made of the action of the court in drawing a line upon a map introduced in evidence, showing the relative location of the streets involved in the controversy, and in refusing certain instructions relating to the particular conduct of the defendants, respectively, immediately preceding the collision. The map is not before us, and it does not appear from anything in the brief printed by the appellant where the line was drawn by the court across the map referred to. The instructions show, however, that the court informed the jury that it was not intending to draw a line accurately, but only for purposes of illustration. There is not enough of the evidence printed in the briefs

to enable us to determine whether or not the instructions offered and refused were applicable to the case. Under these circumstances, we cannot consider these objections. The defendants have failed to show injury, and it is for them to show sufficient prejudicial error to justify a reversal.

There are no other points that deserve even a brief discussion.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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179 Cal. 689

MILLER & LUX, Inc., v. J. G. JAMES CO. et al. (Sac. 2685.)

(Supreme Court of California. Feb. 8, 1919.)

1. Waters and Water Courses 🔑39—Riparian Rights—Conveyance.

Riparian right can be preserved by deed in parcels of land which do not border upon stream when by conveyance they are severed from original riparian tract, and such a conveyance is good against owners of other riparian lands upon the same stream.

2. Property 🔑11—Transfer.

It is fundamental that a man can transfer property which he owns, and that such transfer is good against the whole world.

3. Waters and Water Courses 🔑47—Use of Water—Riparian Rights.

An upper riparian owner cannot sell water for use upon lands not riparian; such not being exercise of a riparian right nor transfer of a riparian right.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Miller & Lux, Incorporated, against the J. G. James Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank H. Short, of Fresno, and Edward F. Treadwell, of San Francisco (Samuel C. Wiel, of San Francisco, of counsel), for appellant.

O'Brien & Spaulding and James M. O'Brien, all of Los Angeles, for respondents.

WILBUR, J. The plaintiff, owner of land riparian to the San Joaquin river below the lands of the defendants, seeks to enjoin them from the use of water upon their lands. It is admitted that the lands of all the defendants were originally portions of a large tract of riparian land belonging to the defendant J. G. James Company. It is conceded that at the time of the conveyance by said J. G. James Company of said several parcels of land the grantor and grantee, by stipulation in their conveyances, intended that the purchaser should become entitled to the use of water "to the same extent as though the ownership of said land had at all times continued in said J. G. James Company." It is also conceded that the rule is correctly stated in Copeland v. Fairview, etc., Co., 165 Cal. 161, 131 Pac. 124:

> "That such riparian right can be thus preserved in parcels which do not border upon the stream when, by the conveyance, they are severed from the original riparian tract, is fully settled by the decisions in this state."

It was, however, also stated in that case:

> "How far such an apportionment or transfer is good against owners of other riparian lands upon the same stream, not part of the tract from which such parcels are conveyed, we need not consider, since none of such other owners are parties to or concerned in this suit." Copeland v. Fairview, etc., Co., supra.

The appellant states:

> "There is no doubt that the detached tracts may take water as against all privies to the transaction, and that has been decided and settled. The case presents for the first time, however, the question of the relation of the owners of the detached areas to outstanding claimants upon the natural stream, without privity to the transaction. * * *"

The appellant asks:

Can the owner of distant land, having no contact with the stream, "take water thereto under the common law of riparian rights, by virtue of the stipulation in the transfer from the owner of the riparian tract of which it was formerly a part, as against a lower claimant upon the natural stream, who had no part in the stipulation and who is a stranger to the transaction"?

As conceded, the right of the owner of the larger riparian tract to convey part of the riparian right to his grantee is fully recognized by the decisions of this court. See Copeland v. Fairview, etc., Co., supra, and cases therein cited. In Strong v. Baldwin, 154 Cal. 150, 97 Pac. 178, 129 Am. St. Rep. 149, it was said:

> "When a tract of land abuts on a stream, and a portion thereof not contiguous to the stream is conveyed by the owner, the riparian right of the portion so conveyed in the stream may also be conveyed with the land, as is fully recognized in the case cited by learned counsel for appellants (Anaheim, etc., Co. v. Fuller, 150 Cal. 331 [88 Pac. 978, 11 L. R. A. (N. S.) 1062]), and so when so conveyed is still a riparian right with all the attributes of such right, and is in strict technical language 'parcel of the land' conveyed. The same is necessarily true where a tract of land abutting on a stream is partitioned in court proceedings among the owners thereof, and appropriate provision for riparian rights is made in the decree as to the portions allotted by the decree which do not abut on the stream."

[1-3] That the riparian right is a part and parcel of the land is also pointed out in the earlier cases:

> "The right to the flow of water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a parcel. Use does not create, and disuse cannot destroy or suspend it.
>
> "The right to the use of water flowing over land is undoubtedly identified with the realty, and is a real and corporeal hereditament. Cary v. Daniels, 5 Metc. [Mass.] 238."
>
> Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

See, also, Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 663, 93 Pac. 1021, 1025, where it is said:

> "Its waters were therefore not merely appurtenant thereto, as a right acquired by prescription, or appropriation, would be, but were a part of the land itself, as parcel thereof."

If, then, there is attached to every portion of a large tract of land a right to the use of the water of the stream, so intimately connected with the land itself that it can appropriately be called a parcel thereof, it being conceded to be the settled law of this state that such right can be conveyed by the owner thereof to a grantee of the land as a part and parcel thereof, there seems to be no good reason for holding that this grant is not effective as against lower riparian lands and water users. They have the same right that they had before the transfer, neither more nor less. If the owner of riparian lands, by subdividing his land and selling parcels thereof not adjacent to the stream by the act of severance of the land, deprives it of the very riparian right which the conveyance purports to grant as against lower riparian owners so that they can compel the water which might otherwise be used upon that land so severed to flow past the lands so conveyed to the lands of lower riparian owners, the effect of the conveyance by the riparian owner is not to vest title in his grantee, but in lower riparian owners or water users. It is fundamental that a man can transfer property which he owns and that such transfer is good against the whole world. There seems to be no reason why this rule, under our authorities, should not apply here. It is true that it has been held that the upper riparian owner cannot sell the water for use upon lands not riparian, for this is not the exercise of a riparian right, and the purported transfer would not be a transfer of a riparian right. Heilbron v. Fowler Switch Canal Co., 75 Cal. 432, 17 Pac. 535, 7 Am. St. Rep. 183; Heilbron v. Seventy-Six Land & Water Co., 80 Cal. 194, 22 Pac. 62. The reasoning upon which this rule is based, however, has no application to the case in hand.

The previous decisions of this court, we think, have already determined this question against the contention of the appellant. The rule above quoted from Strong v. Baldwin, supra, was announced in an action brought by owners of certain parcels of land in the Rancho Paso de Bartolo Viejo against the owner of an upper riparian rancho known as the Rancho la Puente. It will be observed that the lower riparian owner could not gain the title by adverse possession as against the upper riparian owner. As there stated:

> "With respect to the right of the use of the waters of the river as distinguished from the ditch itself, the court found that the use by respondents was not adverse to Baldwin [the owner of the upper riparian land], that all the parties to the action have rights to the use of the waters of San Gabriel river as riparian owners, but that the evidence before the court was not sufficient to enable the court to make findings as to the relative rights of the plaintiffs and cross-defendants, on the one hand, and of Baldwin on the other."

The decision, then, expressly holds that the owners of land in the lower rancho were riparian owners as against an upper riparian owner, even though not contiguous to the stream, and it was in that connection that the court said:

> "This is not a case, as suggested by appellants, of attempting to make riparian lands which are not in fact riparian, but is simply the preservation of the right which the land has at the time of the conveyance or decree. In the case at bar the land of some of these plaintiffs and cross-defendants abuts on the stream, and as to such land there is, of course, no question. As to the land of the others, we think it sufficiently appears that the riparian rights were preserved. It is clear upon the record that at least a portion of each of such parcels has always been dependent for irrigation on the waters of said river, and has always been irrigated by means of said waters."

It appears that the lower rancho had been partitioned, and that the riparian rights were mentioned in the partition decree. In that regard the court stated:

> "As already stated, that decree allotted with each parcel of land 'all riparian rights and privileges,' thus making the same 'parcel of the land,' as in the case of the conveyances from Pico. All of the plaintiffs and cross-defendants, whose land does not abut on the river hold either under such deeds from Pico or under the partition decree. From what we have said, it follows that they are all riparian owners as to the San Gabriel river, even though their land does not abut thereon."

If the riparian character of the land was preserved by the agreement between the holder of the land and his grantees as against an upper riparian owner, the same would be true with reference to a lower riparian owner, as in the instant case. The same question was involved in Arroyo Ditch & Water Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874, although reference to the transcript may be necessary to make that fact fully apparent. In that case the Arroyo Ditch &

Water Company diverted all of the stream known as the Old San Gabriel river, sometimes called "Rio Hondo," at its dam below the land of the plaintiff. This stream was bordered above and below the dam on either side by large Mexican grants. Below the dam of the plaintiff were—

> "47,320 acres of land within the ranchos Paso de Bartolo, Santa Gertrudes, Los Cerritos, San Antonio, and San Pedro, which require for irrigation all the water naturally flowing in the Old San Gabriel river at the point designated as the Arroyo Ditch dam; that said acreage requires 6,760 inches of water under a 4-inch pressure for its successful irrigation; that appellant is the owner of 5,835.80 acres of land bordering on and within the watershed of said river included within the ranchos of Potrero Grande and La Merced; and that he also owns an undivided five-sixths interest in the Potrero Chico rancho, containing 150 acres and riparian to the river."

It was also found that the defendant Baldwin's land required 289 inches of water under a 4-inch pressure for irrigation. The Arroyo Ditch & Water Company distributed the water diverted at its dam to lands within the boundaries of some of the riparian ranchos below said dam, and as against the owners of lands in the riparian ranchos below the dam who had not used water the plaintiff claims to have acquired a right by adverse possession. See page 285 of 155 Cal., page 876 of 100 Pac., and map therein referred to. The court, after stating these facts and referring to the map in question, said:

> "Plaintiff's incorporators having thus acquired such right, or having riparian rights themselves, it is immaterial to the defendant Baldwin, an upper riparian owner, whether the right was enforced by them separately or through a corporation representing them, either as their agent and trustee or as possessor of their former titles."

The court held that—

> "There was also evidence upon which the court's calculations with reference to the proportion of the water belonging to the different litigants were properly based."

By reference to the transcript it appeared that the trial court divided the water, giving $^{6760}/_{7049}$ to the plaintiff, and $^{289}/_{7049}$ to the defendant; in other words, divided the water between Baldwin, an upper riparian owner, and the plaintiff, in the proportion of the amount of water needed by the entire acreage below the dam if the same had been irrigated, to wit, 6,760 inches, and the water needed to irrigate the riparian land above the dam, to wit, 289 inches. It therefore resulted that in this litigation between the diverters of water below Baldwin's land and Baldwin, the upper riparian owner, the court considered all the acreage below the dam, and therefore necessarily considered the various parcels of land within those ranchos belonging to the distributees of water which did not abut upon the stream. For the reasons stated, the question propounded by appellant must be answered in the affirmative.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LENNON, J.

(39 Cal. App. 304)

COOPER v. ROSENSTIRN. (Civ. 2622.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1918.)

BROKERS 🔑86(3) — COMMISSIONS — DIVISION—EVIDENCE.

In action based on written contract whereby it was agreed between plaintiff and defendant brokers that, if plaintiff consummated sale, commission should be divided, conflicting evidence *held* to support court's finding that plaintiff did not consummate the sale.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Charles E. Cooper against A. M. Rosenstirn. Judgment for defendant, and plaintiff appeals. Affirmed.

Stoney, Rouleau, Stoney & Armstrong, of San Francisco, for appellant.

Rothchild, Golden & Rothchild, of San Francisco, for respondent.

BEASLY, Judge pro tem. This case arose out of a controversy between two real estate brokers as to whether or not the commission received by the defendant upon the sale of certain property in San Francisco should be divided between the plaintiff and the defendant.

On the 15th day of March, 1915, the plaintiff and the defendant entered into a written contract whereby it was agreed that if Cooper, the plaintiff, should consummate a sale of certain real property in San Francisco to Livingston Bros., any commissions earned should be divided equally between the plaintiff and the defendant.

The court found that Cooper did not consummate the sale, and the only question is whether or not this finding is supported by the evidence. The evidence showed that Cooper worked long and hard upon Livingston Bros. in an effort to sell the property, but, on the other hand, Livingston testified that, after authorizing Cooper to offer $190,000 to the owners for the property, he advised the latter that he was no longer interested, and to call the matter off. This conversation took place somewhere about June 8, 1915. The owners of the property were at that time demanding a price of $210,000 for the property. It also appeared that, at about the same time that Livingston Bros. called the matter off, Rosenstirn received a telegram from Starr, the owner of the property, in which the latter canceled negotiations.

Cooper never was able to get a higher offer than $190,000 from Livingston, and never was able to get a deposit from him, although Rosenstirn testified that he constantly demanded that Cooper make an effort to do this.

The property was subsequently sold on the 2d day of July, 1915, through Abrahamson, another broker, to Livingston Bros., for $204,000. Abrahamson's testimony is to the effect that Rosenstirn did not know for whom he was dealing until a deposit was secured and he was ready to sign a contract.

The court was justified in believing from the evidence that two brokers, Cooper and Abrahamson, were endeavoring to sell the property to Livingston Bros. Abrahamson finally got Livingston Bros. to agree to pay a price which the owners of the property were willing to accept, secured a deposit, and consummated the contract. The testimony is thus seen to be conflicting and to support the above-recited finding.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

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39 Cal. App. 240

SMITH v. PILLSBURY et al. (Civ. 2503.)

(District Court of Appeal, First District, Division 1, California. Dec. 21, 1918. Rehearing Denied Jan. 20, 1919; Denied by Supreme Court Feb. 17, 1919.)

1. CORPORATIONS 🔑474 — BONDS — ISSUANCE—PLEDGE.

Corporation bonds pledged as security for a note given by a corporation are issued when they are so pledged, irrespective of who holds the legal title during their hypothecation.

2. CORPORATIONS 🔑474—PLEDGE OF CORPORATE BONDS—RIGHTS OF PARTIES.

Where bonds of a corporation are pledged as security for a debt owing by the corporation, the pledgee may collect the interest coupons and the principal of the bonds at their maturity if such maturity occurs during the life of the pledge and the corporation has the corresponding obligation to make such payments to the pledgee.

3. LIMITATION OF ACTIONS 🔑58(4)—ACCRUAL OF STOCKHOLDERS' LIABILITY.

Stockholders' statutory liability accrues at the inception of the corporate liability, and not at the time such liability is sought to be enforced against the corporation.

4. LIMITATION OF ACTIONS 🔑58(4)—STOCKHOLDERS' STATUTORY LIABILITY — BONDS PLEDGED AS SECURITY.

Since the stockholders' statutory liability upon bonds pledged by the corporation as security accrues at the time the bonds are pledged, and not at the time they are sold under the pledge agreement, an action by a purchaser of such bonds against stockholders upon failure of the corporation to pay interest was barred three years after the time the bonds were pledged, under Code Civ. Proc. § 359.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by J. Howard Smith against H. D. Pillsbury and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. Howard Smith and Martin Stevens, of San Francisco, for appellant.

H. D. Pillsbury, Alfred Sutro, Charles C. Moore, and Corbet & Selby, all of San Francisco, for respondents.

BEASLY, Judge pro tem. This is an appeal on the judgment roll alone from a judgment in favor of the defendants in an action brought to recover from them, as stockholders in a corporation, their proportionate liability for an indebtedness of the corporation upon certain bonds owned by the plaintiff; the corporation having failed to meet the payments of interest thereon.

The sole question presented by the record for determination is whether or not the cause of action pleaded is barred by the provisions of section 359 of the Code of Civil Procedure, limiting to three years the time within which an action may be commenced.

There is no dispute about the facts. Each of the defendants was the owner and holder of shares of stock in the Ocean Shore Railway Company, a corporation organized pursuant to the laws of this state. Subsequent to its organization, at a meeting called and held for the purpose, its stockholders regularly ordered and created a bonded indebtedness in a large amount, to be represented by bonds, which were to be issued by the corporation as funds should be required for payment of construction, equipment, and maintenance of the railroad. The bonds were for the sum of $1,000 each, payable 30 years from November 1, 1905, with interest at the rate of 5 per cent. per annum. They were secured by a mortgage and deed of trust of all property owned by the railroad corporation, which provided that, in case default should be made in the payment of interest on any of such bonds for a period of 90 days, then the principal should become immediately due and payable. On the 2d day of April, 1908, the railroad corporation, in payment of certain electrical machinery theretofore purchased by it, gave to the General Electric Company its promissory note, and deposited with that company as a pledge for the payment of the note 150 of said bonds; and the railroad company agreed that, should the note or any interest due thereon remain unpaid according to its terms, the General Electric Company might sell the bonds and apply the net proceeds thereof in satisfaction of the note. The railroad corporation being in default in the payment of certain interest on its said bonds, the trustee, pursuant to the terms of the deed of trust, sold at public auction on January 7, 1911, all the property held by it as security, and applied the sum of money thus realized to the equal and proportionate payment of all of said bonds. In the meantime default had also been made in the payment of interest on its note of April 2, 1908, and on July 28, 1910, the payee of the note sold the bonds pledged with it, and at that sale the plaintiff became the owner of twelve of such bonds.

The court found that the liability of defendants as stockholders of the railroad corporation was created on April 2, 1908, the date the bonds were pledged, and not on July 28, 1910, the time they were sold by the pledgee, and hence that the statute of limitations had barred this action, which was commenced in September, 1912.

[1] We do not think it can be seriously questioned that the bonds here concerned were issued when they were pledged to the General Electric Company as security for the payment of the note, and this irrespective of who held the legal title thereto during their hypothecation. In Illinois Trust & Sav. Bank v. Pacific Railway Co., 117 Cal. 332, 344, 49 Pac. 197, 201, our Supreme Court, upon the question here involved, said:

> "* * * It seems to us that in a just and natural sense the bonds were issued 'for' such money or property; they served the purpose designed by the company—procured value for it. The cases upon the subject uphold the right to pledge as included in the right to sell."

This doctrine has been followed in numerous cases, and in Equitable Trust Co. v. Great Shoshone, etc., Co. (D. C.) 228 Fed. 516, it was said:

> "A bond does not become an obligation of the debtor until it is issued, and it is issued when, and only when, a third party acquires some right or interest therein. True, there need not be an absolute sale; a bond is issued as well when it is put out as collateral."

[2] The pledge of the bonds conferred rights upon the pledgee and corresponding obligations upon the pledgor. Thus the pledgee had the right to collect the interest coupons, with the corresponding obligation upon the corporation to pay them to the pledgee, the holder of the bonds. The same is true as to the principal of the bonds upon their maturity, if such maturity occur during the life of the pledge.

> "A pledgee of interest-bearing securities is entitled to collect and receive the interest as it becomes payable, and he will hold the sums collected on the same terms as he holds the securities themselves. It is immaterial in this respect whether the collateral security be a promissory note, a corporation bond, or shares in a corporation." Jones on Collateral Securities, § 399, citing Androscoggin v. Auburn Bank, 48 Me. 335.

[3, 4] A liability on the part of the pledgor being thus created, the only question remaining to be determined is as to when the stockholder's statutory liability upon this liability of the corporation accrues, whether at the inception of the corporate liability or at the time it becomes enforceable against the corporation. It is the settled doctrine in this state that such statutory liability accrues at the inception of the corporate liability, and that the three-year period within which an action thereon must be commenced commences to run at that time. Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939. In the case at bar, therefore, the trial court correctly held that the liability of the defendants as stockholders in the Ocean Shore Railroad upon the bonds pledged by that corporation arose at the time of the pledge, and not at the time of the sale of the bonds under the pledge; and that consequently the present action is barred, having been commenced more than three years from the date of the pledge.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

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39 Cal. App. 337

WINSLOW v. McCARTHY (two cases).
(Civ. 2454, 2455.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1918.)

1. APPEAL AND ERROR 🔑935(1)—REVIEW—PRESUMPTIONS — ORDER SETTING ASIDE JUDGMENT.

Where an order setting aside a judgment is general, and it can be sustained upon any ground stated in the motion, an appellate court is bound to assume that it was granted on such ground.

2. INSANE PERSONS 🔑94(1)—JUDGMENT—VACATION ON COURT'S MOTION.

A judgment in a personal injury action rendered against an insane defendant for whom no guardian ad litem, or general guardian had been appointed, as required by Code Civ. Proc. §

372, is inadvertent and irregular and may be set aside on the court's own motion.

3. INSANE PERSONS ⚷94(1) — JUDGMENT — VACATION—AFFIDAVIT OF MERITS.

Where a judgment in a personal injury action was rendered against an insane defendant for whom no guardian ad litem or general guardian had been appointed as required by Code Civ. Proc. § 372, because of the inadvertence of the court rather than because of mistake, inadvertence, surprise, or excusable neglect of defendant, an affidavit of merits was not necessary on motion to vacate such judgment.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Separate actions by Claire Winslow and Marguerite Winslow against H. B. McCarthy and others. Actions were dismissed as against all except defendant named, and judgments rendered against him. On appeal of Anna H. McCarthy, guardian of the defendant named, the judgments were set aside, and plaintiffs appeal. Affirmed.

C. D. Dorn, of San Francisco, for appellants.

Myrick & Deering and James Walter Scott, all of San Francisco, for respondent.

STURTEVANT, Judge pro tem. The above actions were brought to recover damages for injuries alleged to have been sustained on July 18, 1915, when the two plaintiffs were riding in an automobile as passengers. The defendant H. B. McCarthy was at the time driving the automobile in what is commonly called "jitney service." While the plaintiffs were in the automobile, it collided with a street car, and, as a result of the collision, the plaintiffs were severely injured, and McCarthy sustained injuries from which he later became insane.

The actions were commenced in October, 1915, and the Pacific Coast Casualty Company was named as a defendant. Summonses and complaints were served upon this company, which appeared and filed a demurrer in each action, which demurrers were sustained. In November, 1915, the defendant H. B. McCarthy was adjudged insane and committed to the state asylum at Agnews. On January 13, 1916, plaintiffs caused copies of the summonses and complaints to be served upon H. B. McCarthy and upon Leonard Stocking, M. D., the medical superintendent of the hospital where defendant was confined. A return of service was made by the sheriff, which return incorrectly stated that Dr. Leonard Stocking was "the guardian of the person of said H. B. McCarthy, defendant." At the time that service was made upon McCarthy, he was actually insane and no guardian had been appointed for him.

On March 2, 1916, counsel for the plaintiffs appeared in open court and dismissed the action as to all defendants except H. B. McCarthy. Without the appointment of a guardian ad litem for said defendant plaintiffs obtained judgments in favor of plaintiff Claire Winslow and in favor of plaintiff Marguerite Winslow, which judgments aggregated $12,452.50.

On the 2d day of September, 1916, Anna H. McCarthy was appointed guardian of the person and estate of said H. B. McCarthy, an insane person. Letters of guardianship were issued to her out of the superior court of the city and county of San Francisco on that day, and on the same day said guardian caused to be served upon counsel for plaintiffs notice of motions to vacate and set aside the judgments. The court, upon a hearing, granted the motions and vacated and set aside the two judgments. These appeals are taken by the plaintiffs from said orders setting aside their respective judgments.

The appellants urge that as there was no affidavit of merits served with the notices of motions to vacate the judgments, or presented at the hearing thereof, the motions should not have been granted.

[1] The order granting the motion is general in its terms, and, if it can be sustained upon any of the grounds stated in the motion, an appellate court is bound to assume that it was granted upon such ground. One of the grounds stated in the motion was that—

> "At the time said judgment was rendered said Harold B. McCarthy was insane and incompetent, and was known by plaintiff to be insane and incompetent, and that nevertheless no guardian, either general or ad litem, was appointed to represent said defendant in said action."

Section 372, Code of Civil Procedure, provides that—

> "When an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, in each case. * * *"

[2] There is nothing in the record to indicate that the trial judge was aware of the fact that the defendant had no general guardian and that the statement in the return made by the sheriff to the effect that Dr. Leonard Stocking was the guardian of the person of said McCarthy was incorrect. We may assume that, had the court known that the defendant had no general guardian, it would have appointed a guardian ad litem in compliance with the provisions of the above section. This being true, the judgments were rendered inadvertently and irregularly by the court, and of its own motion the court had the right to set the same aside. Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605. This being true, we think no affidavit of merits would be required.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Moreover, in the case of Crescent Canal Co. v. Montgomery, 124 Cal. 134 at page 144, 56 Pac. 797, at page 801, the court says, in considering the provisions of section 473, Code of Civil Procedure, requiring an affidavit of merits:

> "The main provision of that section is that a court may relieve a party from judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and it is quite clear that the provision just quoted has no application to the ground upon which the respondent moved in the case at bar. Defendant here is not asking relief from its neglect or mistake or default of any character. * * * In the cases cited, the parties making application to set aside the judgments confessed some neglect or misconduct from which they sought to be relieved, and thus come clearly within the provisions of said section, and, of course, were compelled to comply with the provisions of the section under the construction which the court had given them."

[3] We think that in the case at bar the ground stated, i. e., that no guardian ad litem had been appointed by the court for the defendant, although said defendant had been adjudged insane and had no general guardian at the time the judgments were rendered against him, cannot be said to be chargeable to the mistake, inadvertence, surprise, or excusable neglect of the defendant, but rather to the inadvertence of the court. Therefore, under the language above quoted, no affidavit of merits was necessary.

The orders appealed from are affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

39 Cal. App. 330

BIDWELL et al. v. SONOMA COUNTY TRANSP. CO. (Civ. 2603.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1918. Rehearing Denied by Supreme Court Feb. 27, 1919.)

1. Time 🔑10(7)—Motion for New Trial—Sunday.

Code Civ. Proc. § 660, providing that power of court to pass upon a motion for new trial shall expire within three months after verdict is not affected by section 12, providing that where last day of time provided for doing any act falls on a holiday, it is to be excluded in computing time.

2. Statutes 🔑163—Construction—General and Special Acts.

Specific statutes prevail over general statutes.

3. New Trial 🔑155—Time within Which Court may Act.

Where order granting motion for a new trial was signed by judge on last day of three-month period provided by Code Civ. Proc. § 660, and was delivered to shorthand reporter with instructions to file it on following day, filing was too late, and judicial act with relation to decision for a new trial had not been performed in time.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Mattie Bidwell and S. J. Bidwell against the Sonoma County Transportation Company. From an order granting plaintiff's motion to set aside an order granting a new trial, defendant appeals. Affirmed.

E. F. Conlin, of San Francisco, for appellant.

Ware & Ware, of Santa Rosa, for respondents.

LENNON, P. J. Action for damages for personal injuries suffered by plaintiff, Mattie Bidwell, wife of S. J. Bidwell, coplaintiff, and for consequential injury flowing therefrom to the latter.

The action was tried by a jury and resulted in a verdict for plaintiffs, which was rendered March 11, 1916. The defendant made a motion for a new trial. The order granting it was filed June 13, 1916. This order was signed by the judge of the trial court on the previous day, and was on said day delivered by him to the shorthand reporter of the court, with instructions to file the same on the following day, which was done. Thereafter plaintiffs moved to set aside said order upon the ground that it was void upon its face, and that the court had no jurisdiction to make the same, for the reason that it was made more than three months after the entry of the verdict. This motion was granted, and defendant appeals.

The appellant contends that the trial court had no power to set aside its order granting a new trial, and that the remedy of the party aggrieved was by appeal, citing numerous authorities in support of the principle. Respondents admit the validity of the authorities cited, but contend that an exception to the rule therein announced exists in the case of an order void upon its face. People v. Greene, 74 Cal. 405, 16 Pac. 197, 5 Am. St. Rep. 448; Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740; People v. Davis, 143 Cal. 675, 77 Pac. 651; Carpenter v. Superior Court, 75 Cal. 598, 19 Pac. 174. Respondents, in support of the order appealed from, contend that the order granting the new trial was void because not filed within three months from the entry of the verdict (Code Civ. Proc. § 660), which period of time according to their contention expired on June 11, 1916. Against this contention it is urged by appellant that as June 11th fell upon Sunday the court, under the provisions of section 12 of the Code of Civil Procedure, had until and including the following day within which to make the order. That section provides:

> "The time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

The law relative to the duty and power of the court to pass upon a motion for a new trial is found in section 660 of the Code of Civil Procedure, which, at the time the motion here in question was pending, provided:

> "The motion for a new trial must be heard at the earliest practical time. * * * The hearing and disposition of the motion * * * shall have precedence over all other matters except criminal causes, probate matters and cases actually on trial, and it shall be the duty of the court to determine the same at the earliest possible moment. The power of the court to pass on the motion shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months the effect shall be a denial of the motion without further order of the court."

[1, 2] A careful consideration of the language of these two sections leads us to the conclusion that section 660 is not affected by the provisions of section 12, and that the three-month period during which a court has power to pass upon a motion for a new trial is not extended if the closing day thereof should fall upon a holiday. The clause in section 660 reading, "The power of the court to pass on the motion shall expire within three months after the verdict," etc., undeniably gives to the court three months within which it may do so; and, if nothing more were said, there would be little reason for holding that this period is not extended by one day, conformably to the provisions of section 12, in the contingency mentioned in said section. But section 660 goes much further, and specifically provides that if the court shall not have acted on the motion within the three-month period the motion is ipso facto denied. Without adverting to the evident intent of the Legislature in enacting this section that the utmost speed shall be observed in deciding the motion, and that the three-month period within which to perform the act is not given in affirmative terms, but the act is required to be performed at the earliest possible moment, with a limitation of three months in which to do it, it is sufficient to apply the established principle of construction of statutes, namely, that the specific prevails over the general, to arrive at the conclusion that section 660 is not affected by section 12. The latter section is general in its terms as applied to the time within which an act may be performed; but section 660 is specific as to the time within which the court may pass upon a motion for a new trial, and in the most positive terms confines the power of the court to perform that particular act to the period named, and, going even further, provides that, failing action by the court within said time, the motion is automatically deemed denied. We think the conclusion unavoidable, not only by the application of the principle of construction of statutes above adverted to, but by the whole tenor of section 660, that section 12 has no application thereto.

[3] What we have said thus far is addressed to the proposition advanced by appellant that a decision of the motion for a new trial was in time if made on June 12th; but it appears from the bill of exceptions that this decision was in writing, and, although signed by the judge of the trial court on June 12th, was not filed on that day, but was left by the judge in charge of the shorthand reporter of the court, with instructions to file it on the following day, June 13th, a date admittedly beyond the jurisdictional period.

It is apparent that during the time that the written order was in the possession of the shorthand reporter it was under the control of the judge, and that up to the time of its actual filing no judicial act with relation to the decision of the motion for a new trial had been performed. The decision thereon at most was a matter within the breast of the judge. This is not a case where the omission to file the order on the 12th was by inadvertence or in disregard of the court's instructions. The facts show that if the reporter had filed the order on the 12th he would have violated the directions given to him. In the matter of his possession of this order and his assumed obligation to file it the reporter was not discharging any duty placed upon him by law, and was in no different situation than any other messenger who might have been selected by the judge. We think the conclusion is not to be avoided that the judicial action of the court upon the motion for a new trial was not taken until June 13, 1916, a point of time admittedly too late.

The respondents raise another point, namely, that the bill of exceptions upon which the present appeal is based was not presented to the judge for settlement within the time prescribed by law, and that this court cannot therefore consider it. In view of the conclusion we have reached upon the questions discussed it will not be necessary to formally consider this point. Although it may be meritorious we have in effect overruled it by considering the appeal upon the merits.

For the reasons heretofore given the order is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(39 Cal. App. 347)

VICTORIA PARK CO. et al. v. CONTINENTAL INS. CO. OF NEW YORK.

(Civ. 2583.)

(District Court of Appeal, Second District, Division 1, California. Jan. 2, 1919.)

1. INSURANCE ⟹550—PROOF OF LOSS—EFFECT.

Under a clause in a fire policy that insurer "shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss," unless it shall notify insured of its partial or total disagreement "with the amount of loss claimed," a letter to insured stating, "According to your documents we are criticizing section C," which contained a statement as to the amount of damages suffered, did not express any disagreement within the meaning of the policy.

2. CORPORATIONS ⟹432(1)—POWERS OF OFFICERS—INSURANCE—SETTLEMENT OF LOSS.

The selling agent and treasurer of a corporation are not presumed to possess authority to make any binding engagement with a fire insurance company as to the amount of a loss.

3. INSURANCE ⟹550—PROOF OF LOSS—EFFECT.

Under a clause in a fire policy, providing that insurer would be deemed to have assented to the amount of a loss by failing to notify the insured of a disagreement with the amount claimed in the preliminary proof of loss, insurer was required to announce a specific disagreement as to the amount claimed in a verified proof of loss, although it had in good faith previously entered into negotiations with officers of the insured, a corporation, looking to a settlement of the loss.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Victoria Park Company, a corporation, and Fannie Buttolph, against the Continental Insurance Company of New York, a corporation. Judgment for plaintiffs, and the defendant appeals. Affirmed.

Bicksler & Smith, of Los Angeles, for appellant.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for respondents.

JAMES, J. Appeal from a judgment entered in favor of plaintiffs. The action was brought to recover on two policies of fire insurance. The policies were respectively in the amounts of $4,000 and $5,000, each covering the same building. The policies in form were as is prescribed by the statute of this state, and are designated "the California Standard Policy." The policies contained the stipulation that in case of loss the insured must give to the company written notice thereof and, within 10 days after the commencement of the fire render to the company verified preliminary proof of loss, setting forth certain prescribed things. This provision is also contained in the policies:

> "If the company claims that the preliminary proof of loss is defective and within five days after the receipt thereof notifies in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the insured or such party within ten days after the receipt of such notification and request must comply therewith, or if unable so to do, present to the company an affidavit to that effect."

A further provision of the policies was as follows:

> "This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto."

Other provisions contained in the policies provided, in case of a dispute as to the amount of loss, for the arbitration of the same, and certain options were given to the insurer as to rebuilding or replacing the structure destroyed or damaged. In order to exercise any of such options a term of the policies required that the insurer company give notice to the insured within 20 days after receipt of the preliminary proof of loss. There was no issue in the case as to the fire having occurred as alleged by the plaintiffs. Defendant, however, set forth in its answer that the total loss occasioned by the fire was the sum of $6,148.78. In the preliminary proof of loss as furnished by the plaintiff Victoria Park Company (the interest of plaintiff Buttolph being that of mortgagee only), which was verified by the secretary of the corporation, the clause referring to the amount of loss was as follows:

> "The cash value of the dwelling destroyed was about $17,500. The loss wos total."

The proof of loss was not excepted to by the insurer, except that 10 days after its receipt a letter, signed by the agent of the insurer company, was written to the plaintiff company and contained the following statements:

> "We beg to advise you that through Adjuster George L. McIntire and Agent Matt T. Mancha personal interviews have passed between your company and the two said parties. The adjustment was taken up and the damage to the property estimated, so that we now have

our figures which we are prepared to adjust at your earliest convenience. According to your documents we are criticizing section C, and we are also criticizing the elimination of the date of the fire. Our contractor is a man of reputation and will file a bond to repair every damage caused by the fire, in full compliance with the terms of the policy."

[1-3] The section C of the proof of loss was that containing the statement as to the amount of damage suffered which we have quoted. No other written exception was taken to plaintiff's proof of loss, and upon that condition of facts the trial judge held, in effect, that under the terms of the policies the insurer should be "deemed to have assented to the amount of the loss claimed," for the reason that it did not notify the insured in writing of its partial or total disagreement with the amount stated. We are in entire agreement with the conclusion of the trial judge that the statement in the letter of the insurer dispatched after receipt of the preliminary proof of loss, to wit, "According to your documents we are criticizing section C and we are also criticizing the elimination of the date of the fire," does not express any disagreement with the amount stated by the plaintiff company, either as to the whole or any part of the loss. It will be remembered that the total amount of insurance covering expressed by the two policies was $9,000, while the loss suffered was stated as being about $17,500. The term of the policies which required the insurer to express its disagreement with the amount of loss claimed within the specified time, otherwise it should be deemed to have assented thereto, was a binding condition of the contract. It meant exactly what it expressed, or it meant nothing. It cannot be viewed in any sense as directory; that term is inapplicable to contract conditions entered into understandingly by the parties thereto, and which appear to be of material import as affecting the rights of the contractors. Defendant offered to prove that prior to the filing with it of the verified preliminary proof of loss it had had negotiations with one Barry and one Watson, respectively the selling agent and treasurer of plaintiff company, and that negotiations had been and were in progress looking to an adjustment of the amount of the loss, either by payment of money or rebuilding the structure destroyed. Appellant in making that tender did not offer to show that these persons with whom it was dealing had any authority to bind the insured, and from the character of the offices held by Barry and Watson there would be no presumption that they possessed authority to make any binding engagement in that behalf. We think the rulings of the trial judge in sustaining objections to the offers made were correct. If the insurer had assumed in good faith that Watson and Barry possessed authority to negotiate for a settlement of the claims, it was put upon notice later by the service of the verified proof of loss as to what the amount of damage, as asserted by plaintiff company, was. At that time it should have, in keeping with the requirements of the contract of insurance, specifically announced its disagreement with the amount of the claim, in whole or in part, and stated particularly what amount it did admit should be paid to the insured. We think that, as we have before stated, the letter which was written by the appellant to the plaintiff company upon receipt of the verified proof of loss, was not sufficient to relieve defendant from the effect of that term of the policies which stipulated to work an assent to the amount claimed. If we are correct in this conclusion, the case of appellant requires no further consideration.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 326

DALY CITY v. HOLBROOK et al.

(Civ. 2599.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1918.)

1. Municipal Corporations 🔑1027—Right to Maintain Action—State as Party.

Under Gen. Laws 1910, Act 2348, § 850, unchartered municipal corporation of sixth class had power to bring in its own name, instead of name of state, action to eject defendants from piece of land on ground it was part of public highway, and to recover damages for use and occupation.

2. Adverse Possession 🔑8(2)—Acquisition of Rights Against Public—Street.

No rights can be acquired against the public, as in a street, by adverse possession.

3. Dedication 🔑19(5) — Filing of Map — Acceptance.

Where owner of land files map showing its division into streets, alleys, etc., and sells lots with reference to map, he irrevocably dedicates to public land represented as streets, and to complete dedication no formal acceptance by municipal authorities is necessary.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by the City of Daly City, a municipal corporation, against J. M. Holbrook and others. From judgment for plaintiff, defendants appeal. Affirmed.

E. H. Rixford and Halsey L. Rixford, both of San Francisco, for appellants.

George Appell and Frank E. Powers, both of San Francisco, for respondent.

STURTEVANT, Judge pro tem. This is an action to eject the defendants from a piece of land on the ground that the same is a part of a public highway, and to recover damages for use and occupation. The plaintiff had judgment, and the defendants present the case to this court on an appeal from the judgment with their bill of exceptions.

The facts of the case, from the standpoint of the defendants, are briefly as follows: The plaintiff is a municipal corporation, organized in 1911, as a city of the sixth class. The land in controversy lies within its boundaries. At all times mentioned in the case, prior to the organization of the plaintiff, the land was in unincorporated territory of the county of San Mateo. It was formerly a part of a larger tract which was fenced and used for a pasture and dairy. In the year 1900 Oscar Heyman sold a lot to one Charles Olson, and marked out a space in the pasture as the land sold, which was described as lot 28 in block P of the Mission Street tract, and was 25 feet fronting on San Jose avenue by a uniform depth of 100 feet. Olson, instead of building his house upon said lot, erected it upon land included in Prim street, the exact description of which appears in the complaint herein. Olson built a fence around the land he thus took possession of, and lived there for some time. Later he turned the house back to his grantor, who, in turn, sold it to a Mrs. Paillet, who lived in it for some time, and then sold it to the defendants herein. They have lived there ever since, and the possession of defendants and their predecessors has been continuous since 1900. The other side of the case is made up of the following facts: It appears that a map was filed in 1872 in the county recorder's office called "Map of the Mission Street Extension Homestead Association," with the tract mapped into lots, blocks, and streets, and the word "Prim" printed on a strip of land which includes the land where the house of defendants stands. It also appears that the Homestead Association divided its property into lots and conveyed these lots to its shareholders. It also appears that another map of the tract has been likewise filed, entitled "Map Showing Subdivision of the Property of the Mission Street Land Company," in 1895, with a different scheme of streets and smaller lots and other blocks, and that this company had made deeds of new lots to its stockholders in dividing up the land.

Plaintiff rested its case in the trial court upon the proposition that Prim street, the street in which defendants maintain their house, was and is a public street dedicated to the public use, and was such public street when defendants' predecessor built the house in said street. There is no controversy over the fact that, if Prim street is a public street, defendants' house is situated in Prim street. It is a fact admitted by the pleadings that no taxes were assessed on the land at any time during the possession of the defendants.

The defense of defendants is: First, that the street in question was never dedicated to the public use; and, second, that the only persons who had any rights in the strip of land in controversy were private persons or private corporations, the owners and their grantees, and the possession of defendants was adverse to them; that defendants' possession, as alleged, prevented any of the persons mentioned from using the strip as a street, and continued for years while the land in controversy was entirely privately owned, and ripened into a title in fee simple before the public generally, or the public authorities, took steps on which vested public rights could be predicated.

[1] The defendants contend first that the demurrer to the amended complaint should have been sustained because the plaintiff, being an unchartered municipal corporation of the sixth class, had no power to bring the action in its own name, and that the action should have been brought in the name of the people of the state of California. We think that respondent had the right to commence the action in its own name, under the provisions of section 850 of the General Laws of the State of California, being Act 2348. Referring to cities of the sixth class, there it is distinctly provided:

> "Every municipal corporation of the sixth class may sue and be sued, in all courts and places, and in all proceedings whatever. * * *"

[2] The trial court made a finding that the territory known as Prim street was in 1872, and is now, a public street. This finding, if warranted by the evidence, would make it impossible for the defendants to have obtained title to any portion of said street by adverse possession. No rights can be acquired against the public by adverse possession. Hargro v. Hodgdon, 89 Cal. 631, 26 Pac. 1106; Nerio v. Maestretti, 154 Cal. 581, 98 Pac. 860; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

[3] The appellants contend that the facts before the court were not sufficient upon which to predicate a dedication, and therefore the finding as to Prim street being a public street was unwarranted. The specific contention is that, while it is conceded that there was an offer of dedication of the land in controversy, yet that offer was never accepted by the public until after appellants had acquired title by adverse possession.

In the case of San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, it was held that, where an owner of land files a map thereof, showing it to be divided into streets, alleys, etc., and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets to the use of the public. In such a case, to make the dedication complete, no formal acceptance by the town authorities is necessary. Until such acceptance the owner of the land holds the title to the property dedicated in trust for the public. To the same effect are the cases of Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145, and Davidow v. Griswold, 23 Cal. App. 188, 137 Pac. 619.

The authorities on this subject are extensively reviewed in the case of Shearer v. City of Reno, 36 Nev. 443, 136 Pac. 706, in which case the court approved what was said in the case of Archer v. Salinas City, supra, and announced the law to be in accordance with the above statement in San Leandro v. Le Breton, supra.

In the face of these authorities, this court is compelled to conclude that the finding of the trial court that Prim street was and is a public street was warranted under the evidence. This conclusion also answers the objection of appellants that the amended complaint does not state a cause of action.

We think the other points made by appellants are without merit, and that the judgment should be affirmed. It is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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39 Cal. App. 334

STOTTS v. MEESE et al. (Civ. 2605.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1918. Rehearing Denied Jan. 30, 1919. Denied by Supreme Court Feb. 27, 1919.)

MUNICIPAL CORPORATIONS ⚿514(2)—PUBLIC IMPROVEMENTS—REASSESSMENT.

Though Improvement Act does not expressly confer power to reassess, in case of an erroneous assessment, such power is implied in view of section 82, providing that irregularities not jurisdictional shall not avoid any assessment.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by A. P. Stotts against Edwin Meese, as Treasurer, Charles D. Bates, and others. Plaintiff had judgment, and defendants Bates, Borland, and Ayer appeal. Reversed.

Johnson & Shaw, of Oakland (R. M. F. Soto, of San Francisco, of counsel), for appellants.

Milton S. Hamilton, of San Francisco, for respondent Stotts.

STURTEVANT, Judge pro tem. The plaintiff brought this action to obtain a decree that Bates, Borland, and Ayer did not hold a lien on the lands of the plaintiff by reason of certain proceedings had for the purpose of improving a street in Oakland. The authorities purported to proceed under the Improvement Act of 1911 (St. 1911, p. 730). Whether they did so proceed is the question involved in this case. The plaintiff had judgment in the trial court, and Bates, Borland, and Ayer, the contractors, have appealed.

No attack is made except in the assessment. The assessment proceedings show that on July 8, 1914, a clerk in the office of the superintendent of streets delivered into the hands of the superintendent a completed form of assessment, and, believing it to be in substance as he had directed it should be, the superintendent signed it. Later it transpired that said document contained a mistake. It included charges for crossings which were not legally chargeable to the plaintiff's property. The assessment was for $230, whereas it should have been for $60.91. When the superintendent of streets discovered his mistake one week later, July 15, 1914, he proceeded to correct the mistake by making a new assessment to conform to the true facts.

We concede at the outset that the Improvement Act of 1911 does not contain any clause expressly conferring power to reassess, but we think it contains provisions which clearly imply such power. The plaintiff contends that the assessment could have been corrected on appeal by the city council, and that it was the duty of the superintendent of streets to have taken such appeal. The statute does not contain a provision expressly imposing the duty of taking the appeal on the city authorities, nor does the statute provide that an appeal must be taken. But it will be conceded that on appeal the city council could have ordered the assessment to be corrected. Improvement Act 1911, §§ 21, 26. If, therefore, the plaintiff or the superintendent had appealed, the error could have been, and doubtless would have been, corrected. When such condition exists the error or irregularity is not fatal. Section 26, supra; Chase v. Trout, 146 Cal. 350, 362, 80 Pac. 81. The exact method of correcting the first assessment is not limited by any provision of the Constitution, and therefore an irregularity in the method of correcting the assessment is not a violation of any fundamental right of the plaintiff. These propositions of law are deducible from Chase v. Trout, supra, in which case the court was considering the Vrooman Act. With that case before it the Legislature enacted the act of 1911. To reinforce the scope of section 26, supra, it added section 82. That section provides:

"This act shall be liberally construed to the end that its purposes may be effective. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any procedure taken hereunder, which does not directly affect the jurisdiction of the city council to order the improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided."

As we construe the act of 1911, we cannot say that the assessment was void. It was irregular, but the plaintiff was not entitled to have canceled an assessment that was merely irregular.

It follows that the judgment should be reversed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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39 Cal. App. 341

SWAIN v. KLEIBER & CO., Inc.

(Civ. 2507.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1918.)

1. PRINCIPAL AND AGENT 🔑81(4) — SALES AGENT—TERMS OF EMPLOYMENT—RIGHT TO COMMISSION.

Oil company's order for auto truck, which came to manufacturer through local dealers, exclusive agents for manufacturer in local territory, *held* within manufacturer's contract with sales agent, who had refused to enter employment, unless he should receive commissions on trucks sold to oil companies, through whosoever hands order might come.

2. TRIAL 🔑260(9) — INSTRUCTIONS — REFUSAL TO AMPLIFY.

In action for commission by sales agent of auto truck manufacturer, court's refusal to amplify, by concretely applying principles enunciated to particular phases of case, instructions in general terms as to manufacturer's rights under theory of case pursued by it in presentation of its defense, *held* not erroneous.

3. PRINCIPAL AND AGENT 🔑81(4) — SALES AGENT—RIGHT TO COMMISSION.

Where motor truck manufacturer contracted with sales agent that he should be entitled to commission on all trucks sold to oil companies through whatever hands order immediately came, agent could recover, if order from oil company to local dealers, which was forwarded by them to manufacturer, was brought about by him.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Hadwen Swain against Kleiber & Co., Incorporated. From judgment for plaintiff, defendant appeals. Affirmed.

Tum Suden & Tum Suden, of San Francisco, for appellant.

Wright, Wright & Stetson, of San Francisco, for respondent.

STURTEVANT, Judge pro tem. Plaintiff, an automobile salesman, sued defendant, a manufacturer of auto trucks, for commissions claimed to be due him under his contract of employment with the defendant. The cause was tried before a jury, and resulted in a verdict for the plaintiff for part of the amount demanded. A motion for a new trial made by the defendant company being denied, it appeals from the judgment, and contends in support of its appeal that the evidence is wholly insufficient to justify the verdict, and that the court erred in several particulars in its instructions to the jury.

The contract of employment was oral, and the parties are not agreed as to its precise terms. According to the defendant the contract was the ordinary one between a salesman on commission and his employer, by which the salesman is entitled to commission only upon orders obtained by him. If the jury had accepted this version of the contract, its verdict would have been in favor of the defendant; and we must regard their verdict in plaintiff's favor as indicating that they accepted his version of the agreement, and held that the parties entered into a much more liberal arrangement than the one contended for by the defendant. The latter, we may say in passing, although disputing its liability to the plaintiff for the commissions sued for, appears by the record to have treated him with great liberality, and its present predicament appears to have arisen from entering into a somewhat unusual contract which, resting in parol, was susceptible of almost unconscious variation as to its terms.

The plaintiff testified to his negotiations and the arrangement entered into between himself and the defendant, through its president, Mr. Paul Kleiber, as follows:

> "I told Mr. Kleiber that I did not care for a salary, * * * but that I did want the 5 per cent. commission that is usually paid for selling trucks, and I had had an experience in Los Angeles in which I had induced a man to mortgage his property to buy a truck, and the last minute the garage man takes hold of it and gets all of the commission, and that I would not enter their employment unless this point was made clear. * * * I told him I had been selling to the large companies down there [Los Angeles], including the oil companies and the lumber companies and other big companies—the gas companies. I knew the procedure of their methods of buying, which are very different from an ordinary corporation. These big companies have a board, some of them five to seven members, that had the handling of this purchasing business; * * * that it is a long siege to get these things through these officers; that I wanted to pay off the $4,500 mortgage that I had on my property; that I could not get it unless I played for a stake; and that the oil companies would take some time. His answer to me about that was, 'We are too small to deal with those big oil companies.' I said, 'I

think I can work it up, because I know them personally, the people who have the placing of the order in these companies.' 'Well,' he said, 'all right; go ahead and follow it up.' And I said, 'When they send in an order, they very rarely hand that order to the salesman, the agent that goes in; but it comes in in various odd ways outside;' and I told him I would not follow it up unless I got my commission, no matter how it came in, or whether it came in later. Furthermore, it was useless to spend a year or two chasing these people, if I was not going to get the repeat orders, take all of that time. * * * He said that if I followed the business up that I should have that 5 per cent. commission, no matter how long it took before the order came in, or how it came in; that they were not able to get the business. * * * He told me that he would give me the repeat orders."

Working under his arrangement with the defendant, whatever it was, the plaintiff approached the Schell Oil Company through certain of its officers, and endeavored to interest that company in the product of the defendant. He called on the officers of the company many times, and induced one of them, Mr. Noble, the purchasing agent, to visit the factory of the defendant and witness the process of manufacture. Finally Mr. Noble informed plaintiff that his company was going to give an order for a Kleiber truck, and the plaintiff conveyed this information to Mr. Kleiber. Shortly thereafter the Schell Company ordered two Kleiber trucks, but did not send the order directly to the defendant company, whose factory and place of business was in San Francisco, but handed it to a concern by name Osen & Hunter, dealers in automobiles and trucks in Oakland, who had a contract with the defendant by which they were granted exclusive selling rights to the defendant's product in the county of Alameda. Mr. Noble testified that the plaintiff was the first person who called his attention to the Kleiber truck, and that he had recommended its purchase to the higher officers of the company. As to the reason for placing the order with Osen & Hunter, he testified that the policy of his company was always to place such an order where the truck was to be used; that in this case they were to be used in Oakland; and, further, that Osen & Hunter were large customers of the company, under all of which circumstances it was out of the question to give the order to the plaintiff.

The contract between the defendant and Osen & Hunter was not one which constituted them agents in a legal sense. They were independent dealers, and in consideration of certain advantages conferred upon the defendant, and an agreement to purchase at least 15 trucks per annum from the defendant, they were granted the exclusive right of selling the defendant's products in certain territory, including Oakland. It was not the practice of this concern, nor were they required to do so in their contract with the defendant, to have in stock any Kleiber trucks beyond what is known in the trade as a demonstrator, but on receiving an order for one they would send an order for it to the defendant. This they did in the present case; and the defendant, after the receipt of the first order, assembled the truck and delivered it directly to the Schell Oil Company. During the course of its completion some correspondence passed between the defendant and the Schell Company relative to certain details to be incorporated into the truck, and, as far as they knew, Osen & Hunter were simply agents of the defendant.

[1] Under these circumstances the question that arises (and it is practically the sole question involved in the case) is: Is an order received by the defendant in the way and under the circumstances described one coming within the terms of the defendant's contract with the plaintiff as testified to by him? We are of the opinion that the terms of the contract are so broad and elastic that this question must be answered in the affirmative, and that although as a matter of law the order received by the defendant was an order from Osen & Hunter, and not from the Schell Oil Company, yet it was, under the evidence accepted by the jury, given to the defendant as the result of the plaintiff's efforts.

This construction is reinforced to some extent by what we may regard as the practical construction by the defendant itself of the contract; for, although refusing to pay the specific commission demanded by plaintiff upon the sale of the trucks to the Schell Oil Company, it placed that refusal upon the ground that it could not pay two commissions upon the same sale, and promised to make the amount good to the plaintiff in some other way. The amount awarded by the jury to the plaintiff represented commissions on six automobile trucks—four sold to the Schell Oil Company in the manner above described, and two to the Western Meat Company. If we are correct in our conclusion as to the validity of the plaintiff's claim as to the order for this first Schell truck, then the award of the jury must stand as to the remaining five, for the evidence shows them to be sales made by the defendant within the provisions of the contract as thus construed.

[2] Appellant assigns as error certain modifications made by the trial court to instructions which appellant desired to have presented to the jury. The court instructed the jury in general terms as to the defendant's rights under the theory of the case pursued by it in the presentation of its defense, but refused to go further by concretely applying the principles enunciated to particular phases of the case. While the instructions as offered might well have been given, yet the law applicable to the facts as contended for by the defendant was, we think, sufficiently stat-

ed to the jury, although in general terms; at least we hardly think error can be predicated upon the refusal of the court to amplify the instructions.

[3] One instruction, also criticized by the defendant, told the jury in effect that the plaintiff could recover if the order from the Schell Company to Osen & Hunter was brought about by the plaintiff. This instruction could not be defended if the only evidence of the contract between plaintiff and defendant were that offered by the defendant; but, as we have seen, the plaintiff testified to a widely different state of facts, which the jury had the right to accept as true. As applied to that phase of the evidence we see nothing incorrect in this instruction.

For the reasons hereinbefore given, the judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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39 Cal. App. 324

PEOPLE v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al. (Civ. 2638.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1918.)

1. RAPE ⚷33—ATTEMPT—INDICTMENT.

An indictment, charging that defendant on a fixed day did willfully, unlawfully, and feloniously and with force and violence attempt to have sexual intercourse, etc., *held* to charge a public offense.

2. MANDAMUS ⚷61 — COURTS — CRIMINAL PROSECUTIONS.

Where the trial court erroneously sustained an objection to testimony on the ground that the indictment did not state a public offense and discharged the jury, writ of mandate, commanding the trial court to vacate the order discharging the jury and proceed with the trial, should be issued, the writ of mandamus being applicable in all cases where the law has established no specific remedy, and in justice and good conscience there should be one.

Application by the People of the State of California for a writ of mandate against the Superior Court in and for Fresno County and George E. Church, Judge thereof. Writ issued.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

Brickley & Edwards, of Fresno, for respondents.

PER CURIAM. This is an application for a writ of mandate. The application arises by reason of certain proceedings had in the superior court of the state of California in and for the county of Fresno during the trial of a criminal case, entitled the "People of the State of California v. Julian Depavo." During the trial of the case the jury was duly impaneled, and the prosecuting witness was called to the stand by the prosecution, and was by the prosecution examined and was by the defendant cross-examined, and later another witness was called to the stand, and thereupon counsel for the defendant Depavo objected to the introduction of any testimony relating to the admissions of said defendant on the ground that said information did not state a public offense, and on the further ground that the corpus delicti had not been proven. Said objection was argued by respective counsel, whereupon, at the conclusion of said argument, respondent George E. Church, judge of the superior court, Fresno county, made an order that said objection be sustained and the jury be discharged from further consideration of said cause. Later the jury was so discharged and the people of the state of California, by U. S. Webb, as Attorney General of the state of California, and J. H. Riordan, his deputy, have commenced this proceeding to obtain a writ of mandate, directed to the respondent, commanding the respondent to vacate said order discharging the jury, and to resume and proceed with the trial of said cause to verdict and judgment as in the manner prescribed by law of this state, and to do all things necessary in the premises.

[1] The charging part of the information is as follows:

> "The said Julian Depavo on or about the 13th day of February, 1918, at and in the said county of Fresno and state of California, and prior to the filing of this information, did willfully, unlawfully and feloniously and with force and violence attempt to have and accomplish an act of sexual intercourse with and upon the person of Delora McGovern, a female who was not then and there the wife of the defendant, without the consent and against the will of said Delora McGovern, and she, the said Delora McGovern, then and there resisted the attempt of said defendant to accomplish the said act of sexual intercourse."

[2] The information stated a public offense. People v. Gardner, 98 Cal. 127, 32 Pac. 880; People v. Akens, 25 Cal. App. 373, 143 Pac. 795. Therefore the trial court erred in ruling that the information did not state a public offense. The question then arises: Can the actions of the trial court be controlled in this proceeding? In Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249, Mr. Commissioner Hayne examined with a very great deal of industry into the proper scope of the use of the writ of mandate, and, in closing, he quotes Lord Mansfield as follows:

> "It [the writ] was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used on all oc-

casions where the law has established no specific remedy, and where, in justice and good government, there ought to be one."

And Mr. Commissioner Hayne reaches the conclusion that the quotation exactly and properly states the rule. For the reasons stated the writ will be issued to control and compel action by a court, and even though the court is exercising jurisdiction in a criminal case. Matter of Ford, 160 Cal. 334, 116 Pac. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; Ford v. Court, 17 Cal. App. 1, 118 Pac. 96.

It follows that the writ should issue in this case; and it is so ordered.

(39 Cal. App. 336)

PEOPLE v. DEPAVO. (Cr. 799.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1918.)

CRIMINAL LAW ⚷1023(4) — APPEAL — APPEALABLE ORDERS.

An order of the trial court, discharging a jury when refusing to proceed further with the criminal prosecution, is not an appealable order within the provisions of Pen. Code, § 1238.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Julian Depavo was indicted for felony, and from an order of the trial court discharging the jury before it brought in a verdict, and while the case was yet on trial and the People were attempting to introduce their evidence, the People of the State of California appeal. On motion to dismiss. Dismissed.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

Henry Buckley and J. O. Traber, both of Fresno, for respondent.

PER CURIAM. This is an appeal by the people of the state of California from an order of the trial court discharging a jury before it had brought in a verdict and while the case was as yet on trial and the people were attempting to introduce their evidence. The facts are more fully set forth in The People, etc., v. Superior Court, 178 Pac. 730, filed this date. The plaintiff and appellant have brought up the record in a bill of exceptions and the defendant has appeared and moved to dismiss the appeal. One of the grounds of the motion to dismiss is that the order of a trial court dismissing a jury when refusing to proceed further is not an appealable order under the provisions of section 1238 of the Penal Code of the State of California. We think that the motion is well founded. The appeal is therefore dismissed.

(39 Cal. App. 345)

RANSOME-CRUMMEY CO. v. CORNELIUS. (Civ. 2593.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1918.)

1. MUNICIPAL CORPORATIONS ⚷303(1) — IMPROVEMENTS—RESOLUTION.

Under Oakland City Charter, § 51, authorizing the council to proceed under the "general laws of the state in force at the time of the improvement," where the council proceeded under St. 1911, p. 730, in making an improvement, a resolution declaring the statute under which it was acting was not necessary.

2. MUNICIPAL CORPORATIONS ⚷445—PUBLIC IMPROVEMENTS — ASSESSMENTS — CONTRACT.

A special assessment, imposed by the city council in the exercise of its independent action and judgment, was valid, irrespective of an oral agreement between the contractor and the superintendent of streets, to which the council was not a party.

Appeal from Superior Court, Alameda County; Milton T. Farmer, Judge.

Action by Ransome-Crummey Company, a corporation, against A. W. Cornelius, as executor, etc., to foreclose a street assessment lien. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

Louis Gonsalves, of Oakland, for appellant.

Snook & Church, of Oakland, for respondent.

STURTEVANT, Judge pro tem. The plaintiff brought this action to foreclose a street assessment lien. It had judgment as prayed in the trial court, and the defendant appealed, bringing up the evidence in a bill of exceptions, which is certified as being "full, complete and correct."

The appellant makes two attacks: (1) That it appears nowhere in the record of the city council that the council determined or expressed its judgment that the costs and expenses of the improvements set out in the resolution of intention should be paid by special assessments on private property; (2) that the improvements were not made as purported under chapter 397 of the Statutes of 1911, but were made pursuant to an oral agreement between the plaintiff and the superintendent of streets and the commissioner of streets.

[1] The first point assumes that the law required that the city council should pass a resolution expressly providing that the council was proceeding under any certain statute; but our attention has not been called to any statute to that effect. Section 51 of the charter of Oakland authorized the council to proceed under the provisions of "the general laws

of the state of California in force at the time of the improvement." It proceeded in 1915 to act under chapter 397 of the Statutes of 1911. It omitted nothing the law required it to do in this behalf.

[2] The second point is not well founded. It appears from the record that one of the officers of the Ransome-Crummey Company did have a certain oral understanding with the superintendent of streets. It does not appear, however, that the city council was a party to the oral agreement. If the city council did make the oral agreement with the plaintiff, then the defendant's contention might have been sustained. Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33; Chase v. Trout, 146 Cal. 350, 362, 80 Pac. 81. But the defendant did not show that the city council knew of the oral agreement, or acted on it, or authorized it. However, the taxing power rested in the council and not in the superintendent of streets, nor in the commissioner of streets. No fraud was imposed on the council, and no fraud was either pleaded or proved.

It follows that the judgment should be affirmed; and it is so ordered.

I concur: LENNON, P. J.

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39 Cal. App. 287

CUSHING v. MACAULAY et al. (Civ. 2582.)

(District Court of Appeal, First District, Division 1, California. Dec. 26, 1918.)

APPEAL AND ERROR ⚷1010(1)—REVIEW—FINDINGS—WEIGHT OF EVIDENCE.

Judgment will not be disturbed on appeal, where findings on which it is based are supported by the evidence, though evidence would have warranted and supported findings in favor of appellant.

Appeal from Superior Court, Alameda County; Henry D. Burroughs, Judge.

Action by J. G. Cushing against H. C. Macaulay and others. Judgment for defendants, and plaintiff appeals. Affirmed.

G. C. De Garmo, of Los Angeles, and Franklin P. Nutting, of San Francisco, for appellant.

J. N. Young, of Oakland, for respondents.

PER CURIAM. The complaint sets out a contract between two corporations, one named Pacific Wall Bed Company of Los Angeles and the other named Pacific Wall Bed Manufacturing Company (hereinafter referred to as the manufacturing company), under which on March 18, 1915, a certain indebtedness existed from the latter to the former and which was assigned to the plaintiff. Said indebtedness was made up in part of a bonus upon the sale of beds at the rate of $5 per bed sold by the manufacturing company, and on said last-mentioned date the plaintiff commenced an action against said company in the superior court of Los Angeles county for the sum of $1,500, alleged to be the balance due upon said bonus account, and levied an attachment upon certain accounts due to the said corporation. The complaint then charges that thereupon the plaintiff and defendant in said action, through their respective attorneys, entered into a written stipulation, by which the plaintiff agreed to release the attachment, and that the amount due to plaintiff upon said bonus account should be arbitrated, and when determined, should be paid by H. C. Macaulay and C. M. Henderson, the defendants in the present suit, and who were officers and stockholders of said manufacturing company. It is also alleged that as a part of said stipulation and agreement these defendants agreed to execute and deliver to plaintiff their promissory note in the sum of $3,735.35, in replacement of a note of similar amount which the manufacturing company had agreed to pay under the contract first mentioned, the right to receive which had also been assigned to the plaintiff. The complaint then proceeds to charge that subsequently and on May 25, 1915, the plaintiff and defendants herein entered into a supplemental agreement by which the appointment of the arbitrator hereinbefore mentioned was waived, and defendants agreed to execute and deliver to plaintiff their promissory note in the sum of $3,959.47, which sum represented the note previously mentioned of $3,735.35 and interest thereon. Finally it is charged that the defendants refused to execute or deliver said notes as provided in said last-mentioned agreement, to the plaintiff's damage in the sum of $3,478.22, for which amount he prays judgment.

The court found (finding III) that only 87 beds were sold, upon which the plaintiff was entitled to receive the bonus of $5 per bed, and (finding VIII) that said amount had been paid; that as to the written stipulation and agreement to arbitrate the dispute between the plaintiff and the manufacturing company the same had been entered into by one R. L. Dailey without authority from the manufacturing company so to do (finding VI); that as to the supplemental agreement alleged to have been entered into between the plaintiff and defendants, by which the latter agreed to execute certain promissory notes in favor of the plaintiff, it was never consummated nor entered into by the defendants (finding VII); and, finally, that the plaintiff has not been damaged by anything contained in said complaint.

Judgment was accordingly entered in favor of the defendants, from which the plaintiff appeals, basing his appeal upon the contention that findings III, VII, and VIII, the substance of which is given above, are not supported by the evidence.

In support of this contention counsel for the plaintiff quote copiously from the evidence adduced upon the whole case, and draw therefrom deductions which he claims could and should have been made in his favor by the trial court. On the other hand, counsel for the respondents deduces from the same and other evidence, which he quotes, clearly contrary conclusions, which he, in effect, claims could be and were in fact drawn by the trial court in support of the findings assailed. It will thus be seen that the argument pro and con is but a discussion of the weight of the evidence, which, of course, avails nothing upon appeal.

If it be conceded that the evidence upon the whole case would have warranted and supported findings in favor of the plaintiff, still the fact remains that a review of the record shows that the evidence, as a whole, is also susceptible of the construction placed upon it by the trial court as implied from the findings made, and, consequently, it must be held that the evidence supports the findings, which, in turn, support the judgment.

The judgment appealed from is affirmed.

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39 Cal. App. 312

KAHN v. REVETT. (Civ. 2585.)

(District Court of Appeal, First District, Division 1, California. Dec. 28, 1918.)

1. **CORPORATIONS** 🔑117—**SALES OF CORPORATE STOCK—FALSE REPRESENTATIONS.**

False statements of sellers of stock that the corporation owned a patented device, that they had investigated the patent, and that it had been established in an infringement suit, are affirmations of fact, relative to furnishing basis for rescission of contract.

2. **CORPORATIONS** 🔑116—**SALES OF STOCK—LACK OF CONSIDERATION.**

Finding, in an action for price of stock sold, that the sole consideration for the contract was ownership by the corporation of a patent, falsely asserted by the sellers, sustains the defense of want of consideration.

3. **TRIAL** 🔑62(2)—**EVIDENCE IN REBUTTAL.**

The court *held* justified in refusing to hear further evidence on the subject; plaintiff's testimony, offered in rebuttal, being merely contradictory of testimony for defendant.

4. **EVIDENCE** 🔑241(1) — **STATEMENTS OF AGENTS.**

Statements testified to by defendant, having been made by agents of plaintiffs in conversation with him, are not objectionable as hearsay.

Appeal from Superior Court, City and County of San Francisco; J. E. Barber, Judge.

Action by Felix Kahn against Ben S. Revett. Judgment for defendant, and plaintiff appeals. Affirmed.

Wise & O'Connor and Richard S. Goldman, all of San Francisco, for appellant.

Wm. M. Sims and Franklin A. Plank, both of San Francisco, for respondent.

PER CURIAM. This action was brought to recover the purchase price of certain stock in a corporation. The company was engaged in the manufacture of a combination vibrator and vacuum apparatus. The defendant was interested in and desirous of obtaining control of the vibrator portion thereof, upon which he was assured the company owned a patent. With this end in view he negotiated for the purchase of the patent rights, but subsequently changed his plans and sought to purchase all of the stock of the corporation which owned the patent. Accordingly the parties entered into a written agreement in May, 1915, by the terms of which plaintiff agreed to sell and the defendant agreed to buy certain shares of the company. The corporation was known as the Vital Force Vibrator Company. The names of the holders of the stock and the number of shares owned by each of them are set forth in the agreement, the total number being 2,152 shares. The stock was placed in escrow, to be delivered to the defendant upon payment of the purchase price of $6,332.17. Defendant failed to pay, and this action was brought to recover the agreed amount.

The case was tried below upon issues raised by plaintiff's complaint and defendant's second amended answer and his counterclaim thereto, and by defendant's cross-complaint against plaintiff and the other stockholders of the company and the joint answer thereto of plaintiff and his cross-defendants. The answer set up the following defenses: (1) that the defendant was induced to enter into the agreement sued upon solely by reason of the false and fraudulent representations of the plaintiff and his associates; (2) that the defendant entered into the contract solely by reason of his mistake as to a material fact induced by the misrepresentations of plaintiff and his associates; and (3) want of consideration. Practically the same allegations appear in the counterclaim and the cross-complaint by which the defendant sought to have the contract sued upon rescinded and to recover damages for the money expended by him in reliance upon the representations of plaintiff. No relief was granted defendant, however, under these subsequent pleadings.

The false representations alleged to have been the inducement of the contract are, first, that the Vital Force Vibrator Company was the owner of letters patent issued by the United States Patent Office, numbered 1,025,504, and that said letters patent were basic, unassailable, and absolutely free from infringement, having been upheld and sustained in an infringement suit against the manufacturers of a similar device. It is also claimed that plaintiff represented that the principal and essential feature of the vibrator was an unbalanced arm or hammer, and that the same was covered by the patent, and, further, that the corporation and the officers and directors thereof had caused the letters patent to be examined, and that they covered the vibrator device.

The trial court found that such representations were untrue, and that defendant, relying upon the truth of the representations of plaintiff and his associates in respect thereto, was induced solely thereby and for no other consideration whatsoever to enter into the agreement sued upon, and that the only consideration for said contract was the pretended ownership by the corporation of letters patent upon the vibrator apparatus which the corporation did not own. The court further found that the shares of stock were valueless, and judgment went for defendant.

Plaintiff seeks a reversal of the judgment upon the ground that the representations, which the trial court found were made by plaintiff to defendant, were merely matters of opinion, and did not furnish the basis for the rescission of the contract made between the parties. It is also claimed that the evidence shows that the company did have letters patent in the vibrator. In addition thereto defendant is charged with laches in pursuing his remedy. Certain rulings of the court with reference to the admission and rejection of evidence are further relied upon for a reversal.

[1] That mere expressions of opinion do not constitute sufficient grounds of recission of a contract there can be no doubt. The question as to whether or not the statements here made, that the patent involved was basic, unassailable and not subject to infringement, come within that rule presents a question that we do not deem necessary to discuss. The evidence shows, and the court found, that plaintiff made the further representations that he and his associates owned the device exhibited to the defendant, and that they had investigated the patent, and that it had already been established in an infringement suit. These statements beyond question were affirmations of fact, and they were found by the trial court to be untrue. These findings are therefore sufficient to support the judgment, and it must stand affirmed, in the absence of merit in the further grounds relied upon for a reversal.

[2] Plaintiff contends that independent of all other considerations the judgment should be reversed because of the laches of defendant in asserting his right to rescind. Rescission, however, was not the exclusive remedy relied upon by defendant; his main defense being lack of consideration. The trial court having found that the sole consideration of the contract was the pretended ownership of a patent which the corporation did not own, that finding in itself is sufficient to support the judgment.

[3] Nor do we think that there is any force in the objection to the action of the trial court in refusing to permit plaintiff to testify in rebuttal. The offered testimony was merely contradictory of evidence of the defendant and his witnesses, and the court was justified in refusing to hear further evidence upon the subject.

[4] The same may be said of the objection to the admission of certain hearsay evidence claimed to have been prejudicial to plaintiff. This evidence related to conversations between certain persons and defendant relative to the misrepresentations of plaintiff. The record shows that the persons making the statements were agents of the plaintiff.

We are therefore of the opinion that there is no error in the record entitling the plaintiff to reversal. This conclusion makes it unnecessary to pass upon the question raised by respondent that the notice of appeal is limited solely to the consideration of the judgment for costs in favor of defendant and against plaintiff.

From what we have said it follows that the judgment should be affirmed; and it is so ordered.

39 Cal. App. 306

GOPCEVIC v. GOPCEVIC. (Civ. 2551.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1918. Rehearing Denied by Supreme Court Feb. 24, 1919.)

1. Work and Labor ⟹7(1)—Relation of Parties—Inferences.

Where there is a blood relationship between the parties, it may well be inferred, in the absence of direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services.

2. Contracts ⟹28(3) — Contract to Support—Evidence.

In action for breach of contract to support plaintiff for life, which plaintiff claimed was made verbally with him by defendant, his brother, *held* there was not sufficient evidence of such a direct understanding as to the performance of services and compensation therefor as conclusively showed a contract between them.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Appeal and Error 🔑1011(1)—Finding Based on Conflicting Evidence.

Where there was a substantial conflict in the evidence on question of making of contract, court's finding of no contract would be sustained on appeal.

4. Trial 🔑377(2)—Reopening Case—Delay.

Motion to reopen case and submit further testimony *held* properly denied, where made six months after the case had been argued and submitted.

5. Appeal and Error 🔑1047(5)—Failure to Compel Production of Evidence — Harmless Error.

Refusal to deliver to plaintiff a certain letter to be introduced in evidence, if error, was cured by subsequent introduction in evidence by defendant.

6. Appeal and Error 🔑1041(4)—Permission to Amend—Prejudicial Error.

Where plaintiff counted upon an express contract, he was not, technically speaking, entitled to testify as to reasonable value of services; and, where it appeared that he had no contract, refusal to grant his request to amend by adding a cause of action for reasonable services would not prejudice his case.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Bozo M. Gopcevic against Milos M. Gopcevic. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter M. Willett and R. H. Countryman, both of San Francisco, for appellant.

Charles S. Wheeler, of San Francisco (John F. Bowie and Nathan M. Moran, both of San Francisco, of counsel), for respondent.

BEASLY, Judge pro tem. This is an action for damages for breach of an alleged contract to support plaintiff for life, which plaintiff claims was made verbally with him by the defendant, his brother. The court found that no contract existed, and gave judgment for the defendant, from which he appeals. This exceedingly voluminous record, consisting of over 5,000 folios of closely printed transcript, seems to us to present but a single vital question, namely, whether or not there was a conflict of evidence upon the question of the making of this contract.

The evidence of the alleged contract consisted of two conversations between plaintiff and defendant, one had in the year 1904 and the other in the year 1911. The plaintiff's testimony as to the first of these conversations is as follows:

"Q. Now, then, did you go then to Europe at the request of Judge Davis and your brother Petar? A. I did. Before I went to Europe Milos came right after them in the same place, in the dining room. I was living there. He said, 'You go and try to do what you can; you don't need to work or anything else any more; you will be provided for all right. You will live with me as long as you live; everything what is mine is yours.'"

In a second version of this conversation, the plaintiff testified as follows:

"* * * They come before I went to Europe, and he told me that, 'Now,' he said, 'You go to Europe and do what I ask from you.' And Pete and Judge Davis was there before. After that he said, 'After everything will be settled and you will live here and you will be provided for and every one of the family.' That was the conversation with me before I left for Europe the second time."

Plaintiff's counsel in their brief assert that "the defendant did not deny that this conversation took place," but the defendant testified as follows:

"Q. You heard the testimony, did you, given by the plaintiff, when he testified that you came to him in the house on Sacramento street and you said, 'Go and do what you can; you don't have to work; everything that is mine is yours;' you heard that testimony did you? A. Yes.

"Q. Will you state whether or not you ever had such a conversation with the plaintiff? A. Never.

"Q. Did you ever have any conversation with him about him getting any information about the family in Europe? A. No never."

John F. Davis, mentioned by plaintiff in his first version of this conversation, testified:

"I never had any interview with plaintiff in which I asked him to get testimony or evidence at any time."

The following facts will shed light upon the breadth of meaning of this denial of Mr. Davis: It seems that the defendant was engaged at the time of the conversation in 1904, above quoted, in a legal controversy of a somewhat sensational character over the estate of his deceased wife, and that Judge Davis was his attorney. The plaintiff claimed that a part, at least, of the services which he was to perform, in return for his support for the remainder of his life, was to proceed to Dalmatia, of which country the brothers were natives—and there procure evidence as to the lineage of his family for use in controverting certain allegations as to misrepresentations which the opponents of the defendant in the litigation above named asserted the defendant had made to his wife. The defendant did proceed to Europe at that time, and did attempt, at least, to procure this testimony. The denial by Judge Davis that he asked the plaintiff to get such testimony, or that he had any interview with him on this subject, was practically a complete denial of the conversation so far as it referred to him. Further, Judge Davis testified that the best of his recollection was that he had not met plaintiff until a later date. It will thus be seen that the defendant positively denied the conversation and the agreement as testified to by the plaintiff, and that he was corroborated in this assertion in an important particular by Judge Davis.

Petar Gopcevic, mentioned in the testimony of plaintiff, died before this action was tried.

The evidence of the second alleged contract is the conversation which plaintiff testified took place in San Francisco in May, 1911. It is as follows:

> "A. Milos see me and tried to run across the street. I met him, and I said, 'Why you want to run away?' He said, 'No.' I said, 'What you mean, what you promised to me?' 'Oh,' he said, 'I never did,' I said, 'You discharged me,' and he said he didn't, and I said, 'You did,' and I said, 'What you order Mathews to do that?' 'Well,' he said, 'I will give you $100.' I say, 'No; I want you to settle down with me right now.' 'Well,' he said, 'I will see.' I said '$100 is not enough for me.'"

The defendant contradicted this evidence in the following language:

> "* * * We met there. Bozo comes up. We stepped in front of the saloon. 'Well,' he said, 'I am without money, and ain't got nothing to do.' I say, 'Well, that ain't my fault.' He said, 'I haven't got anything.' I walked in the saloon. I said, 'Who told you to go out of the house.' We went in the saloon; we three went in the saloon and had some talk that don't concern anybody but me Millan, and we took three drinks, and he wanted to talk more to me, and I went away."

This latter conversation of 1911 may be disposed of briefly by the statement that, even taking the plaintiff's own testimony at its full value, it constitutes no contract between the parties. For it will be evident, from reading it, that if the offer was made by the defendant at all, it was an offer to give the plaintiff $100, and that plaintiff refused to accept this offer. But defendant's reply to this testimony certainly raises a conflict as to whether this conversation was correctly stated by the plaintiff.

Perhaps this matter will be made a little more clear by a brief history of the relations of the parties. The brothers, Milos and Bozo, were working as gripmen on the San Francisco cable cars in 1903. The defendant in that year met and married an American girl who possessed considerable property. From the time of this marriage, the wife seems to have been very generous with her husband, and the husband seems to have been equally generous with the plaintiff, his older brother. For instance, Milos' wife gave him $1,000 as a Christmas present. He promptly handed this entire $1,000 over to Bozo, so that the latter might take a trip to Europe. From that time until some time after the death of Milos' wife, the defendant seems to have been generous on all occasions with his brother, who, so far as this evidence is concerned, did nothing in return therefor, except to engage in various errands and small oversights of business, which services might very well have been performed gratuitously by one brother for another in any family, and especially in a family bound together by as close ties as those which unite ordinary South-European relatives.

[1] There was in the case certain circumstantial evidence and certain evidence of various third parties—relatives and those not related to the parties—which the plaintiff claims corroborated his assertions as to the contract upon which he sues; but, taken all together, this testimony does no more than raise a conflict when read in relation to the evidence of the defendant and of Judge Davis. Indeed, it may well be doubted whether the plaintiff's evidence. if uncontradicted, would have constituted a contract between these parties, for where there is a blood relationship between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services. Gjurich v. Fieg, 164 Cal. 432, 129 Pac. 464, Ann. Cas. 1916B, 111.

[2] And certainly here there was not, without other circumstances and other evidence, such a direct understanding between the parties as to the performance of services and compensation therefor as conclusively shows any contract between them. Murdock v. Murdock, 7 Cal. 511; Crane v. Derrick, 157 Cal. 667, 672, 109 Pac. 31.

[3] But, however that may be, it must be held here that there is a substantial conflict in the evidence of the parties, and that, therefore, the trial court's finding on the subject of the existence of this contract must be sustained. This issue, being the vital issue in the case, the remaining points argued by appellant, become immaterial, unless errors of law in the exclusion of other evidence which would have established the contract are disclosed by the record. There are no such errors, for the offered evidence, if admitted, would not have made possible any different finding.

Appellant argues that the case should be reversed because of the refusal of the court to find upon an allegation of the complaint as to an alleged Dalmatian custom, which, he claims, was a material issue in the case. The allegation of the complaint, stripped of immaterial matter, is that the oldest male member is regarded as the head of the family in Dalmatia. We really cannot see how this fact could have affected the issues in this case, even if it were true.

[4] Plaintiff also complains that the court improperly denied his motion to reopen the case. The trial was commenced on February 8, 1915, and after several days' hearing was adjourned and resumed on April 26, 1915. The case was argued and submitted on the 28th day of April, 1915, and not until six months later, namely, on October 27, 1915 (during which time the court seems to have been waiting for the filing of briefs by the respective parties), did plaintiff give notice of the motion to reopen the case and submit further testimony. This motion was based upon an affidavit of plaintiff, and the further testimony which he desired to offer consisted of testimony taken from the depositions in the litigation over the defendant's wife's estate, and certain evidence found in records of that estate and the testimony of one Bullut, which, it is claimed, would have established the date upon which the plaintiff left for Europe, as he claims, for the purpose of procuring testimony for use in the trial of that case. It is not possible that six months could have been necessary to ascertain these facts. Due diligence, had it been exercised, undoubtedly would have disclosed this testimony. The plaintiff claims that these matters were called to his attention a short time before the filing of his affidavit and the noticing of his motion by a newspaper clipping apparently contemporaneous with the contest over the wife's property, and which he says he did not previously know of. But if he had searched the records in Lake county in the court in which this case was tried he could not have failed to ascertain all that these records would have disclosed, and the testimony which he claims defendant gave in the deposition referred to would not in any way have strengthened his case, for it referred to nothing except the ancestors of the Gopcevic family.

But reopening of a case is usually a matter of discretion with the trial court, and in this case it can hardly be doubted that had the trial court reopened the case, it would have abused that discretion.

[5] Appellant complains that a certain letter which he demanded from counsel for the plaintiff was not delivered to him to be introduced in evidence in his case. This letter was produced and was left in the hands of the court or clerk. It was subsequently introduced in evidence by the defendant. It is not necessary under these circumstances to determine whether or not it should have been delivered to the plaintiff so that he might use it in support of his motion because of its subsequent production in evidence, which cured any error, if error there was, in refusing to permit its use by the plaintiff.

[6] The plaintiff complains that he was not permitted to testify as to the reasonable value of his services. He counted upon an express contract, and, speaking technically, the objection was properly sustained. He asked permission to amend his complaint by adding a cause of action for the reasonable value of these services. It appearing that he had no contract, the refusal of the court to grant the request did not prejudice his case.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

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39 Cal. App. 302

EDELEN v. OAKLAND BANK OF SAVINGS. (Civ. 2359.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1918. Rehearing Denied Jan. 25, 1919; Denied by Supreme Court Feb. 24, 1919.)

BANKS AND BANKING ⚷148(3) — DEPOSITORS—WRONGFUL PAYMENT OF CHECKS.

Where a depositor, who had a commercial account, signed checks in blank and delivered them to his bookkeeper to be filled out, and the bookkeeper, on leaving his employ, retained one check, filling in a fictitious name, and the check was indorsed and cashed by her son, *held*, that the bank was not liable on the theory that it should have discovered that fact; the depositor's own negligence being the cause of the loss.

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by Jas. H. Edelen against the Oakland Bank of Savings. From a judgment for defendant, plaintiff appeals. Affirmed.

Reed, Nusbaumer & Bingaman, of Oakland, for appellant.

McKee & Tasheira, of Oakland, for respondent.

PER CURIAM. Edelen, the plaintiff, had a commercial account with the defendant, the Oakland Bank of Savings. He also had in his employ a trusted bookkeeper, by name Mrs. L. B. Simpson. He signed a number of checks "in blank," drawn upon the defendant bank, and delivered them to Mrs. Simpson for use in the conduct of his business. Without his knowledge, Mrs. Simpson retained one of these blanks checks after quitting the employment of Edelen, and, after filling in the blanks by writing in the date, July 1, 1916, the amount, $600, and the name, Arthur H. Shaw, as payee, sent her son to the Central Bank of Oakland, where, after

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

indorsing the name of Shaw and writing his own name also upon the back of the check, he negotiated it to the Central Bank, which paid him the amount thereof. The Central Bank presented the check to the Oakland Bank of Savings through the clearing house, and the Oakland Bank of Savings paid it and charged the amount thereof to the account of Edelen. Upon learning of this Edelen brought action against the Oakland Bank of Savings for the amount of the check, and the trial court gave judgment for the defendant for its costs, whereupon Edelen appeals, and endeavors to escape liability for his negligence in leaving the blank check in the possession of Mrs. Simpson by contending that, Shaw's name, being fictitious (which it was), it was the duty of the Central Bank of Oakland to discover this fact, and that, not having done so, the bank is chargeable with negligence, and is liable to the defendant Oakland Bank of Savings for the $600, and that therefore the plaintiff is entitled to receive back his money from the last-named bank.

There is nothing in this point. The plaintiff's own negligence was the proximate cause of his loss. The Oakland Bank of Savings paid the check on the faith of the signature of Edelen, which, because he was its depositor, it was bound to know and to honor at its peril; and it would be unjust to force it to repay the $600 to Edelen and resort for reimbursement to a probable lawsuit against the Central Bank. We are cited to no authority compelling us to so hold.

The judgment is affirmed.

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39 Cal. App. 274

CHINO LAND & WATER CO. v. HAMAKER et al. (two cases). SAME v. MOSS et al. SAME v. CHALMERS et al. (Civ. 2608.)

(District Court of Appeal, Second District, Division 1, California. Dec. 26, 1918.)

1. Public Lands 🔑78—Railroad Land Grants—"Mineral" Lands.

Petroleum or mineral oil is within the meaning of the term "mineral" as used in Act Cong. March 3, 1871, § 23, reserving mineral lands from railroad land grants.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mineral.]

2. Public Lands 🔑117—Patent—Collateral Attack.

Patent, though irregular in that the lands in question were mineral, passed title subject to the right of the government to attack it by direct suit for annulment, and defendant not in privity with the government could not successfully attack the patent.

3. Public Lands 🔑78—Reservation of Minerals.

The reservation "mineral land excepted" in grant in patent to railroad company based upon proceedings had under certain land grant legislation, referring to Act Cong. July 27, 1866, Joint Resolution June 28, 1870, and Act March 3, 1871, § 23, is a void exception.

4. Public Lands 🔑117—Patent—Collateral Attack.

Patent to railroad company based upon proceedings had under certain land grant legislation referring to Act Cong. July 27, 1866, Joint Resolution June 28, 1870, and Act March 3, 1871, § 23, is upon collateral attack a conclusive official declaration that land in question is agricultural, and that all requirements preliminary to issuance of patent have been complied with.

Appeals from Superior Court, Orange County; W. H. Thomas, Judge.

Four actions by the Chino Land & Water Company, two against C. R. Hamaker and others, one against H. L. Moss and others, and one against John K. Chalmers and others. In each case defendants appealed from judgment and order denying motion for new trial. It was stipulated that the actions be consolidated and presented upon a single transcript. The several judgments appealed from affirmed, and in each case the order denying motion for new trial also affirmed.

See, also, 171 Cal. 689, 154 Pac. 850.

Kimball Fletcher and Wm. A. Gaines, both of Los Angeles, and D. J. Hinkley, for appellants.

O'Melveny, Stevens & Millikin and Walter K. Tuller, all of Los Angeles, for respondent.

CONREY, P. J. It has been stipulated between respondent and appellants, through their respective counsel, that, whereas the records in the above-entitled cases are absolutely identical, except as to description of the property, the several appeals in said actions shall be consolidated and presented upon a single transcript. In each case the defendants have appealed from the judgment and from an order denying their motion for a new trial.

In view of the stipulation, we shall refer to the facts hereafter as if there were only one case. This is an action wherein the plaintiff seeks to quiet its title to certain described lands in the county of Orange. The defendants claim the lands as mining claims under placer mining locations. It may be assumed, as claimed by them, that in their answer they have alleged the facts necessary to sustain their claim, providing the lands in controversy were open to location under the mineral land laws of the United States and those of California in 1911. The plaintiff deraigns title by mesne conveyances from the Southern Pacific Railroad Company of California, to which company a patent had been issued by the United States of America. At the trial the plaintiff introduced in evidence the patent issued by the government to the railroad company, including the lands in controversy, which patent was dated April 4, 1879, and on the 12th day of February, 1881, recorded in the office of the county recorder of the county in which the lands were located. The plaintiff also introduced in evidence a deed from the Southern Pacific Railroad Company and others, including in its description the lands in controversy, conveying to one Franklin Cogswell the lands therein described, "reserving all claim of the United States to the same as mineral land." It was admitted at the trial that the plaintiff had acquired whatever right, title, and interest passed from the United States to the Southern Pacific Railroad Company by the granting act referred to in the patent and by the said patent and from the Southern Pacific Railroad Company and others to Franklin Cogswell by said deed. Such were the sole sources of plaintiff's title, except certain evidence offered for the purpose of showing title by adverse possession; but we shall not find it necessary to further discuss the subject of adverse possession in this case. The plaintiff having rested, the defendants requested the court to dismiss the complaint on the ground that the evidence was insufficient to show title in the premises in the plaintiff for the reason that there was no evidence before the court that the land was not mineral land. Said motion having been denied, the defendants offered to prove that all the lands in controversy were mineral lands within the meaning and purview of the granting act mentioned in the patent and within the meaning of said patent, and that the defendants had, in the year 1911, located said lands as mineral lands belonging to the United States and had ever since done upon them the annual assessment work required by law to be done. To this the plaintiff objected on the ground that the issuance of the patent by the United States was a conclusive adjudication that all the land described therein was nonmineral. This objection was sustained by the court. Thereupon the court made its findings and entered its decree in favor of the plaintiff.

The patent shows that it was based upon proceedings had under the provisions of certain railroad land grant legislation, referring to the act of Congress approved July 27, 1866 (14 Stat. 292, c. 278) and Joint Resolution of June 28, 1870 (16 Stat. 382, No. 87), and the twenty-third section of an act of March 3, 1871 (16 Stat. 579, c. 122), whereby the Southern Pacific Railroad Company of California was authorized to construct certain lines of railroad, and provision was made for granting to said company certain alternate sections of public land on each side of the line of railroad. The patent purports to grant to the grantees the tracts of land therein described, "mineral land excepted."

Every question necessary to a determination of this case has been answered by the decision of the Supreme Court of the United States in the case of Burke v. Southern Pacific Railroad Co. et al., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, 1556. Without indulging in the extensive quotations which would be necessary to a full statement of that case, we will briefly make its application to the case at bar.

[1-4] Petroleum or mineral oil is within the meaning of the term "mineral," as it was used in said act of Congress reserving mineral lands from the railroad land grants. If, for the reasons claimed, the patent was irregularly issued, it was nevertheless the act of a legally constituted tribunal and was done within its jurisdiction. Therefore the patent is not void, and it passed the title, subject to the right of the government to attack the patent by direct suit for its annulment, if the land was known to be mineral when the patent issued. The reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company excepting mineral lands is a void exception. The patent upon collateral attack is a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with. The fact that appellants were not in privity with the government in any respect at the time when the patent was issued to the railroad company prevents them from successfully attacking the patent in this case.

In Van Ness v. Rooney, 160 Cal. 131, at page 142, 116 Pac. 392, the court was dealing with the validity of a patent to a railroad company of similar character to the patent here in question, but the plaintiff in that case had made a valid mining location and initiated his title to his mining claim before the patent was issued to the railroad company. While sustaining the plaintiff's right as superior to that claimed under the patent, the court clearly held, in accord with earlier decisions there cited, that as to junior claimants the patent to such land as nonmineral land is conclusive.

The several judgments appealed from herein are affirmed, and in each case the order denying defendants' motion for a new trial is also affirmed.

We concur: **JAMES, J.**; **MYERS**, Judge pro tem.

39 Cal. App. 351

FARRELL v. CITY OF ONTARIO et al.
(Civ. 2783.)

(District Court of Appeal, Second District, Division 1, California. Jan. 3, 1919.)

1. Equity 🔑39(1) — Jurisdiction — Scope.

The doctrine that equity, having taken jurisdiction, will retain it for the purpose of disposing of the entire case is limited by the rule that where the title of a complainant is doubtful, or the violation of his right is not clear, he will be required to establish his right, title, and the violation thereof in an action at law before equity will entertain his motion for extraordinary relief.

2. Jury 🔑10—Jury Trial—Guaranty.

Const. art. 1, § 7, guaranteeing the right to trial by jury, guaranteed the right to trial as it existed at common law.

3. Jury 🔑13(9)—Right to Jury Trial.

In an action for diversion of surface water and for an injunction *held*, in view of Code Civ. Proc. § 592, relating to jury trial, and the fact that the common-law right to trial by jury was guaranteed by Const. art. 1, § 7, that plaintiff was entitled as of right to trial by jury on the issue of damages, and a verdict could only be vacated under the power vested in the court under proceedings for new trial.

4. Appeal and Error 🔑930(3)—Presumptions—Special Interrogatories—General Verdict.

No presumption will be indulged in favor of the answers of the jury to special interrogatories as against the general verdict.

5. Municipal Corporations 🔑845(6) — Tort — Flowage — Verdict — Answers to Special Interrogatories.

In an action for damages for the act of defendant which cast surface waters on plaintiff's land and to enjoin continuance, etc., *held* that answers to special interrogatories as to the flowing of such waters did not overthrow the general verdict for plaintiff.

6. Municipal Corporations 🔑845(6) — Tort — Flowage — Answers to Special Interrogatories.

In an action for damages for the act of defendant which plaintiff claimed cast surface waters on his premises, finding that the floods were unprecedented *held* not inconsistent with a general verdict for plaintiff.

7. Municipal Corporations 🔑835—Torts—Diversion of Waters.

Where a city graded a street so that surface waters were cast on the premises of plaintiff, the fact that the amount of the waters was unprecedented is no defense.

8. Appeal and Error 🔑1170(6)—Review—Harmless Error.

The denial of a jury trial to a party entitled thereto is in itself a miscarriage of justice, and cannot be deemed harmless error under Const. art. 6, § 4½.

9. Appeal and Error 🔑1000—Equitable Proceedings—Verdict of Jury.

Where in one proceeding plaintiff united a demand for damages for the acts of defendant in casting surface water on his land, with a prayer for an injunction against maintenance of the condition, *held* that the verdict of the jury, while conclusive on the issues of damages, was not conclusive on the equitable issues.

10. Judgment 🔑203 — Separate Judgments in Same Case—Validity.

Where in one proceeding plaintiff prayed recovery of damages for act of defendant in casting surface waters on his premises and an injunction, it was improper for the clerk to enter judgment on the verdict of the jury on the issue of damages before the court had determined the equitable issues, and hence the entry of such judgment was of no effect, and the court, on determining the equitable issues, might enter judgment.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Patrick Farrell against the City of Ontario and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Joseph Scott, of Los Angeles, A. S. Maloney, of San Bernardino, and A. G. Ritter, of Los Angeles, for appellant.

Archie D. Mitchell, of Ontario, R. S. Parker, of Pasadena, and E. H. Jolliffe, of Ontario, for respondents.

MYERS, Judge pro tem. Plaintiff appeals from a judgment in favor of defendants. He concedes its correctness, however, as to the defendants other than the city of Ontario. Plaintiff, as the owner of certain lands situate a short distance south of the southerly limits of that city, charges the defendants with having constructed a certain ditch and culvert, the effect of which was to divert storm waters upon plaintiff's lands to their injury. It is alleged that in January, 1916, large quantities of storm waters were so diverted upon plaintiff's lands, to his damage in the sum of $10,000, and that if defendant city is not restrained from maintaining said ditch and culvert they will continue to divert waters upon plaintiff's lands during the winter season of each year, to plaintiff's further and irreparable damage. The prayer is for damages and for an injunction abating the alleged nuisance and restraining its further maintenance.

The case was tried before a jury which, on February 14, 1917, returned its general verdict in favor of the plaintiff as against the defendant city alone in the sum of $2,500. It also returned therewith its special verdict in answer to eight interrogatories submitted by the court. On the following day the clerk, of his own motion, entered judgment for the plaintiff on the general verdict. Thereafter, within ten days, defendant served and filed notice of its intention to move for a new trial and notice of motion for judgment for defendant on the special findings of fact, under section 663, Code of Civil Procedure, subd. 2. These two motions were argued and taken under submission by the court, which thereafter, on July 11, 1917, without ruling upon either of the motions, filed its written opinion, ordering findings and judgment for the defendants. From the judgment entered pursuant thereto upon findings made by the court this appeal is prosecuted.

Appellant's position is twofold: First. That the judgment in favor of plaintiff, entered February 15, 1917, not having been vacated or modified, and no appeal having been taken therefrom, has become final, and that defendant's motion for a new trial has been automatically denied by the lapse of time under section 660 of the Code of Civil Procedure. Second. That the plaintiff was entitled as of right to a trial by jury, at least upon the issues as to damages, and that the verdict was therefore binding upon the court, and could be vacated only under the power vested in the court under proceedings for a new trial, which power was not here exercised.

[1-3] Taking up the second point first, we find two divergent lines of decision in this state, the decisions in one group apparently ignoring those in the other group and no apparent attempt having been made to reconcile them. The one group is illustrated by the case of Hughes v. Dunlap, 91 Cal. 385, 27 Pac. 642, wherein it was held, in an action for damages for trespasses upon land and for an injunction to restrain future repetitions thereof, that the action for damages was a legal remedy as to which the parties were entitled to a jury trial, and that the verdict of the jury thereon was binding upon the court. This case was followed and approved in the recent case of Moore v. San Vicente Lumber Co., 175 Cal. 212, 214, 165 Pac. 687, which was an action for the abatement of a nuisance by injunction and for damages. The other group is illustrated by the cases of McLaughlin v. Del Re, 64 Cal. 472, 2 Pac. 244; Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; Richardson v. City of Eureka, 110 Cal. 441, 446, 42 Pac. 965, and McCarthy v. Gaston Ridge, etc., Co., 144 Cal. 542, 545, 78 Pac. 7—holding that in such case the prayer for damages is but incidental to the principal relief sought, which is of equitable cognizance, and that, therefore, the verdict of a jury thereon is merely advisory and may be disregarded by the trial judge upon whom rests the responsibility of finding the facts.

The decision in Hughes v. Dunlap appears to be based upon the sounder reasoning. According to the allegations of his complaint, plaintiff had two rights of action and was entitled to two remedies, of which he might pursue either or both at his election, the legal remedy of damages for past injuries suffered and the equitable remedy of injunction to prevent their recurrence in the future. He might have prosecuted separate actions for these two remedies concurrently. In that case the facts alleged in the two actions would have been the same, except that in the action at law he would have alleged the money value of the injuries suffered and in the suit in equity he would have alleged the facts showing a threat of future repetitions thereof. Under those circumstances it will be conceded that the plaintiff would have been entitled as of right to a trial by jury of the legal issues as to damages. Instead of doing this, he accepted the invitation held out to him by our laws and joined his two actions in one. He should not be held to have thereby forfeited his right to a jury trial of the legal issues, unless the reason for so holding is clearly apparent.

The rule followed in the decisions of which McCarthy v. Gaston Ridge, etc., Co., supra, is an exemplar, finds support in the decisions of the courts of some of the other states, notably those of New York and Iowa. It seems to us to have grown out of an unnecessary and unwarranted application of a recognized doctrine of equity jurisprudence, to wit, the rule "that when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at issue." Pomeroy's Eq. Jurisprudence, §§ 181, 236; Watson v. Sutro, 86 Cal. 500, 528, 24 Pac. 172, 25 Pac. 64; Becker v. Superior Court, 151 Cal. 313, 316, 90 Pac. 689. This rule, both in its origin and in its application, wherever the jurisdiction at law and in equity was vested in separate tribunals, had for its reason and its purpose the avoidance of a multiplicity of actions. Where, under the "reformed procedure," issues at law and in equity may be tried before the same tribunal and in the same action, this reason ceases to exist. There is no occasion in this state for the application of the rule that equity, once taking jurisdiction, will retain it for the purpose of disposing of the entire case, because here the court may dispose of the entire case without the necessity of trying it as a case wholly of equitable cognizance. Here the court, having jurisdiction, may hear and determine the equitable issues according to the rules of equity, and the legal issues in accordance with the rules of law, both in the same action.

The doctrine that equity, once having taken jurisdiction, will retain it for the purpose of disposing of the entire case was limited and safeguarded in its application under the former procedure by another rule, equally well established, namely, that where the title of the plaintiff is doubtful or the violation of his right by the defendant is not clear, he will be required to first establish his title, his right, and the violation thereof, in an action at law, before equity will entertain his application for extraordinary relief. High on Injunctions, § 8; 29 Cyc. 1228, and cases cited. Under this rule, if the plaintiff had filed in a court of purely equitable jurisdiction the complaint upon which this action is based and the defendant had made answer thereto, as it did here, denying plaintiff's title to the land alleged to have been injured, denying the diversion of waters, and denying the alleged injuries to the land, the court would have said to the plaintiff, in effect:

> "You must first go into a court of law and there establish these disputed claims of right upon which you are basing your claims for relief; if you succeed in establishing there your legal rights, we will then entertain and consider your petition for equitable relief."

And, of course, in such action at law the parties would have been entitled to a jury whose verdict would have been binding upon the court and subject to be set aside only upon motion for a new trial.

By analogy, then, it would seem that where, as under our procedure, parties are permitted to submit both their legal rights and their equitable rights to the same tribunal for adjudication at the same time, the right to a jury trial with respect to the former, which was adequately safeguarded under the old system, should be equally respected under the new. That would seem to be the effect of our constitutional guaranty. Article 1, § 7. The right to trial by jury thus guaranteed was the right as it existed at common law. Koppikus v. State Capitol Commissioners, 16 Cal. 248, 253; Cauhape v. Bank, 127 Cal. 197, 202, 59 Pac. 589. The purpose of the amendment of 1874 to section 592 of the Code of Civil Procedure was to make it conform thereto. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 556, 147 Pac. 238. It follows, therefore, that the common-law rule respecting the right to trial by jury as it existed in 1850 is the rule of decision in this state. Pol. Code, § 4468; Martin v. Superior Court (Sup.) 168 Pac. 135, 136, L. R. A. 1918B, 313.

It is material, therefore, to ascertain what was the rule of the English common law upon this subject in 1850. The case of Walter v. Selfe, 4 De Gex & Smale, 315, was decided in 1851, upon a bill filed in July, 1850, for the abatement of a nuisance by injunction. Both parties stipulated that all of the issues should be tried in equity without a jury. The vice chancellor in the course of his opinion said:

> "Certainly, I should, whether granting or not granting a provisional injunction, have directed an action or an issue, for the purpose of trying the material questions of fact raised by the bill and affidavits. But the counsel for each party having requested me not to do so, and also not to send a case for the opinion of a court of law, I consented to decide it without assistance. It appears to me that, in the present instance, the defendant, as well as the plaintiff, declining to go before a jury, and asking the Court of Chancery to decide between them without assistance in any shape from a court of law, I ought to grant an injunction."

The case of Imperial Gas Light & Coke Co. v. Broadbent, 7 House of Lords Cas. 601, was decided in 1859 upon a bill in equity filed in 1856 (and, therefor, prior to the chancery amendment of 1858), to abate a nuisance by injunction. The lord chancellor (Lord Campbell) said:

> "There is no doubt whatever that before a perpetual injunction can be granted, the party applying for it must establish his right by a proceeding at law."

Lord Kingsdown, concurring, said:

> "The rule I take to be clearly this: If a plaintiff applies for an injunction to restrain a violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent a recurrence."

So far as we have been able to ascertain, there were no statutory enactments in England between 1850 and 1858 affecting the right of trial by jury in connection with suits to abate nuisances. These decisions may be taken then as determinative of the proposition that, under the English common law as it stood in 1850, at the time it was adopted as the rule of decision in this state, "if a plaintiff applies for an injunction to restrain a violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law"; or, in other words, by a jury, if one be demanded. We conclude, therefore, that the parties here were entitled to a jury trial upon the issues as to damages, and that the verdict of the jury thereon was binding. We do not regard the provision of section 731 of the Code of Civil Procedure as in any way affecting that right. If the jurisdictions in law and equity were here separately vested, it might well be held that the plaintiff, by filing in equity a complaint such as is here presented, had thereby elected to submit all the issues for determination by the court, and thereby waived his right to a jury trial on the legal issues; but where, as here, all such issues may be tried in the one action, no reason for such holding appears.

[4, 5] It is the contention of the respond-

ent that the special findings of the jury are inconsistent with the general verdict, and that, therefor, the latter cannot stand in any event. Plaintiff's land was situated on the southerly side of Walnut street, opposite the intersection thereof with Fern street. Plaintiff's contention was that the acts of the defendants caused the storm waters to enter his land opposite that point of intersection. Defendants' contention was that the storm waters had always naturally flowed across plaintiff's land at that point. In findings numbered I, II and VI, read together, the jury found that prior to the acts of the defendants the storm waters naturally flowed "southwesterly to Fern and Walnut streets," but that none of them entered upon plaintiff's land to the south of Walnut street. By finding numbered III they found that the act of the defendant city caused a substantial change of the place at which the waters flowed southerly from Walnut street. Apply the rule adopted by the Supreme Court in Law v. Northern Assurance Co., 165 Cal. 394, 406, 132 Pac. 590, 596, that "no presumption will be indulged in favor of answers of the jury to special interrogatories as against the general verdict; but, on the contrary, every reasonable intendment in favor of the general verdict should be indulged, and all parts of the verdict are to be reconciled in support thereof if it can reasonably be done," we construe the findings to mean that prior to the acts complained of the storm waters were wont to reach the street which formed the northern boundary of plaintiff's land, but did not flow southerly therefrom except at a point outside of plaintiff's boundaries; and that the acts of the defendants caused these waters to be discharged upon plaintiff's lands at a point where they had never flowed before. Thus construed, these findings are wholly consistent with the general verdict. This appeal is not from the judgment upon that verdict, nor from an order upon motion for new trial, and we are therefore not concerned here with the question whether or not those findings are supported by the evidence.

[6, 7] By findings numbered V and VI the jury found that the storm and flood of January, 1916, were unprecedented. This, of course, is not inconsistent with the general verdict, in the absence of any finding that the unprecedented character of such storm and flood was the sole cause of the injuries. That fact would constitute no defense if any negligent or wrongful act of the defendants contributed with it to cause the injuries. Chidester v. Consolidated Ditch Co., 59 Cal. 197, 202. In support of the general verdict, we must assume that the jury also found such contributing wrongful acts on the part of the defendants. Tremble v. Tuman, 175 Cal. 696, 167 Pac. 142. The remaining special findings are not claimed to be inconsistent with the general verdict.

[8] Respondent urges that the decision of the court, as embodied in the findings and conclusions drawn by it, is a just one under the evidence, and that therefore its reversal is precluded by section 4½, art. 6, of the Constitution. It may be doubted that this section applies to a situation such as is here presented; but, assuming that it does, we do not hesitate to hold that the denial of the right of trial by jury to a party entitled thereto is, in itself, a miscarriage of justice.

[9] The verdict of the jury, while conclusive upon the issues as to damages (subject only to the power of the court to set it aside on motion for new trial), is in no sense conclusive as to the equitable issues. They are to be determined by the court upon findings of fact made by it. "Of course, it is always for the judge sitting as a chancellor to determine whether, when certain rights are established, he will grant an equitable remedy prayed for, or compel a party to be satisfied with his legal remedy." Hughes v. Dunlap, supra. Appellant contends that the allegations of the complaint upon which the prayer for equitable relief is directly predicated are admitted by the failure to deny them in the answer. This is true with respect to the allegations of the probability of future injuries. The other allegations so referred to by appellant, while not categorically denied, are sufficiently traversed by affirmative allegations in the answer inconsistent therewith.

[10] To appellant's contention that the judgment entered by the clerk upon the verdict has now become final, in the absence of any appeal therefrom, we cannot assent. The clerk was without authority to enter that judgment at that time. There were issues of purely equitable cognizance which the court alone could determine and which it had not then determined. Churchill v. Louie, 135 Cal. 608, 612, 67 Pac. 1052. Therefore, the trial of the action had not been concluded and the judgment so entered was premature and of no effect. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 558, 147 Pac. 238. It follows from this that the motion for new trial was also premature and of no effect.

The judgment appealed from is reversed, and the cause remanded to the superior court, with direction to enter judgment in accordance with the general verdict upon the issues as to damages, and appropriate to such findings of fact as it shall make upon such evidence as may be taken before the court as to the equitable issues.

We concur: CONREY, P. J.; JAMES, J.

179 Cal. 703

In re PHELPS' ESTATE.

LORD v. CHIPMAN et al.

(S. F. 8821.)

(Supreme Court of California. Feb. 10, 1919. Rehearing Denied March 10, 1919.)

1. WILLS 🔑684(1)—ESTATE IN TRUST—INCOME—FUND FROM WHICH PAYABLE.

A will directing the executors and trustees to pay monthly out of the net income of estate, from whatever source accruing, certain annuities, until the accumulation of a certain trust fund, referred only to the net income of the property set apart for trust purposes and not to the income of the entire estate, notwithstanding Civ. Code, § 1357, subds. 2, 3, and section 1360.

2. TRUSTS 🔑271½—MANAGEMENT AND DISPOSAL OF TRUST PROPERTY — AUTHORITY OF COURT.

A probate court has no authority to order the executors, as such, to pay during the administration of an estate certain annuities, which are under the will payable only out of the trust property by the executors in their capacity as trustees of such property.

3. WILLS 🔑684(1)—TRUST ESTATE—INCOME—CORPUS OF ESTATE.

Where, under a will, it is provided that until the accumulation of a certain trust fund certain annuities are to be paid monthly "out of the net income," the intention of the testatrix that the net income alone from the trust property, and not the trust property itself, should be resorted to in paying such annuities, is clearly indicated.

Department 1.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

In the matter of the petition of Virginia A. Lord to obtain an order construing the will of Josephine A. Phelps, deceased, and to direct the executors to pay her certain sums of money alleged to be due her under the terms of the will. From an order directing executor to sell property of the estate and out of the proceeds to pay petitioner the sums claimed, the executors, W. F. Chipman and the Union Trust Company, appeal. Order reversed.

W. C. Sharpstein, of San Francisco, for appellants.

Ross & Ross, of Redwood City, for respondent.

SHAW, J. Virginia A. Lord filed a petition in the matter of the administration of the estate of Josephine A. Phelps, deceased, to obtain an order construing the will of the said decedent and directing the executors to pay to her certain sums of money alleged to be due her under the terms of said will. Thereupon the court made an order directing the executors to sell property of the estate and out of the proceeds to pay to the petitioner the sums claimed by her to be due to her at that time under said will. From this order said W. F. Chipman and Union Trust Company, as executors of the said will, appeal.

The decision of the case depends upon the meaning and effect of the will, and upon the law of this state regarding the jurisdiction and powers of the superior court sitting as a court of probate in the administration of an estate.

The second article of the will nominated Chipman and the trust company "as executors and trustees of this my will." The third article gave to the petitioner, Mrs. Lord, the use of the dwelling house of the decedent, and the inclosed premises surrounding it, and certain personal property thereon, during her life. The fourth article gave to Eugenie H. Schroeder the use during her life of certain property of small value. The fifth article opens as follows:

"Fifth. All the rest and residue of my estate, including the property described in the two preceding articles, after termination of the life estates of my said sisters Virginia A. Lord and Eugenie H. Schroeder respectively therein, but excluding the personal property described in the sixth and seventh articles hereof, I devise and bequeath to my executors and trustees in trust for the following uses and purposes:

"A. To lease until sold as hereinafter provided all of my real estate upon such terms as to them may seem best, and until the accumulation of the fund hereinafter provided, I direct my executors and trustees from the time of my death

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to pay monthly out of the net income of my estate from whatever source accruing, to my sisters and brothers hereinafter named, the annuities set opposite their respective names, to wit:

"1. To my sister Virginia A. Lord three hundred dollars.

"2. To my sister Eugenie H. Schroeder three hundred dollars.

"3. To my brother Edward T. McLean and his wife Mattie McLean jointly and to the survivor of them one hundred dollars.

"4. To my sister Amanda A. Swasey one hundred dollars.

"5. To my brother Alfred A. McLean one hundred dollars.

"Should the income in any month be insufficient to pay all of said annuities in full, I direct my executors and trustees to pay the annuities to my sisters Virginia A. Lord and Eugenie H. Schroeder in full and prorate the balance among the remaining annuitants, and whenever there shall be more than sufficient to pay all of said annuities in full, I direct my said executors and trustees to pay such annuitants as have not received their annuities in full a sufficient sum to make up such deficit but without interest."

The will then proceeds to direct the "executors and trustees" to sell sufficient of the property to create a fund of $240,000, and to invest and keep invested the sums derived from such sales and use the income from that money in payment upon the above annuities until the entire fund is raised, and then and thereafter to invest and keep such fund invested and pay the net income therefrom to said annuitants in the following proportions, to wit, three-eighths to Mrs. Lord, three-eighths to Mrs. Schroeder, one-twelfth to Edward T. and Mattie McLean jointly, one-twelfth to Amanda A. Swasey, and one-twelfth to Alfred A. McLean. Upon the death of these respective beneficiaries the corpus of the fund is to go to certain successors of them respectively in the proportions above stated. The surplus of the estate remaining after providing for said fund is to be sold and the proceeds paid by the executors and trustees to a number of persons in specific amounts aggregating $280,600, and the excess, if any, is to be paid in equal parts to Mrs. Lord, Mrs. Schroeder, and the said W. F. Chipman, her nephew. The final clause of the fifth article was as follows:

"Although it is my intention to have all of my estate, with the exceptions already stated, converted into cash, I desire that my executors and trustees shall make sales with the sole object that my two sisters and my nephew above mentioned shall receive substantial sums out of the remainder of my estate. My estate at present valuations is ample for that purpose, and I do not wish it sacrificed to satisfy the importunities of those, who while dear to me, are not the first in my affections."

The entire estate was of the value of $535,860.17, according to the appraisement returned by the executors.

The decedent died on December 5, 1916, the will was admitted to probate, letters testamentary were issued to the aforesaid persons named as "executors and trustees," and they have ever since been acting as executors of the estate. On June 15, 1917, all the persons named as annuitants in the above-quoted clause of the will, and the said executors, entered into a stipulation, in pursuance whereof the court made an order directing said executors to pay out of the general assets of the estate from the time of the death of said decedent to June 5, 1917, to Mrs. Lord and Mrs. Schroeder, the sum of $200 a month each, and to the other annuitants respectively, two-thirds of the sums directed by the will to be paid to them during the aforesaid period, and thereafter, during the administration of the estate, to continue to pay monthly to each of the said annuitants two-thirds of their respective annuities. The appellants pleaded this stipulation and the order thereon as an adjudication of the matter and as a bar to the relief applied for. The court found that the stipulation was not entered into in settlement or compromise of the respective claims of the said annuitants, and its conclusion was that the order thereon did not bar them from afterwards claiming the remainder of the said annuities out of the general assets of the estate or otherwise.

The order appealed from recites that there was no net income from the estate of the decedent and would not be for a long time in the future, nor any money or funds in the possession of the executors with which to pay the annuity to Mrs. Lord, and it directs that the executors forthwith proceed to sell, subject to confirmation by the court, property of the estate to obtain money to pay the sum of $1,300, due at the time upon the aforesaid annuity to Mrs. Lord, and thereafter, until the net income of the estate was sufficient to pay said annuity, to continue to convert the general assets of the estate into money and therefrom to pay the said annuity monthly as it became due. It proceeds upon the theory that the will does not make the annuities payable exclusively out of the net income of the estate, and that the general assets may be resorted to for that purpose; that the sums paid under the prior order above recited were payments on account and should be credited upon the sums due under the will from the date of the death of the decedent to the time of making the order; that the balance unpaid should be paid out of the funds raised by sales, so as to make complete payment of the entire annuity up to that time; that thereafter the entire annuity should be paid out of the general assets of the estate whenever it was necessary to resort to them for that purpose; and that all this was to be done and could be done by the executors, prior to distribution, and as part of their duties as executors in the administration of the estate.

The respondent relies on subdivisions 2 and 3 of section 1357 of the Civil Code, which are as follows:

> "2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;
>
> "3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy."

The provisions regarding payment of general legacies out of general assets are found in section 1360. It describes the order in which the general assets may be resorted to, and makes all the property of the testator available for that purpose.

The appellants insist that this theory is contrary to law, and that it involves an erroneous construction of the will. Their position is that the annuities are payable only out of the trust property, and not out of the general assets, and that these interim annuities are not to be paid except out of the net income and the interest derived from the proceeds of sales accruing during the time when the $240,000 trust fund is being accumulated.

The third and fourth articles of the will gave to Mrs. Lord and Mrs. Schroeder, respectively, for life, the use of certain parts of the property of the estate. This life interest is not included in the property given in trust. The fifth and seventh articles make an absolute disposition of certain personal property, and this also is excluded from the property given in trust.

[1] It necessarily follows, therefore, that the annuities are not made a charge on the general assets of the estate, nor upon the net income of the entire estate, since these parcels of property are entirely excluded from the provisions of the trust under which the annuities are payable. It is a necessary conclusion, therefore, that the phrase "net income of my estate from whatever source accruing," in the second paragraph of the fifth article of the will, refers only to the net income of the property set apart for the trust purposes, and not to the income of the entire estate. At all events, this trust property is the only property that can be looked to for the payment of the annuities.

[2] The performance of the trust created by the fifth article of the will is a duty devolving upon the persons named as executors and trustees in their capacity as trustees. It forms no part of their duty in their capacity as executors in the administration of the estate proper. Furthermore, the trust property was given to the trustees and vested in them immediately upon the death of the testatrix, and the court, sitting in probate, cannot direct them in their capacity as trustees, with respect to their duties in carrying out the trust. The order appealed from does not even purport to direct them as trustees, but is addressed to them solely as executors. This is fully settled by the authorities. In Estate of Mackay, 107 Cal. 303, 40 Pac. 558, the testator in his will declared that he bequeathed "to my said executors in trust" $15,000, and directed them to invest the same and pay the income to Hattie Schenck during her life. The court below made an order directing the executors, as such, to invest the money and pay the income to the beneficiary during administration of the estate. This court declared that the interest thus given to her was not a legacy payable directly to her, and that she was under no circumstances entitled to receive any part of the principal, but that the principal was to be received and held by the trustees; that they were the only parties to whom the probate court could order it paid, and that such order would constitute a distribution of the estate, partial or final; that the only right of the beneficiary during administration was the right to ask for a distribution of the fund to the trustees; that all that "she is entitled to is payment by the trustees of the income of the specific fund after distribution of such fund to them"; and that the court had no power to do more than to distribute the principal to the trustees, and was not authorized to order payment to the respondent of any sum from the funds of the estate. The latter portion of the opinion declaring that the provision for Hattie Schenck was a legacy for maintenance under section 1369 of the Civil Code, and that it bore interest from the death of the testator, was inserted in the way of a direction to the trustees as to the control of the fund after distribution thereof to them. The authorities elsewhere are to the same effect. "The appointment to a trust under the will, not essential to the office of an executor, does not constitute the trustee an executor according to the tenor, for the offices of an executor and of a trustee are distinct, and may be vested in different persons, and when they are vested in the same person, the functions of each are nevertheless to be performed by him in the respective capacity, the probate court having jurisdiction over him in the one, but not in the other, capacity; and an administrator de bonis non cum testamento annexo, appointed after the death of an executor who was also appointed trustee in the will, does not virtute officii succeed to the trust. But where the testator uses the word 'trustee,' and imposes duties involving the functions of an executor, this will be held a good appointment as executor." 1 Woerner on Administration, p. 304.

The authorities cited by the author fully support the text. Wheatly v. Badger, 7 Pa. 459; Creamer v. Holbrook, 99 Ala. 52, 11 South. 830; Smith v. Smith, 15 Wash. 239, 46 Pac. 249. From these authorities it is clear that the court had no authority to make orders directing the executors, as such, to pay the annuities during the administration of the estate.

[3] We are also of the opinion that even if the order were otherwise proper the court erred in its conclusion that the general property of the trust fund could be resorted to to supply any deficiency of the net income to pay these annuities. Taking the trust provision as a whole it does not fairly bear this construction. It is the intention of the testatrix that must be ascertained, and when that is found it controls the disposition of the property. The express language is that the annuities are to be paid "out of the net income," and there is no word or phrase indicating an intention to make their payment a charge upon the general trust property itself, or a purpose that they should be paid at all events, regardless of the sufficiency of the net income. "The leading principle of the cases is that, when a testator bequeaths a life annuity in such a manner as to show a separate and independent intention that the money shall be paid to the annuitant at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund." 3 Cor. Jur. 216, § 34, note to 50 (a). There is no such intention discernible from the terms of this will. The immediately succeeding clause of the trust article shows a positive intent that the annuitants should not receive more than the net income would supply. It declares that if in any month the income was insufficient to pay all the annuities in full, that then Mrs. Lord and Mrs. Schroeder should have preference over the others; that the others should take the balance, if any, pro rata, and that thereafter whenever there should be more than sufficient income therefor, the arrears upon the annuities should be paid "but without interest." Except for the quoted phrase the annuities would bear interest from the date of the death of the testatrix. Civ. Code, § 1370. Here, therefore, is a direct statement that if the income is insufficient to pay the annuities in full, not even interest thereon shall be paid from any subsequently accruing income, much less from the principal. It is a clear indication of the intent by the testatrix that the income alone should be resorted to for such payment. This is further indicated by the next provision to the effect that when money is derived from sales before the entire sum of $240,000 is accumulated, such money is to be invested as fast as obtained and the income therefrom applied to pay the said annuities as far as it would go. It is obvious from this provision that the testatrix did not contemplate or intend that the proceeds of the sales so made should go to pay the annuities and that her understanding was that only the interest of such proceeds should be so applied. The provision shows that she could not have contemplated that the entire annuities should have been paid in the meantime by the application of the proceeds of sales thereto. The final clause in the trust article declares the desire and expectation of the testatrix; that after realizing the $240,000 intended as a provision for the annuitants, and the additional sum of $280,600 to be paid in specific legacies out of the surplus, there will still remain a substantial sum to be divided between her two sisters and her nephew, the ultimate beneficiaries. Manifestly she did not suppose in framing this article that the corpus of the trust property might be largely depleted by sales thereof to pay the annuities pending administration or pending the conversion of the entire assets into money.

The general conclusion from the whole case is that the court below erred in making the order appealed from, and that it has no power to direct the executors in their executorial capacity to pay the money derived from the trust property to the beneficiaries of the trust.

This conclusion makes it unnecessary to determine whether or not the order made in pursuance of the stipulation of the respective annuitants is an adjudication upon the merits of their claims to full payment, either out of the net income or out of the corpus of the trust property. That question must remain until the administration of the trust properly comes before some court for determination.

The order appealed from is reversed.

We concur: SLOSS, J.; LAWLOR, J.

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179 Cal. 816

In re PHELPS' ESTATE.

McLEAN et al. v. CHIPMAN et al.

(S. F. 8897.)

(Supreme Court of California. Feb. 10, 1919. Rehearing Denied March 10, 1919.)

Department 1.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

In the matter of the petition of Edward T. McLean and others for an order directing W. F. Chipman and the Union Trust Company, as executors of the will of Josephine A. Phelps, deceased, to pay to them certain sums of money alleged to be due them under said will. From an order directing the executors to make said payments, the executors appeal. Reversed.

W. C. Sharpstein, of San Francisco, for appellants.

Henry L. Corson, of San Francisco, for respondents.

SHAW, J. This is an appeal by Chipman and the Union Trust Company, as executors of the will of Josephine A. Phelps, deceased, from an order made in said estate in the course of the administration, upon the petition of the respondents, Edward T., Mattie, and Alfred A. McLean, and directing the executors to pay to them certain sums of money found to be due them under the will of the said decedent, and to continue paying them thereafter monthly, one-third of the sums to be given to them monthly according to the provisions of the said will.

The case is practically the same in all respects, so far as the legal questions are concerned, as case No. S. F. 8821, 178 Pac. 846, in which an opinion has been written. The respondents here are the same persons named in that opinion, and their rights depend upon the same clauses in the will. The order was made upon the same theory as in the other case, and for the reasons there stated we hold it to be erroneous.

The order appealed from is reversed.

We concur: SLOSS, J.; LAWLOR, J.

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179 Cal. 722

DOE et al. v. CRAMER et al. (S. F. 8105.)

(Supreme Court of California. Feb. 13, 1919. Rehearing Denied March 13, 1919.)

1. ATTACHMENT ⚷278 — TIME FOR REDELIVERY OF PROPERTY—DISCHARGE ON SECURITY.

Under Code Civ. Proc. § 554, relating to discharge of attachment on filing of undertaking, a constable was not required to deliver the property until five days had elapsed from filing of undertaking, sureties not having justified.

2. ATTACHMENT ⚷278—REDELIVERY OF PROPERTY—UNDERTAKING—WAIVER OF TIME.

A constable, under Code Civ. Proc. § 554, relating to discharge of attachment on filing of undertaking, could not waive time provided by law for requirement for justification of sureties, and hence a demand for his fees as a condition of releasing property could not operate as a waiver of objection that redelivery of property to defendant was not yet due.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles P. Doe and Albion Doe, etc., against Eugene Cramer and the American Surety Company. Judgment for defendants, and plaintiffs appeal. Affirmed.

H. W. Glensor and Aitken, Glensor & Clewe, all of San Francisco, for appellants.

L. C. Pistolesi, Charles A. Shurtleff, and J. G. De Forest, all of San Francisco, for respondents.

SHAW, J. This is an action by the plaintiffs against the defendants to recover damages for the alleged conversion by the defendant Cramer of property belonging to the plaintiffs. Judgment was given below for the defendants, and the plaintiffs appeal.

The defendant Cramer, as constable of Sausalito township, in Marin county, received a writ of attachment issued out of the justices' court of the city and county of San Francisco, in an action by one Catoni against the two plaintiffs, by virtue whereof on June 19, 1915, he levied upon the property in controversy. Thereafter on July 1, 1915, after due notice, the plaintiffs herein filed in the justices' court an undertaking in an amount fixed by the court as provided in sections 554 and 555 of the Code of Civil Procedure, and thereupon applied for an order to discharge the attachment and to release from the operation of such attachment all the property so attached. On the same day the justice of the peace made an order that the writ of attachment theretofore issued in the case be released. On the next day, July 2d, the plaintiffs herein demanded of Cramer the delivery of the property held by him under said attachment. Cramer refused to deliver the same, and demanded $58.25, which he claimed as his fees for the expenses incurred by him as such officer in levying the writ and keeping the property. Thereafter on July 14, 1915, the said Catoni, the attachment plaintiff, required the sureties in said undertaking to justify, and in pursuance thereof said sureties did justify before said justice on July 19, 1915. The present action was begun on July 8, 1915. This, it will be observed, was after the demand for release of the property and before the notice requiring the sureties to justify had been given and before the justification was made thereunder.

[1] We are of the opinion that the finding of the court that the defendant Cramer did not convert the property to his own use is sustained by the evidence. Section 554 of the Code of Civil Procedure provides that when the defendant has appeared in an action in which an attachment has been issued and levied against him, he may, upon notice, apply to the court for an order to discharge the attachment, and that, upon the execution of the undertaking required in section 555, "an order may be made, releasing from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sales thereof, must be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff. Such justification must take

place within five days after notice of the filing of such undertaking." Section 555, referring to the same undertaking, declares that "the sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same is required." The undertaking was filed on July 1, 1915. The attachment plaintiff could not have notice of its filing until then, and he had at least five days from that day within which to require justification. Until he suffered that time to pass without requiring justification, the constable was bound to keep the property for the benefit of the attachment plaintiff. The demand made on July 2d was therefore premature, the constable was not then required to deliver the property, and his refusal to do so was not evidence sufficient to justify a finding that he had converted the property to his own use. The finding of the court that the defendant did not convert the property to his own use is sustained by the evidence, and is sufficient to support the judgment.

[2] Cramer, as constable, was the agent of the plaintiff to hold the property until the law authorized him to deliver it to the defendant upon the proceedings for a release. His authority was limited to that given by the statute and he had no authority by law, or from the plaintiff in the attachment suit, to waive the time provided by law for the requirement for justification. Consequently his demand for his fees as a condition of releasing the property, and his offer to release the same upon such payment, could not operate as a waiver of the objection that delivery was not yet due. It is unnecessary to consider the other question argued in the briefs.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

(179 Cal. 727)

UPTON v. TRAVELERS' INS. CO.

(L. A. 4763.)

(Supreme Court of California. Feb. 13, 1919. Rehearing Denied Mar. 13, 1919.)

1. TIME 🔑10(10)—ACCIDENT INSURANCE — EXPIRATION OF POLICY—"ACT."

Where an accident insurance policy expired on October 12th, a legal holiday, Civ. Code, § 10, declaring the time in which an act provided by law to be done is computed by excluding the first day and including the last, unless a holiday, when it is excluded, and section 11, providing that when the particular day on which an act is to be done is a holiday it may be performed upon the next day, do not render insurer liable for an accident happening October 13th; the accident not being an "act" within these sections.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act.]

2. INSURANCE 🔑177—ACCIDENT INSURANCE —OPTION TO CONTINUE TERMS OF POLICY.

The existence of an unexercised option to extend an accident policy beyond the period specified therein does not operate to extend the period of insurance so as to cover an accident which happens between the expiration of the policy and the termination of the option; and Civ. Code, § 11, only extends the time for exercising option in case of termination upon a holiday, and not the time of insurance against accident.

3. INSURANCE 🔑145(3)—ACCIDENT INSURANCE—WAIVER OF COMPLIANCE WITH RENEWAL CLAUSE.

While the receipt of a premium by the insurer from its agent, after the expiration of the time provided in the policy for renewing its terms, with knowledge of the fact that it had not been paid to the agent until after such expiration, would for the purpose of that renewal operate as a waiver of the condition of advance payment, it would not abrogate such condition as to future renewals.

4. INSURANCE 🔑145(3)—ACCIDENT INSURANCE—RENEWAL OF POLICY—PROMISE OF AGENT TO CALL AND COLLECT PREMIUM.

Where an insurer provided that "no agent has power to waive any condition of this policy," and the policy contained an option for renewal by payment of premium in advance, the advance payment condition was not waived by insurer's local agent's failure to call at insured's residence for the payment in time as promised.

5. INSURANCE 🔑376(2) — ACCIDENT INSURANCE—RENEWAL OF POLICY—ESTOPPEL.

An accident insurance company is not estopped to claim that a policy had lapsed, where insurer's failure to renew by advance payment of premium as provided in the policy was due to reliance upon insurer's local agent's promise to call for the premium, made without insurer's knowledge, where the policy expressly provided no agent could waive its terms.

Department 1.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Henrietta D. Upton against the Travelers' Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

George P. Cary and Frank C. Dunham, both of Pasadena, for appellant.

O'Melveny, Stevens & Milliken, of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from the judgment.

The action was upon a contract to insure the plaintiff against accidents. The policy was issued on April 12, 1912, and bore that date. It contained the provision that—

> "This policy is issued for a term of six months, beginning at twelve o'clock noon, standard time, on the twelfth day of April, 1912, and ending at the same hour, but it may be renewed, subject to all its provisions, from term to term thereafter by payment of the premium in advance."

It was renewed from time to time, the last renewal taking place on April 12, 1914.

[1] The accident causing the injury for which plaintiff seeks recovery in this action occurred on October 13, 1914. This was one day after the policy had expired, and consequently the defendant is not liable. The fact that October 12th was a legal holiday does not aid the plaintiff. The policy expired by its terms on the 12th day of October at noon. The accident does not come within the provisions of sections 10 or 11 of the Civil Code or the corresponding provisions of the other Codes. Section 10 declares that the time in which any act is provided by law to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded. The accident, of course, was not an act provided to be done by any law, or by the policy. Therefore this section has no application. Section 11 provides that whenever any act of a secular nature is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day with the same effect as if it had been performed upon the day appointed. The policy did not appoint the accident as an act to be performed at any time, or at all; consequently that act does not fall within this section.

[2] The fact that the policy contained an option to the plaintiff to renew the policy, and that this option continued in force by the terms of the policy until October 12, 1914, does not extend the policy so as to cover an accident which happened on the following day. Section 11 does not purport to do more than to extend the time for exercising the option where it expires on a holiday. As a matter of fact, there was never any exercise of the option nor any attempt to exercise it. Consequently, such extension of the time for exercising it could have no effect whatever after the extension had expired, even if the accident did happen before that time. An option is a mere offer, and, unless it is accepted within the time limited, it is of no force for any purpose. The mere existence of such unexercised option, extending beyond the period of insurance specified in the policy, cannot operate to extend the period of insurance so as to cover an accident which happens between the expiration of the insurance and the termination of the option. The only thing extended by the statute is the time for exercising the option, not the time of insurance against the happening of an accident.

[3, 4] It is also claimed that by the conduct of its agent, V. W. Good, and by the acceptance of previous renewal premiums after the time had expired, the defendant company had waived the requirement that the premium for renewal on October 12, 1914, must be paid before the prior renewal time expired. The policy was issued to Samuel W. Upton and was made payable to his wife, the plaintiff. They resided in Pasadena. Mr. Good had his office in Pasadena. It was the custom of the company to send renewal notices for this policy to Good in Pasadena some time before the expiration of the current term, whereupon Good would send a notice thereof to Mr. Upton. It had been the habit of Good to call at the residence of Upton to collect the renewal premium, and he had promised Upton that he would continue to do so. Sometimes it would be paid only in part and he would deliver the renewal receipt of the company and personally trust Mr. Upton for the balance until a time beyond the current renewal term. He had done this at the renewal in April, 1914. This, it is insisted, constituted a waiver by the company of the condition for payment in advance and operated to continue the policy in force, notwithstanding its positive terms to the contrary.

[5] It may be conceded that the receipt of the premium by the company from its agent, after the time had expired, with knowledge of the fact that it had not been paid to the agent until after such expiration, would operate as a waiver, for the purpose of that renewal, of the condition that payment must be made in advance. It is difficult to perceive any sound reason for holding that this would abrogate the condition as to future renewals. Here there was no proof that Good had any authority, except to collect the renewal premiums and deliver the renewal receipts prepared, signed, and sent to him by the proper officers of the company. No attempt was made to prove that the general or managing agents of the company were informed or knew that the premiums in question were not paid in advance or that Good had promised to call at Upton's residence for the payment. The policy declared that "no agent has power to waive any condition of this policy." Under these circumstances, no estoppel was created against the company to prevent it from refusing acceptance of a renewal premium offered after the time expired, and there was no waiver of the condition as to payment in advance. Upton had no right to rely on Good's promise to call at his house to demand payment. It devolved on Upton to exercise his option if he desired to renew the policy. The company owed him no duty to request such exercise.

The court below properly directed the jury to return a verdict for the defendant.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(179 Cal. 725)

MAHANA et al. v. VAN ALSTYNE.

(L. A. 4796.)

(Supreme Court of California. Feb. 13, 1919.)

1. BILLS AND NOTES 🔑139(3)—RENEWAL—CONSIDERATION.

Where a note given for a valuable consideration is surrendered and a new note given with an extension of time, such extension and surrender constitute a valuable consideration for the new note.

2. HUSBAND AND WIFE 🔑156—CONSIDERATION—SURRENDER OF PREVIOUS NOTE AND TRUST DEED.

The surrender of a note and trust deed given by a husband and wife for the husband's debt, which were valid obligations, constitutes a sufficient consideration for a new note, signed by the wife alone.

Department 1.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by George T. Mahana and another against Katharine Van Alstyne. From a judgment for defendant, plaintiffs appeal. Reversed.

Duke Stone, of Los Angeles, for appellants.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

SHAW, J. The plaintiffs sued the defendant to recover judgment upon a promissory note executed by defendant to plaintiffs on April 17, 1915, for $2,500, payable July 1, 1915. The defendant in answer admitted the execution and nonpayment of the note, but alleged, in effect, that the same was executed without any valuable consideration.

The facts stated in the findings and shown by the uncontradicted evidence are as follows: Katharine Van Alstyne and Guy Van Alstyne were husband and wife. On July 31, 1914, said Guy Van Alstyne and the defendant executed a note to the plaintiffs for $5,000 and a deed of trust upon certain land, which was the separate property of the defendant, as security therefor. Said note was given for the personal debt of Guy Van Alstyne to the plaintiffs. Thereafter it was discovered that the note was not for the correct amount, and an accounting was had between Guy Van Alstyne and the plaintiffs, whereby it was ascertained that his debt to them was only $4,174. Thereupon, on November 5, 1914, the first note and deed of trust were canceled and Guy Van Alstyne and the defendant executed to plaintiff a new note for $4,174, and a new deed of trust on the same real property to secure said new note. This note was made payable two years after said date. Thereafter, on April 17, 1915, the plaintiffs, at the request of defendant, canceled and returned to the defendant said note and deed of trust of November 5, 1914, in consideration whereof the defendant executed to plaintiffs the note for $2,500 herein sued on. There was no consideration for this note other than that disclosed by the foregoing facts. The court below decided that said note was only collateral security for the previous debt of the defendant's husband, and was not supported by any consideration. Judgment was given for the defendant, and the plaintiffs appeal.

The facts stated do not support the conclusion that the note was without consideration. The conclusions of law and the judgment were erroneous. There was a valuable consideration for the original note for $5,000 to the extent of the debt due from Van Alstyne to the plaintiffs at the time it was executed. The new note for $4,174, executed on November 5, 1914, and made payable two years after said date, was given in consideration of the cancellation of the old note and deed of trust. It was therefore supported by a valuable consideration. The plaintiffs surrendered the old note for $5,000 and accepted the new note of the parties, maturing two years from that date.

[1, 2] This extension of time and this surrender of the former note and deed constituted a valuable consideration. Whelan v. Swain, 132 Cal. 389, 64 Pac. 560. It was both a benefit to the defendants and a detriment to the plaintiffs. As to the $2,500 note it appears that the defendant desired to sell her property, but could not do so with the outstanding deed of trust thereon; that she requested the plaintiffs to assist her in the matter, and they thereupon agreed to take her unsecured note for $2,500 in consideration of their release of the previous note and of the deed of trust given to secure the same. The fact that the original note was given for the debt of Guy Van Alstyne, and that at no time was there any new consideration running to him other than the several renewals and cancellations, does not aid the defendant. The giving up of the deed of trust and the old note, which were at that time valid obligations, was a sufficient consideration for the note of $2,500 sued on.

The judgment should have been for the plaintiffs.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

179 Cal. 712

PACIFIC WOOD & COAL CO. v. OSWALD et al. (L. A. 4642.)

(Supreme Court of California. Feb. 11, 1919.)

1. HIGHWAYS ⚿113(5)—PUBLIC CONTRACTS—BONDS—SUPPLIES.

Items furnished a subcontractor, consisting of hay and feed for horses and mules used in doing roadwork under Road District Improvement Act of 1907, are covered by a bond requiring a public contractor under such statute to pay for materials furnished for or in doing the work, irrespective of the presence or absence of the word "supplies" in the bond, or of St. 1897, p. 201, amended by St. 1911, p. 1422.

2. HIGHWAYS ⚿113(5) — IMPROVEMENTS — STATUTES—VALIDITY.

Road District Improvement Act of 1907, requiring a contractor under such statute to give a bond, is not unconstitutional.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Pacific Wood & Coal Company against George H. Oswald and others. From a judgment for defendants, plaintiff appeals. Reversed.

E. H. Lamme and Eugene Daney, both of San Diego, for appellant.

Crouch & Chambers, of San Diego, for respondents.

SLOSS, J. This action was brought upon a bond accompanying a contract for road work to be done under the Road District Improvement Act of 1907 (Stats. 1907, p. 806). A demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment was entered in favor of the defendants. From this judgment the plaintiff appeals.

The act to which we have referred is one authorizing the improvement of roads and streets outside of incorporated cities or towns, and the assessment of the cost upon the lands within a district to be fixed by the board of supervisors of the county. The procedure is, in its main features, similar to that provided by the Vrooman Act (St. 1885, p. 147). By section 9 it is provided that before entering upon the contract the contractor shall execute and file a bond, running to the county, in an amount not less than one-half of the contract price "conditioned for the faithful execution of the contract by the party contracting to do the work, and the payment by him for all labor and materials furnished for or in the doing of the work. * * * Such bond shall inure as well to the benefit of any and all persons furnishing labor or materials for the work as to the county."

In this connection mention should also be made of "An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal or other public work" (Stats. 1897, p. 201, amended Stats. 1911, p. 1422). The statute of 1897 is one requiring every person to whom is awarded a contract for work for the state, or by any county, city and county, city, town, or district, to file a bond in not less than half the contract price, providing that, if the contractor "fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same, in an amount not exceeding the sum specified in the bond." It will be noted that, while the act of 1897 undertakes to secure payment for labor, materials, or supplies furnished for the performance of the work, the Road District Improvement Act of 1907 exacts a bond covering labor and materials merely. The bond here sued upon contains all of the provisions required by the Road District Improvement Act. It contains, in addition, a provision that if the contractor "fails to pay for any materials or supplies furnished for the said work," the sureties on the bond will pay the same.

The claim which the plaintiff here seeks to enforce is one for hay, grain, and other supplies furnished to a subcontractor for feeding and maintaining horses and mules used in the performance of the work. It is contended by the respondents, and virtually conceded by the appellant, that the articles thus furnished are not embraced within the meaning of the term "materials." The appellant seeks, however, to bring his claim within the scope of the broader term "supplies," found in the statute of 1897. The briefs are devoted, in large part, to a discussion of the question whether the bond is to be deemed governed by the provisions of this act, or by those of the road district improvement act of 1907. The respondents claim that the later statute alone is applicable, and that the bond must be read without reference to the use therein of the word "supplies," which, in their view, found its way into the bond without statutory authority. We may, for the purposes of the present case, accept this position as correct. It still remains to be decided whether the plaintiff's demand is covered by a bond given under the terms of the Road District Improvement Act, and binding the sureties to pay for all "materials furnished for or in the doing of the work."

[1] In acquiescing in the respondents' assumption that this question must be answered in the negative, the appellant concedes too much. Since the filing of the briefs here-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

in, this court has had occasion to consider the effect of statutes like the one here involved, and has, in at least two cases, declared that such statutes must be given a broader construction than had, perhaps, been thought to be proper theretofore. In Sherman v. American Surety Co., 173 Pac. 161, it was held by department 2 of this court that the rental of tools used in the performance of work, and the cost of transporting them to the place of use, could be recovered in an action on a bond given under the statute of 1897. It is true that this statute is the one which includes the word "supplies," but the decision is not placed upon this ground. The court points out that statutes requiring bonds for the protection of persons dealing with contractors on public work are different in their purpose and effect from acts for the establishment and enforcement of mechanics' liens, and that the reasons for giving a limited construction to the latter are not applicable to the former. See French v. Powell, 135 Cal. 636, 68 Pac. 92; Ass'd Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 Pac. 702.

In the Sherman Case the court reviews at some length a series of decisions in the Supreme Court of the United States, and in inferior federal courts, dealing with the construction of section 6923 of the United States Compiled Statutes. This section requires contractors doing public work to execute a bond conditioned that they will "promptly make payments to all persons supplying them with labor and materials in the prosecution of the work provided in such contract." The provision is substantially the same as that found in section 9 of our Road District Improvement Act. The federal decisions, cited in the Sherman Case, unite in giving to the statute and the bond a liberal interpretation, and hold, accordingly, that the obligation of the sureties will cover such items as cartage and towage of materials, rental of cars, and other equipment used by the contractor, freight charges in transporting materials, and even the cost of provisions used by a contractor in feeding his employés, where the location of the work rendered the furnishing of such board necessary. A similar result was reached by department 1 in Bricker v. Rollins, 173 Pac. 592. The opinion in that case did, it is true, refer to the inclusion in the statute and the bond of the "more comprehensive word 'supplies.'" It relied, however, on the authority of the Sherman Case and the cases there cited. In their reasoning, as well as in their citation of authority, the Sherman and the Bricker Cases must therefore be regarded as authority for the conclusion that items like the one here claimed are recoverable under a bond requiring payment for "materials furnished for or in the doing of the work," irrespective of the presence or absence of the word "supplies."

[2] The contention of respondents that the provision of the Road District Improvement Act requiring the contractor to give a bond is unconstitutional is sufficiently answered by a reference to Barber Asphalt Paving Co. v. Bancroft, 167 Cal. 185, 191, 138 Pac. 742.

The views expressed above render it unnecessary to consider other points argued. The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

179 Cal. 731

THOMAS et al. v. HACKER et al.

(L. A. 4733.)

(Supreme Court of California. Feb. 13, 1919.)

1. DEEDS 🔑190 — FRAUD — FAILURE OF PROOF.

In an action by grantor to set aside a transfer of land on ground of false representations, failure of plaintiff to establish that defendants had made every false statement charged did not affect right to relief on ground of material representations which were made.

2. SALES 🔑38(1)—FRAUD—SETTING ASIDE SALE.

Plaintiffs were entitled to rescind purchase of business, where they showed that defendants made false representations as to income from the business, that defendants knew such representations to be false, and that plaintiffs believed them and purchased in reliance upon them.

3. APPEAL AND ERROR 🔑994(3)—MATTERS REVIEWABLE—WEIGHT OF THE EVIDENCE.

The credibility of witnesses is exclusively for the trial court.

4. APPEAL AND ERROR 🔑1078(4)—MATTERS REVIEWABLE.

Assignments of error to rulings on evidence will not be considered on appeal, where unsupported by argument or citation of authority.

Department 1.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Alice E. Thomas and W. H. Thomas, her husband, against Louise R. Hacker and C. H. Hacker, her husband. Judgment for plaintiffs, and defendants appeal. Affirmed.

Sidney J. Parsons, of Los Angeles, for appellants.

F. A. Knight, of Long Beach, for respondents.

SLOSS, J. The plaintiffs are husband and wife, as are the defendants. The defendant

C. H. Hacker had been engaged in the business of placing registers in hotels. These registers were furnished to hotels without charge, the profit lying in the sale of advertising space. Hacker had the exclusive right to place the registers of the "National Hotel Register Company" in several states, including Oregon, Washington, Idaho, and Montana. In July, 1914, the parties entered into a written agreement for the sale by the Hackers to the plaintiffs of such right in the four states last named. The purchase price was fixed at $7,500, payable by transfer of five parcels of land owned by Mrs. Thomas, and valued at an aggregate of $6,665, the balance of $835 to be evidenced by a promissory note. The agreement, which bore date July 24, 1914, was signed at Long Beach, in Los Angeles county. Coincidentally with its execution, the plaintiffs delivered to the defendants deeds conveying the real estate described in the contract to the defendant Louise R. Hacker. They also, at the same time, gave the defendants their promissory note for $835, and a bill of sale of certain furniture, found by the court to be worth $400. Shortly thereafter the plaintiffs left California, and undertook to carry on the business transferred to them. They continued their efforts with small success for several months, and finally, in February, 1915, notified the defendants that they rescinded their contract on the ground of fraudulent representations alleged to have been made to them, tendering back to the defendants everything of value which they had received, and demanding a return of the property, real and personal, which they had transferred to the defendants, as well as a cancellation of the promissory note. Shortly thereafter, this action was commenced to enforce the terms of the demand, which had been refused. Judgment went in favor of the plaintiffs, and the defendants appeal.

[1] The complaint sets out that the defendants had, in order to induce the plaintiffs to enter into the contract, made a number of false and fraudulent representations to them, that the plaintiffs had believed these representations, and had entered into the contract in reliance upon them. It also contained a statement of all other facts necessary to make a case entitling them to the relief of rescission upon the ground of fraud. The law on the subject is too well settled to require statement or the citation of authority. Indeed, the parties to this appeal do not differ in their contentions in this regard. The court found in favor of a number, but not all, of the averments of false representation. The failure of plaintiffs to establish that the defendants had made every false statement charged does not, of course, affect their right to relief on the ground of the material representations which were made. Davis v. Butler, 154 Cal. 623, 98 Pac. 1047.

[2, 3] The only substantial point made by the appellants is that the evidence does not sustain the findings in favor of the plaintiffs' accusations. In view of the familiar limitations on the right of an appellate court to review findings made on conflicting evidence, this contention deserves little notice. The misrepresentations charged related, in a number of particulars, to matters of fact, rather than of opinion, and to matters which were clearly material to the subject of the proposed contract. For example, it was charged that the defendants had told the plaintiffs that the business in the four northwestern states had for some years netted them over $5,000 per annum in profits; that the defendants had received and refused two separate offers to sell the privilege for which the plaintiffs were negotiating, for $10,000; that the mere replacing of the registers in the hotels in which they already were in use would bring a profit of over $5,000 a year. The testimony of the plaintiffs was ample to support the finding that all of these representations were made, that each was false, that the defendants knew it to be false, that the plaintiffs believed it, and purchased in reliance upon it. Any contention to the contrary involves an argument on the respective credibility as witnesses of the plaintiffs and the defendants, an argument that must be addressed to the trial court, and finally disposed of by that court.

[4] Certain rulings on the admission and rejection of evidence are claimed to have been erroneous. But these assignments are unsupported by argument or citation of authority the appellants contenting themselves with stating, in effect, that each of the rulings was wrong. Questions so presented can receive no consideration here. We have, however, examined all of the rulings complained of, and find that no prejudicial error was committed in any instance.

On the whole case the appeal appears to be without merit.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

179 Cal. 734

TITLE INS. & TRUST CO. v. CALIFORNIA DEVELOPMENT CO. et al. (DUNCAN, Intervener). (L. A. 4647.)

(Supreme Court of California. Feb. 13, 1919. Rehearing Denied March 13, 1919.)

APPEAL AND ERROR 🔑1194(2)—EFFECT OF DECISION ON APPEAL—ATTORNEY'S FEES.

Judgment in foreclosure of trust deed, affirmed on appeal, so far as allowing trustee $20,000 for counsel's services performed, and directing payment of $10,000 into court, out of which may be paid any expenses of trustee, including subsequent services by counsel, *held* not to prevent the lower court, after remand, allowing more than $10,000 for services of counsel subsequent to original judgment.

Department 2.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Suit by the Title Insurance & Trust Company against the California Development Company, Southern Pacific Company, and others, wherein Boaz Duncan intervened. From an order for payment of fees for attorneys for plaintiff, defendant Southern Pacific Company appeals. Affirmed.

See, also, 171 Cal. 173, 152 Pac. 542.

E. S. Ives, Irving M. Walker, and Loeb, Walker & Loeb, all of Los Angeles, for appellant.

O'Melveny, Stevens & Millikin and Walter K. Tuller, all of Los Angeles, for respondents.

MELVIN, J. This is an appeal from a certain order in the above-entitled case for the payment of $22,000 additional fees for the attorneys of plaintiff. The order recites that plaintiff has become indebted to attorneys for their services necessarily rendered in the action in the sum of $50,000, which is declared to be a reasonable sum, of which $20,000 is the reasonable value of services performed prior to the judgment on January 4, 1913, and $30,000 the reasonable value of the work performed by counsel since that time; that there has been paid plaintiff on account thereof only $28,000; and that there is due the sum of $22,000. This the receiver is ordered to pay forthwith.

The property covered by the trust deed, foreclosed by the original judgment of 1913, had been in the hands of a receiver, and was to be retained by him until sold by him as a commissioner. The original judgment provided that the receiver should forthwith pay to plaintiff $20,000 as attorneys' fees, said payment to include all services rendered by counsel "in conducting said sale and securing confirmation thereof." The decree also contained a provision "that the said receiver shall forthwith pay out of the funds in his hands to the clerk of this court the sum of ten thousand dollars ($10,000.00), to be held by said clerk as a fund out of which any expenses (not included in the payments above directed) properly incurred by the plaintiff in and to this litigation, including attorneys' fees for any service hereafter rendered by its counsel, may be paid." No payment was to be made from said fund except upon order of court, and in the event of its not being exhausted the residue was to be paid pursuant to order of court "to the party or parties entitled thereto." On appeal the original judgment was affirmed as to certain matters and ordered modified as to others, the superior court being directed "to frame the decree in such form as will preserve the relative rights of all of the parties, as declared by those portions of the decree which are affirmed, and by our opinion and judgment." Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173–223, 152 Pac. 542, 563.

It is contended by appellant that by this judgment the entire amount which the receiver was empowered to pay was $30,000; that this part of the original judgment was affirmed on appeal; and that any attempted further allowance was beyond the authority of the superior court and was as to such excess void.

In the judgment after remittitur, in specifying the order of payment, there was a direction (which preceded any authorization with reference to settlement of appellant's claims) that plaintiff's judgment be paid in full by the receiver, and also a provision that said receiver "shall pay to plaintiff such further sum as the court may allow on account of its expenses, including compensation to its attorneys, since the rendition of said original decree."

It is asserted by appellant that a new liability was created by the judgment after remittitur and by the order to pay fees greater than $30,000, and that such liability in favor of plaintiff was improperly given priority over the claims of appellant, who already had vested rights in the moneys out of which the new liability was directed to be paid. It is also asserted that the original judgment, as modified by this court, was a final adjudication that $30,000 was the maximum sum which might be expended for the compensation of plaintiff's attorneys.

We are unable to uphold these contentions. We must remember that the very terms of the trust itself, expressed in the deed, gave the trustee (plaintiff here) the right to employ counsel, and that by the deed the proper charges and expenses of the trustee were to be paid by the California Development Company out of the trust estate on which such expenses were made charges. No matter what sequence of payment was directed by the judgment the proper charges against the trust estate would naturally follow, and did follow, the order for the payment of plaintiff's judgment. Therefore the mere sequence of payment ordered in the judgment of claims subsequent and subordinate to those of plaintiff would give appellant no vested right in the funds of the receiver as against these proper charges.

The judgment creating a fund of $10,000, out of which any expenses for services of counsel not included in payments previously directed "may be paid," did not fix the sum of $10,000 as the maximum for such services. It merely segregated that sum from the moneys in the hands of the receiver as a form of assurance to plaintiff that to the extent of the fund at least it might be secured for the expenses it should incur. But the limitation of $10,000 for this fund did not absolve the trustee from its full duty of asserting and diligently and faithfully protecting the interests of its beneficiaries—a duty imposed not merely by the judgment, but by the trust itself. Mitau v. Roddan, 149 Cal. 1–16, 84 Pac. 145, 6 L. R. A. (N. S.) 275. The judgment contemplated further action by the court in the event that the services should be worth less than $10,000, and it cannot justly be said that in setting aside a fund out of which the attorneys for plaintiff might be paid the court abdicated its duty of awarding reasonable compensation for services worth more than $10,000.

It follows that the order must be, and accordingly it is, affirmed.

We concur: WILBUR, J.; LENNON, J.

179 Cal. 716

MARYLAND CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 8864.)

(Supreme Court of California. Feb. 11, 1919.)

1. Master and Servant 🔑95—Illegal Employment—Entirety of Contract.

Under St. 1915, p. 1205, § 10, inhibiting employment in certain places, during hours schools are in session, of a child of 15, not supplied with age and schooling certificate, his employment for all hours of the day, being an entirety, is illegal even after school hours.

2. Master and Servant 🔑95—Illegal Employment—Attending Night School.

Employment in a factory of a boy of 15, not supplied with age and schooling certificate, inhibited by St. 1915, p. 1205, § 10, is not saved from illegality by the fact that he is attending night school; considerations of public health and safety, as well as of education, entering into the statute.

3. Insurance 🔑389(10)—Waiver—Issuance of Policy—Existing Breach.

Where employer's liability policy covered only employés legally employed, the rule that conditions in the policy which would render it void ab initio under facts known to or readily ascertainable by insurer are waived by its issuance could not be invoked to show insurer's waiver of illegality of employment of a certain employé; the policy not being void ab initio, since it covered some employés legally employed.

4. Insurance 🔑377(4)—Waiver of Condition—Knowledge—Presumption of Innocence.

Relative to waiver of condition that policy insures against injury only to employés "legally employed," insurer, even if knowing an employé is only 15 years old, is not chargeable with knowledge of his illegal employment, which under St. 1915, p. 1208, § 13, would render the employer guilty of crime, but may presume innocence of crime, and that the necessary certificate had been furnished.

5. Insurance 🔑128(1)—Oral Agreement—Presumption as to Terms.

An oral agreement to insure employer against liability under Workmen's Compensation Law will be presumed to contemplate insurance on the usual terms contained in the company's policies.

6. Insurance 🔑389(10), 392(8)—Waiver of Condition—Issuance of Policy—Acceptance of Premium.

Neither issuance after death of employé of employer's liability insurance policy, pursuant to oral agreement before death, nor acceptance and retention of premium, waives condition of policy limiting insurance to employés legally employed; the policy being a continuing liability.

In Bank.

Application by the Maryland Casualty Company for writ of review against the Industrial Accident Commission of California and others; an award for death of an employé having been made against petitioner as insurance carrier of the employers. Award and order annulled.

John Ralph Wilson and Charles B. Morris, both of San Francisco, for petitioner.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco (Christopher M. Bradley, of San Francisco, of counsel), for respondents.

WILBUR, J. An award was made by the Industrial Accident Commission against the petitioner as insurance carrier of respondents Bronstein and Le Blanc, employers of Frank T. Sharon, a minor of the age of 15 years and 2 months, in favor of the mother and sister of the employé, to compensate them for his death resulting from an elevator accident in the course of his employment. The petitioner claims that the loss is not covered by the terms of its policy of insurance for the reason that said employé was not legally employed, because such employment was in violation of the child labor law in force at the time the policy was issued. The respondents claim that the employment was legal, but, if not, that the provision of the policy excluding liability in cases of illegal employment was waived by the petitioner.

Prior to the accident and on the day that the employé was killed an insurance solicitor, who placed insurance in a number of different companies, for a commission, secured from the employers an agreement to take an insurance policy from the petitioner, covering liability under the Workmen's Compensation Law (St. 1917, p. 831). The solicitor observed Frank T. Sharon at work, and called the attention of the respondent employers to the liability incurred by them under the Workmen's Compensation Law for injuries to such employé, and urged them to take out an insurance policy to cover such liability, and received their verbal consent thereto. Subsequently the solicitor or broker reported to an agent of the petitioner authorized to issue policies the employers' application for this insurance, and requested that the same be issued as of noon, November 14, 1916. No inquiries were made by either the agent of the company in accepting the application or by the broker with reference to the age of Frank T. Sharon, and no statement was made in relation thereto by the employer. The broker had no knowledge of the age of the employé other than that derived by observing him, and no knowledge as to whether or not an age and schooling permit had been issued by the proper authorities. After the accident occurred and in pursuance of the previous arrangement, the petitioner, knowing that an accident had occurred resulting in the death of Frank T. Sharon, nevertheless issued its policy of insurance as agreed, containing the usual provision that it should cover "such injuries, including death, sustained by any employé legally employed" by Bronstein and Le Blanc. Petitioner subsequently learned that the decedent at the time of the accident was 15 years and 2 months old, and that he had been employed without the issuance to him of any age and schooling certificate, as required by section 10 of the child labor law (St. 1915, p. 1205). Immediately upon learning these facts petitioner notified the employers that they would not waive that fact, and would stand on the terms of the policy.

[1] It is clear from the unambiguous terms of the child labor law that the employment of Frank T. Sharon, a minor of the age of 15 years, was illegal without the issuance to him, and the presentation to his employer, of an age and schooling certificate (St. 1915, p. 1205, § 10), by the school authorities after proper investigation and proof to ascertain the truth of the facts therein certified. Section 13 of the child labor law provides:

> "Any person, firm, corporation, agent or officer of a firm or corporation that * * * omits to comply with any of the foregoing provisions of this act, or that employs or suffers or permits any minor to be employed in violation thereof, is guilty of a misdemeanor. * * *" St. 1915, p. 1208.

The accident in question occurred at 4:30 in the afternoon. Section 10 provides:

> "No minor of the age of fifteen years shall be employed, permitted or suffered to work in or in connection with any of the places enumerated in section 1 during the hours public schools are in session, unless such minor is provided with an age and schooling certificate as herein provided."

Among other places in which employment is prohibited by the provisions of section 1 so referred to is "any manufacturing establishment or workshop," which would include the employment in which the decedent was engaged at the time of his death. It is therefore argued that, even though the employment during the hours the schools were in session was illegal, without an age and schooling certificate, it was not illegal at the hour in question; for, although the schools of the city were in session November 14th, they had adjourned before 4:30, and that therefore the decedent was not working "during the hours the public schools are in session." But the contract of employment was an entirety, and required the decedent to work six days in a week during the whole day and while school was in session. The contract was therefore one prohibited by the law, and the fact that the decedent might have been legally employed after school hours on the day in question does not alter the fact that the contract of employment in question was illegal and in violation of the plain terms of the law.

[2] Respondents, however, claim that in construing the child labor law the court should look to its purposes, and that, as the main purpose is to secure the education of the child, that purpose had been fully accomplished in the case of Frank T. Sharon by reason of the fact that he had entered a public night school on November 13th, and was intending to there continue his education. No consideration of the general purposes of the law would justify a departure from the plain provisions of the law, nor is it true that education was the main consideration entering into the child labor law. The compulsory school law (Stats. 1905, p. 388, and its amendments, 1907, p. 95; 1911, p. 949; 1915, p. 762) provides for the attendance of all children between 8 and 15 years, with certain exceptions. The age and schooling certificate required by the child labor

law is also required by the compulsory school law, but the main purpose of the child labor law is, as therein stated, to prohibit children under certain ages from engaging in certain forms of labor. Considerations of public health and safety enter into the general plan as well as matters of education.

[3, 4] The employment being illegal, the question remains as to whether the illegality was waived by express agreement or necessary implication at the time the policy was issued, or thereafter. Respondents rely upon the well-established rule that conditions in the policy of insurance which would render it void ab initio, under facts known or readily ascertainable by the insurer, are waived by its issuance. But there are two insuperable obstacles to the application of that rule in this case: First, the policy was not void ab initio. It insured all employés legally employed, and upon the issuance of a proper age and schooling certificate would have at once attached to the employment in question, or would apply to any other employé taking the place of said employé. Second, the petitioner had no knowledge of the illegality of the employment in question (even assuming that the knowledge of the solicitor of the insurance was the knowledge of the company), and had a right to assume that the contract of employment was legal. For the petitioner was entitled to indulge in the presumption that the employer was innocent of crime, at least until notice of some fact inconsistent with such innocence. Knowledge of the exact age of the boy would not be inconsistent with innocence, because it was lawful to employ such a boy if provided with proper proof of his age, viz., the age and schooling certificate required by law. While it is true that fire insurance companies that have issued policies without written application and without inquiry have been held chargeable with notice of facts which might have been readily ascertained concerning the condition of the title to the property insured at the time of the issuance of the policy, and therefore to have waived conditions in the policy which would render the policy void by its terms, upon the facts, no case has been found that goes so far as to require the insurance company to ignore the presumption of innocence of crime.

[5] It is urged by respondents that the insurance in question was oral, and that, as it applied specifically to the employé it was binding. The utmost that can be said of the verbal agreement, ignoring all questions as to the authority of the agent, which may well be doubted (Sharman v. Continental Ins. Co., 167 Cal. 124, 138 Pac. 708, 52 L. R. A. [N. S.] 670), is that it was an agreement to insure or to issue insurance upon the usual terms contained in the company's policies. As was said concerning an agreement to insure by the Supreme Court of the United States, in Eames v. Home Ins. Co., 94 U. S. 621, 629 (24 L. Ed. 298):

> "It will be presumed that they contemplate such form of policy containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

The contention, therefore, that the insurance in question was oral, and therefore did not contain the clause confining liability to legal contracts, cannot be sustained.

[6] There is no significance in the issuance of the policy after the death of the employé, and the cases of fire insurance in which such issuance after a loss have been held to waive certain conditions do not apply to this character of insurance, where the policy is a continuing liability even after an accident, nor, for the same reason, does the acceptance or retention of the premium under the circumstances operate as a waiver.

On the whole, therefore, the contract of employment, in violation of the child labor law, was illegal, and not included in the policy of insurance (Mt. Vernon Co. v. Frankfort Co., 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636), and, there being no waiver or estoppel, the petitioner is not liable under the policy for the accident in question.

The award against the petitioner and the order substituting it for the employers are annulled.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; LENNON, J.

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179 Cal. 738

HEFFNER v. GROSS. (L. A. 4693.)

(Supreme Court of California. Feb. 15, 1919.)

1. TRIAL ⚷136(3)—WRITTEN AGREEMENT—QUESTION OF LAW.

The question whether a writing is upon its face a complete expression of the agreement of the parties under Code Civ. Proc. § 1856, providing that when the terms of an agreement have been reduced to writing it is to be considered as containing all the terms, is one of law for the court.

2. EVIDENCE ⚷442(1)—TERMS OF CONTRACT—PAROL EVIDENCE—PAROL AGREEMENT.

A contract importing on its face to be a complete expression of the whole agreement will be presumed to contain all the terms of the agreement, and parol evidence is inadmissible to add another term thereto under Code Civ. Proc. § 1856.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. EVIDENCE ⚷442(6)—TERMS OF CONTRACT —PAROL EVIDENCE—PAROL AGREEMENT.

Where agreements for sale of land entered into contemporaneously with deposit of deeds in escrow contained a complete statement of terms of contract and left no uncertainty as to object or extent thereof, parol evidence was inadmissible under Code Civ. Proc. § 1856, to prove vendor's agreement to resign from certain position and recommend purchaser as a successor, where no such promise was specified in written agreements.

4. VENDOR AND PURCHASER ⚷50—ENTIRE CONTRACT.

Written agreements entered into by vendor and purchaser contemporaneously with deposit of deeds in escrow, together with escrow instructions and deeds, constitute an entire contract, having been executed at the same time and as part of the same transaction.

5. APPEAL AND ERROR ⚷907(5)—REVIEW—PRESUMPTIONS—CONTENTS OF ESCROW INSTRUCTIONS.

Where neither escrow instructions nor the substance thereof is set forth in appellant's brief, such instructions will be presumed on appeal to contain no term not contained in agreements executed by the parties contemporaneously with deposit of deeds in escrow, and together with escrow instructions constituting one entire contract, in support of court's ruling that parol evidence of term not contained in agreements was inadmissible under Code Civ. Proc. § 1856.

Department 1.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Harry L. Heffner against Fred W. Gross. Judgment for defendant, and plaintiff appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

F. W. Allender, of Los Angeles, for respondent.

SHAW, J. Plaintiff appeals from a judgment in favor of the defendant.

The complaint states a cause of action for damages from the breach of an agreement alleged to have been made as a part of the consideration for a contract between the plaintiff and defendant for an exchange of their respective tracts of land. The contract of exchange was made in November, 1910. The defendant owned a tract of 280 acres of land, on a certain 40-acre tract of which the Southern Pacific Railroad Company had an easement to maintain a well and pumping plant by which to supply water for its station at Ravenna. The defendant resided on the land. For more than 12 years prior to the said exchange, the said railroad company had employed the said defendant to operate its said pump. It is alleged that for the purpose of inducing the plaintiff to make said exchange the defendant promised that if it were made he would resign his position as pumper operating said plant, on or about April 1, 1911, recommend the plaintiff as his successor, and use his best endeavors to secure for the plaintiff such appointment; that he (the defendant) had great influence in that behalf and that the employment of the plaintiff by said company would be continuous so long as the plaintiff attended to the duties thereof; that his compensation would amount to about $105 a month, including free transportation to and from Acton and Los Angeles, and that it would not require more than about two hours per day of his time; that plaintiff believed said representations and promises, and relying thereon he entered into the agreement and made the proposed exchange of land; that the defendant at the time of making said promise had no intention of performing the same, but that plaintiff did not know of said want of intention until April 1, 1911; that in pursuance of said agreement of exchange the plaintiff and defendant each executed to the other a deed for his own land; that thereafter, on April 1, 1911, plaintiff demanded of said defendant that he sever his connection with said company as operator of said pumping plant, but the defendant refused to do so and still refuses, and refused to recommend the plaintiff as his successor; that if he had resigned his position as pumper and recommended said plaintiff as his successor the said company would have employed the plaintiff in that capacity; and that by said refusal the plaintiff has been damaged in the sum of $10,000.

Upon the trial it was shown that a contract in writing was made between the parties, relating to the exchange, and the respective deeds were deposited in escrow with the Title Insurance & Trust Company, each grantor accompanying his deed with written instructions to said company directing the delivery thereof upon the happening of the conditions specified in the instructions. Each grantor signed the instructions which accompanied his own deed to the other party, but did not sign the instructions of the other party. All of these documents bore the date of November 10, 1910. The respective instructions to the escrow company contained no provisions concerning the pumping plant or resignation by the defendant of his position as pumper for the Southern Pacific Company. The promise of the defendant to resign his position and endeavor to secure the appointment of the plaintiff as pumper as aforesaid was not in writing. At the close of the evidence, the court directed the jury to return a verdict in favor of the defendant on the ground that the contract of exchange between the parties had been reduced to writing; that it was presumed to contain all the agreements between the parties relating to said exchange and that the alleged contract in regard to the position of pumper for the Southern Pacific Company was not contained in said writings, but was entirely in parol; that it should have been incorporated in the writings if the parties intended to rely upon it; that as it was not so incorporated it must be wholly disregarded; and that consequently there was no competent proof of the contract alleged in the complaint for the breach of which the plaintiff sought to recover damages. It is claimed that this instruction was erroneous.

The record is presented in typewriting, under the provisions of sections 953a and 953c of the Code of Civil Procedure. The appellant does not in his brief set forth said escrow instructions, nor point out anything purporting to give the substance thereof. On examining the typewritten record, we find that the escrow instructions were introduced in evidence, but that they are not set forth in the record, either in terms or in effect. The plaintiff resided at Newport, in Orange county, and the defendant on his land, near Ravenna, in Los Angeles county. It appears from the parts of the record printed by the respondent in his brief that the escrow instructions did not constitute the entire contract between the parties, but that, as above stated, other writings were made between them. In the latter part of October, 1910, letters were exchanged between the parties concerning the deal; the plaintiff making a proposal, and the defendant a counter proposal. The letters state the proposed terms of exchange in detail, and they show that the parties were approaching an agreement. Reference was made to the agreement with the railroad company, giving it an easement to maintain and operate the well and pump, but the letters contain not a word concerning any proposed resignation by Gross of his position as pumper or the recommendation of Heffner, or of any one, as successor. On November 10, 1910, contemporaneously with the deposit of the deeds in escrow, the parties executed two agreements in writing, which are as follows:

"Los Angeles, Cal., Nov. 10, 1910.

"This agreement by and between Fred W. Gross and H. L. Heffner, Witnesseth, that whereas the said Fred W. Gross has conveyed unto the said H. L. Heffner that certain ranch property known as the Gross ranch, at Ravenna, California, and comprising two hundred eighty (280) acres, more or less, and whereas, a certain parcel of the said ranch known as the N. W. ¼ of the N. W. ¼ of section 14, is incumbered by a deed to Phoebe L. Parker and Rebecca Le Baron, who hold no title, and, whereas, said deed constitutes an incumbrance, it is therefore hereby promised and agreed by the said Fred W. Gross to remove the aforementioned deed by a quit claim from the parties thereto, within six (6) months from date of this agreement, and failing to do so within the time specified, it is herein agreed and promised by the said Fred W. Gross to quiet title to said forty (40) acre tract by process of law, and to use all power to press the suit to an early conclusion; it is further promised that the said purchaser, Harry L. Heffner, shall not be called upon for any portion of the expenses whatsoever.

"[Signed] Fred W. Gross.

"Approved: H. L. Heffner."

"Los Angeles, California, Nov. 10, 1910.

"This agreement, made and entered into this 10th day of November, 1910, by and between Harry L. Heffner and Fred W. Gross.

Witnesseth, that Harry L. Heffner, the purchaser of the Gross ranch, does hereby grant to Fred W. Gross thirty (30) days from November 15, 1910, in which to remove the live stock belonging to said Fred W. Gross from the ranch, and sixty (60) days from November 15, in which to remove the personal property owned by the said Gross. [Signed] H. L. Heffner.

"Approved: F. W. Gross."

Section 1856 of the Code of Civil Procedure puts in statutory form a well established rule of evidence in the following words, to wit:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing."

[1, 2] The section contains certain exceptions, also well established in the law of evidence, relating to cases where it is sought to correct a writing or where its validity is in dispute, or where extrinsic evidence is necessary to explain an ambiguity, but as neither of these circumstances appear in this case the exceptions are not material. The proper construction of this section and its application to a case like the present one is stated in Harrison v. McCormick, 89 Cal. 330, 26 Pac. 831, 23 Am. St. Rep. 469, as follows:

"The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: 'If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.'"

The following rule from Greenleaf on Evidence, § 275, is approved in that case:

"When parties have deliberately put their agreement in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing."

See, also, Bradford, etc., Co. v. Joost, 117 Cal. 209, 48 Pac. 1083; Gardiner v. McDonogh, 147 Cal. 319, 81 Pac. 964; and Johnson v. Bibb Lumber Co., 140 Cal. 98, 73 Pac. 730.

[3-5] Under the rule thus stated, there can be no doubt that the court was correct in disregarding the evidence concerning the alleged promise and agreement of Gross to resign his position as pumper and recommend Heffner as his successor. The two documents above set forth contain a complete statement of the terms of the contract and leave no uncertainty as to the object or extent thereof. They appear to have been made as the conclusion of previous negotiations between them. We are uninformed as to the contents of the escrow instructions, but as it is possible that they may have contained other conditions of the contract and as said instructions together with the aforesaid agreements and the deeds were all made at the same time and as a part of the same transaction and must be taken together as constituting the entire contract between the parties, and further as we are bound to presume in favor of the court below, we would also, if necessary to support the ruling, assume that the escrow instructions were of such a character as to exclude the existence of any collateral parol agreement between the parties regarding said position as pumper or any other matter.

A number of other questions are discussed by the appellant concerning the amount of damages and the right to recover damages upon such a contract; but, as what we have already said is decisive of the case and requires an affirmance of the judgment, it is unnecessary to consider them.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

179 Cal. 743

STEPHENS v. AHRENS.

AHRENS et al. v. STEPHENS et al.

(L. A. 4696, 4695.)

(Supreme Court of California. Feb. 15, 1919.)

1. Brokers ⚷8(3)—Agency—Payment of Commission.

Fact that broker negotiating loan received commission from borrower does not conclusively establish that he was agent for borrower.

2. Brokers ⚷7—Agency.

A broker is ordinarily held to be agent of party who first employs him.

3. Brokers ⚷8(3)—For Whom Acting—Evidence.

In action between a mortgagor and mortgagee, evidence *held* to warrant finding that broker was agent of the mortgagee in payment to mortgagor of money for which mortgage was given.

4. Principal and Agent ⚷171(2)—Unauthorized Acts of Agent—Ratification.

If agent lends money in manner and to persons other than originally contemplated by his principal, principal ratifies his acts by accepting mortgage and note given by borrowers.

5. Principal and Agent ⚷108(2)—Loaning Money—Powers of Agent.

It was within implied authority of agent lending money for principal to exact condition that money should be paid out only as building for which money was borrowed progressed, under Civ. Code, § 2319.

6. Mortgages ⚷116—Amount—Advances.

Where mortgage and note were given for money for use in construction of building and conditions were exacted that money should be paid only as building progressed, mortgage was security for not more than amount really advanced.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank Jackson, Judge.

Actions by L. A. Stephens against Henrietta Ahrens, and by Henrietta Ahrens and Fred Ahrens against L. A. Stephens and Lulu B. Stephens. From judgments in favor of the Stephens in both actions, the Ahrens appeal. Affirmed.

Tanner, Odell, Odell & Taft, of Los Angeles, for appellants.

J. W. Morin (L. W. Brooke, of Pasadena, of counsel), for respondents.

SLOSS, J. These appeals arise out of cross-actions based on the same transaction. The cases were tried together, and the evidence is brought up in a single bill of exceptions. Both actions and both appeals involve the rights of the parties under a note and mortgage made by Levi A. Stephens and Lulu B. Stephens, his wife, to Henrietta Ahrens, wife of Fred Ahrens. For present purposes, we may proceed as if there were but one plaintiff and one defendant in each case, and shall therefore refer to the parties respectively as Stephens and Ahrens.

In January, 1914, Ahrens had placed $4,000 in the hands of one Gaut, a loan broker, to be invested in mortgages; $1,800 still remained in Gaut's hands in May of the same year. In the latter month Stephens applied to Gaut for a loan, to be secured by mortgage of a lot of land upon which Stephens desired to build a home. The loan was negotiated on May 26, 1914, Gaut taking from Stephens a note and mortgage for $1,800, payable to Ahrens three years after date, with a provision authorizing the payee to declare the principal due on default in the payment of interest. Gaut arranged with Stephens that the money should not be advanced at once, but should be paid over in installments as the construction of the building progressed. The mortgage was immediately recorded, and it, with the note, remained in the possession of Gaut until his death, which occurred on September 14, 1914. At that date Gaut had advanced to Stephens the sum of $1,125.90 on account of the $1,800 covered by the note. The sum so advanced included payments on account of the building, together with charges for recording the mortgage, a commission to Gaut, and an installment of interest, figured on the face of the note, and paid by Gaut to Ahrens. Ahrens was not informed until after Gaut's death of the arrangement for partial advancements to Stephens.

The real question is whether the amount due on the mortgage is $1,125.90, the sum actually received by the mortgagor, or $1,800, the amount placed by Ahrens in the hands of Gaut.

Ahrens v. Stephens is an action to foreclose the mortgage for the full amount. The suit was commenced before the expiration of the three years' period named in the note, and Ahrens alleged, in the complaint, an exercise of the option to declare the entire principal due for nonpayment of interest. Interest had, however, been tendered on the sum actually received by Stephens. Accordingly, if this is all that was due, the action was premature. The court below took this view and gave judgment dismissing the action without prejudice to the right to begin a new suit.

The other action under review was brought by Stephens against Ahrens. In it the mortgagor sought judgment for the payment of $674.10, the portion of the $1,800 not received, or a decree of the court that the note is a valid obligation for $1,125.90 and no more. The trial court gave judgment declaring that the note and mortgage were valid obligations for the last-named amount.

Ahrens appeals from each of the judgments, asserting the right to foreclose for the full amount of the note.

[1-4] There is no question of the entire good faith of both parties. Ahrens parted with $1,800, and very naturally seeks a recovery of this amount. On the other hand, Stephens received only $1,125.90, and recognizes no obligation to repay more. In consequence of the interposition of a third party, one or the other must lose the difference between the face of the note and the amount received by the mortgagor, unless recovery can be had from Gaut's estate. As between the parties to these actions, which must be the loser? To answer this question we must ascertain whose agent Gaut was with respect to the money which remained in his hands; or, in other words, whose money was this balance? The court below found that Gaut was the agent of Ahrens and was not the agent of Stephens. The present appeals turn upon the correctness of these findings, which are assailed by the appellants. We think the court below was justified in finding as it did. The fact that Gaut received a commission for his services from Stephens does not conclusively establish his agency for Stephens. It is not unusual for lenders to exact a bonus or commission for making a loan, and Gaut may have been the agent of Ahrens, even though he was required to look to the borrower for his compensation. The broker is ordinarily held to be the agent of the party who first employs him. 9 C. J. 518, and cases cited. Under the evidence in this case the court was warranted in drawing the inference that Gaut was first employed by Ahrens. Ahrens placed this money in Gaut's hands for investment as early as January, 1914. Stephens, apparently, did not come in contact with Gaut until May of that year. Ahrens contends that, if there was any agency, Gaut's only authority was to purchase specific mortgages for cash. In this behalf reliance is placed upon certain receipts signed by Gaut. The receipt covering the transaction here in question was not delivered to Ahrens until some months after the mortgage was executed and delivered. It could not operate to limit the terms of an agency which had been created and carried out long before. It is true that similar receipts had been given on prior occasions. But these papers, not signed by the alleged principal, were mere acknowledgments that Gaut had received money "to apply as the purchase price on a certain first mortgage." They did not purport to define the scope of Gaut's authority, which was to be determined from the whole course of the transactions between him and Ahrens. The plaintiff, Mrs. Ahrens, herself testified that Gaut had made other loans for her, and that she and her husband had turned over $4,000 to him to loan. This testimony, considered in connection with the dealings between Ahrens and Gaut, warranted the court in concluding that the money had been placed with Gaut to be loaned on mortgage, and that Gaut was the agent of Ahrens for that purpose. If, as is suggested, an advance to others than Stephens was originally contemplated, Ahrens ratified Gaut's act by accepting the Stephens note and mortgage.

[5] In exacting the condition that the money should be paid out only as the building progressed, Gaut was making a provision in the interest of the lender rather than the borrower. Conditions of this kind, designed to enhance the security, are very

commonly attached to mortgage loans made for the purpose of enabling the borrower to erect improvements upon the mortgaged land. The contract made by Gaut was therefore within his implied authority. An agent has authority, not only to do the things expressly authorized, but "to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." Civ. Code, § 2319.

[6] If the foregoing views be correct, the rights of the parties are the same as if Ahrens himself had conducted the transaction with Stephens. In that event the mortgage would undoubtedly have been security for no more than the amount really advanced. Savings Bank of So. Cal. v. Asbury, 117 Cal. 96, 48 Pac. 1081; Leahy v. Warden, 163 Cal. 178, 124 Pac. 825.

We do not find it necessary to review the cases cited by the appellants. They all present states of facts differing substantially from that before us.

The views expressed dispose of the substantial point common to both appeals. It is further contended that, even if the right conclusion was reached in the foreclosure action, there was no ground for the interposition of equity in the suit brought by the mortgagor. But the judgment in that suit does no more than to declare and establish the rights of the parties. No different results would follow from it than from the findings and decree in the foreclosure suit itself. If the judgment in Ahrens v. Stephens is to stand, the appellants are not aggrieved by the rendition of the other judgment.

Complaint is made of certain rulings on the admission of evidence; but, under the conclusions reached on the merits, these assignments become unimportant.

The judgment in each of the cases is affirmed.

We concur: SHAW, J.; LAWLOR, J.

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39 Cal. App. 216

PEOPLE v. HOWARD. (Cr. 743, 2230.)

(District Court of Appeal, First District, Division 1, California. Dec. 19, 1918. Rehearing Denied Jan. 16, 1919; On Rehearing in Supreme Court in Bank, Feb. 17, 1919.)

1. CRIMINAL LAW 🔑1144(10) — REVIEW — PRESUMPTIONS—READING INDICTMENT.

It cannot be said from statement in accused's brief: "The record here explicitly states that * * * the information was read by the clerk to the jury. In the body of the information thus read is an averment of the 'prior' "—that clerk of court read allegation as to prior convictions, which accused had admitted, contrary to Pen. Code, § 1093; it being presumed in support of the verdict that clerk did his duty.

2. CRIMINAL LAW 🔑1206(4) — REPEAL OF STATUTE—PRIOR CONVICTIONS—INDETERMINATE SENTENCES.

Provisions of Penal Code in relation to prior convictions as a basis for increased penalty are in no way affected by indeterminate sentence law, but are still in force and effect, with result that when a prior conviction is established by record in trial court it must be taken into consideration by state board of prison directors in determining duration of imprisonment under indeterminate sentence law.

3. CRIMINAL LAW 🔑1172(1)—HARMLESS ERROR—INSTRUCTIONS.

Where it appeared from evidence without possibility of contradiction that burglary, if committed at all, was committed in nighttime, an instruction of court, defining burglary in first degree and stating that defendant was to be convicted, if at all, of burglary in first degree, did not prejudice any substantial right of accused.

4. BURGLARY 🔑41(1)—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of burglary in the first degree.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Tom Howard was convicted of burglary in the first degree, and he appeals. Affirmed.

Geo. D. Collins, Jr., of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BEASLY, Judge pro tem. This is an appeal from a final judgment of conviction had in the superior court of Alameda county, by which the defendant was convicted of burglary in the first degree. The defendant's motion for a new trial having been denied, he appeals from the judgment and order.

[1] The defendant was charged with a prior conviction of assault to murder, and the first point made in his behalf is that, although he pleaded guilty to the prior conviction, that part of the information was read to the jury, contrary to section 1093 of the Penal Code. This point is stated as follows in appellant's brief:

> "The record here explicitly states that the defendant admitted the 'prior' when arraigned; and that thereafter the information was read by the clerk to the jury, it being the duty of the clerk under section 1093 of the Penal Code to read the information to the jury. In the body of the information thus read is an averment of the 'prior,' contrary to the usual practice of annexing to the pleading a printed slip alleging the 'prior.' "

The practice in many superior courts is to allege the "prior" in the information, and this is the better practice. Upon the foregoing statement this court cannot say that that portion of the information alleging the prior conviction was read to the jury, for it must be assumed in support of the verdict that the clerk did his duty properly, and that he read only that portion of the information which was material at the time the information was read. In the absence of an affirmative showing that the "prior" was read, it will not be assumed that such course was taken.

[2] Appellant also makes the point that the legal effect of the indeterminate sentence is to repeal, by necessary implication, all the provisions of the Penal Code in relation to prior convictions as a basis for increased penalty. We cannot agree to this. It may well be that the Legislature, when it enacted the statute providing for the indeterminate sentence without directly repealing the provisions with relation to the allegation of prior convictions, had in mind that the establishment of the fact of prior conviction beyond a reasonable doubt, by an allegation in the pleadings and a conviction thereon, would be of value to the state board of prison directors, whose function in fixing the duration of imprisonment under the indeterminate sentence is practically the same as was that of the trial judge before the indeterminate sentence was adopted in this state, and as there is nothing in the indeterminate sentence statute repugnant to the provisions of the Code in relation to allegation and proof of prior convictions, we are bound to decide that those provisions which it must be conceded will be useful as above set forth were not repealed by implication by the indeterminate sentence law.

[3] As it appeared from the evidence, without possibility of contradiction, that the burglary, if committed at all, was committed in the nighttime, the instruction of the court defining burglary in the first degree, and stating that the defendant was to be convicted, if at all, of burglary in the first degree, did not prejudice any substantial right of the defendant.

[4] It is claimed that the evidence does not sustain the verdict. The commission of the burglary on the night of January 14, 1918, between 5 minutes to 7 in the evening and 10 minutes after 9 the same evening is shown beyond any doubt by the testimony of the complaining witness. A gold bracelet, a signet ring, a cigar case, and some beads, identified as the property of the complaining witness and stolen from the premises burglarized, were discovered on the 16th day of January (within two days after the burglary) in premises hired and occupied by the defendant. In these premises were also found a set of "burglar tools," consisting of two revolvers and a hand satchel containing four revolvers and two "jimmies," also skeleton keys and some more jewelry. The defendant was arrested on the evening of the crime charged, at about 9:15 o'clock, in Oakland, where the burglary was committed. When asked where he lived he stated that he resided in San Francisco, but could not give his address. When questioned further by the officers he admitted that he was living on Thirty-Ninth avenue, in Oakland, with two other persons named Harris and Graham. He was also asked if there was not another party named Egan, concerning whom he stated, "Oh, well, now what is the use of bringing an innocent man into it? Egan didn't have anything to do with this." He was unable to account for the property of Mrs. Blakemore being found in his rooms. He further refused to state where he was at the time of the commission of the crime, other than to declare that he was at the house of some friends whose names he did not wish to bring into the case. When he was further questioned by the officer, who asked, "Well, now, Tom, you must know something about this," defendant replied, "Now, what the hell is the use of asking me these questions? You have got enough here on me to hang me and keep me here as long as you want."

This evidence certainly sustains the verdict of guilty.

The judgment and order are affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

On Rehearing in Supreme Court.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, we deem it proper to say that we are entirely satisfied with the conclusion of the District Court of Appeal that the provisions of the Penal Code in relation to prior convictions as a basis for increased penalty are in no way affected by the indeterminate sentence law, but are still in force and effect, with the result that when a prior conviction is established by the record in the trial court it must be taken into consideration by the state board of prison directors in determining the duration of imprisonment under the indeterminate sentence law.

All concur.

39 Cal. App. 362

JAMES v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

(Civ. 2206.)

(District Court of Appeal, First District. Division 1. California. Jan. 7, 1919.)

1. Certiorari 🔑37—Right to Writ—"Party Beneficially Interested."

Plaintiff, who was manager of a warehouse for the owner, a corporation, and brought action for writ of review requiring police judge to certify transcript of record in search warrant proceeding under which three cases of opium were taken from the warehouse, was not a "party beneficially interested" within Code Civ. Proc. § 1069, requiring application to be made by such party.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Party Beneficially Interested.]

2. Certiorari 🔑53—Return—Sufficiency.

In proceeding for writ of review requiring police judge to certify transcript of record in search warrant proceeding, answer of police judge setting out in narrative form the history of the case did not constitute a return to the writ.

3. Certiorari 🔑53, 55—"Transcript of Record and Proceedings"—Further Return.

In proceeding for writ of review requiring police judge to certify transcript of record in search warrant proceeding, exhibits incorporated in petition *held* not to constitute the "transcript of record and proceedings" required by Code Civ. Proc. § 1071, so that court should have ordered further return in view of section 1075.

4. Certiorari 🔑60—Duty to Furnish Record.

In action for writ of review requiring police judge to certify transcript of record in search warrant proceeding, it was the duty of plaintiff to furnish the record to be reviewed, and where he failed to use due diligence in having a complete record made out, his proceeding should have been dismissed.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Special proceeding for a writ of review by Louis James against the Police Court of the City and County of San Francisco and Morris Oppenheim, Judge of Department No. 4 thereof. Appeal from the judgment rendered. Judgment reversed.

John F. Davis, of San Francisco, for appellant.

Louis Bartlett and A. E. Graupner, both of San Francisco, for respondent.

WASTE, P. J. This is an appeal from the judgment in a special proceeding for a writ of review. The lower court held that the defendant acted in excess of jurisdiction in issuing a search warrant, refused to quash the writ, and directed the return to plaintiff of the property seized.

Plaintiff and respondent was president of the Broadway United States Bonded Warehouse, in San Francisco, and manager thereof for the Danforth Warehouse Company, a corporation, the owner. There were in storage in this warehouse three cases of opium, in the original packages, the tins containing the opium having been stamped, replaced in the cases, and sealed by United States customs officers. This opium, so far as the record discloses, was owned by Look Tin Eli, who had purchased it from the original consignee, and who paid the duty on the same.

On the 9th of April, 1912, defendant Oppenheim, as police judge of the city and county of San Francisco, issued a search warrant under which F. A. Sutherland, a deputy sheriff, and a detail of police officers took and removed said opium from the warehouse and deposited it with the property clerk of the police department. Plaintiff, James, moved the police court for an order for the restoration to himself of the property so seized, which motion was denied. Thereupon he brought the action for a writ of review.

[1] One point made by appellant is that James was not a "party beneficially interested" within the purview of section 1069 of the Code of Civil Procedure. "The requirement that the application must be made by 'the party beneficially interested' has been construed to mean 'that in an application made by a private party his interest must be of a nature which is distinguishable from that of the mass of the community.'" Ashe v. Board of Supervisors, 71 Cal. 238, 16 Pac. 783. We are not willing to hold that James in an individual capacity comes within even the broad scope of the cases cited. Personally he was in no way beneficially interested.

The writ was directed to the defendant Oppenheim, judge of the police court, requiring him to certify a transcript of the record in the search warrant proceedings. No such return was ever made. Instead, so far as the record in the bill of exceptions shows, the only return was a copy of the petition for a writ of review filed in the superior court to which were attached certain exhibits, followed by a copy of the writ itself; the whole being attested by the clerk of the superior court as being a "full, true, and correct copy of the original record in the" superior court action for the writ of review.

The exhibits attached are copies of: (1) The motion for an order directing the property clerk to return the property to the defendant (in the search warrant proceedings); (2) affidavit of Louis James for such return;

(3) purported affidavit of F. A. Sutherland for search warrant which does not appear to have been sworn to before any one; (4) the search warrant; (5) order of the police judge denying the motion to quash the warrant and seeking return of the property seized. There is nothing to show that these exhibits are correct copies of the documents on file in the police court in the search warrant proceedings.

[2] The judge of the police court appeared by verified answer in the action for the writ, setting out in narrative form the history of the case and alleging "that no further proceedings have been had in said police court, other than as set forth in the petition for a writ of review." The court below, on motion of plaintiff, struck the answer from the files; one of the grounds of motion being that the purported answer did not constitute a return to the writ. In this the court was right.

[3] It thus appears that the superior court, in rendering the judgment, had no record of the inferior tribunal before it, other than the exhibits incorporated in the petition for the writ. This does not constitute the "transcript of the record and proceedings" required by section 1071 of the Code of Civil Procedure. The return being defective, the court could have ordered a further return to be made. Section 1075, Code Civ. Proc.

Respondent's position is not aided by his suggestion for diminution of the record by the stipulation of the parties, entered into in the court below, granting defendant time to prepare a return; for, as we have stated, none was presented.

[4] It was the duty of the plaintiff to furnish the record to be reviewed, and, failing "to use due diligence in having a complete record made out" his proceeding should have been dismissed. I. X. L. Lime Co. v. Superior Court, 143 Cal. 175, 76 Pac. 973.

Inasmuch as the petitioner was not beneficially interested to the degree required by the statute, to enable him to maintain the proceeding, and as the court below acted in excess of its jurisdiction in proceeding with no record before it, the judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

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39 Cal. App. 360

PEOPLE v. LIBERTY. (Cr. 711.)

(District Court of Appeal, First District, Division 1. California. Jan. 6, 1919.)

INDICTMENT AND INFORMATION ⚷159(2)—AMENDMENT.

In prosecution for violation of Pen. Code, § 288, where indictment charged commission of lewd and lascivious acts upon female child by "placing the hands of him upon the private parts of her, etc.," amendment allowed by court in its discretion under section 1008, charging commission of crime by "placing hands and private parts of him * * * upon private parts of her," *held* not to prejudice defendant's rights by stating different offense.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Nick Liberty was convicted of committing lewd and lascivious acts upon person of female child in violation of Pen. Code, § 288, and from judgment of conviction and from orders denying motions for new trial and in arrest of judgment he appeals. Affirmed.

Jas. W. Cochrane, of San Francisco, and Ernest B. D. Spagnoli, of Jackson, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. The defendant appeals from the judgment of conviction under section 288 of the Penal Code, and from the orders denying his motions for a new trial and in arrest of judgment.

The original information in the case charged the commission of the lewd and lascivious acts with and upon the person of a female child "of the age of 12 years by then and there placing the hands of him * * * upon the private parts of her, etc." During the trial of the case the court, in the exercise of the discretion granted by section 1008 of the Penal Code, directed the district attorney, over the objection of the defendant, to file an amended information which charged the offense committed "by then and there placing the hands *and private parts* of him * * * upon the private parts *and legs* of her, etc." The italics indicate the new matter inserted by way of amendment.

Appellant claims that the amending of the information was prejudicial to his rights, in that it charged an offense different from that stated in the original information. There is no merit in this contention. People v. Rippe, 32 Cal. App. 514, 163 Pac. 506; People v. Miller, 34 Cal. App. 641, 168 Pac. 574; People v. Donaldson, 171 Pac. 442. The record also sufficiently indicates that the evidence taken at the preliminary examination clearly showed the commission of the offense as charged in the information as amended. Furthermore, the court offered the defendant a reasonable continuance to enable him to prepare to meet the situation, but he did not avail himself of the opportunity.

One of the witnesses for the prosecution was shown to have made at other times statements contrary to her testimony given in court. The jury heard and passed on her credibility, and there was sufficient evidence in the whole case to warrant the conviction.

The criticism by the court of the prosecuting officer in connection with the amending of the information in no way prejudiced the defendant.

The judgment and orders are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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39 Cal. App. 321

CARLTON v. PACIFIC ELECTRIC RY. CO.

(Civ. 2612.)

(District Court of Appeal, Second District, Division 1, California. Dec. 31, 1918.)

1. STREET RAILROADS 🔑114(13) — CROSSING ACCIDENT—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In action for injuries to an automobile in collision with street car, evidence *held* to support finding that plaintiff driver of car was contributorily negligent.

2. APPEAL AND ERROR 🔑1011(1)—REVIEW—WEIGHT OF TESTIMONY—CONFLICTING EVIDENCE.

The appellate court will not weigh the testimony or resolve conflicting circumstances shown in the proof, but will merely inspect record to ascertain that there is testimony to warrant court's conclusions.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Don W. Carlton against the Pacific Electric Railway Company. From judgment entered and from an order denying a new trial, plaintiff appeals. Affirmed.

Oscar C. Mueller and Alfred Wright, both of Los Angeles (William W. Lovett, Jr., of Los Angeles, of counsel), for appellant.

Frank Karr, R. C. Gortner, A. W. Ashburn, and W. R. Millar, all of Los Angeles, for respondent.

JAMES, J. Plaintiff prosecuted this action for the purpose of securing damages caused to him by reason of a collision which occurred in December, 1913, between an automobile which the plaintiff was driving and a car of the defendant corporation. The damages sought to be recovered were the cost of repairs to the automobile. The accident occurred at the intersection of two streets. It was alleged that the defendant was negligent in the operation of its car. The court, sitting without a jury, made its findings of fact, in which it determined that, while the servant of the defendant was negligent in not looking in the direction from which plaintiff was coming, plaintiff was guilty of such contributory negligence as to bar recovery of damages. The appeal is from the judgment as entered and from an order denying to plaintiff a new trial.

[1, 2] At the point where the accident occurred, North Broadway street, in the city of Los Angeles, runs in a north and south direction. Daly street, upon which the tracks of defendant are located, extends easterly and westerly. North Broadway is a paved street. At the time of and just prior to the accident rain had been falling, and the pavement was wet. Plaintiff was proceeding northerly along the easterly side of Broadway. The car of the defendant came from the west on Daly street and crossed Broadway, on the south side of which it struck the automobile of the plaintiff. The right front corner of the street car struck the left front door of the automobile. Before the street car was stopped, the automobile had been carried along 7 or 8 feet into the entrance of Daly street. The occupants of the car were uninjured. We are asked on this appeal to say that the court was not justified in finding that the plaintiff was guilty of contributory negligence. After a careful reading of the entire transcript of the testimony, we conclude that it cannot be said that there was no substantial evidence to support the finding. This court has no function to weigh testimony or to resolve conflicting circumstances shown in proof. We can only look into the record for the purpose of ascertaining whether any testimony was furnished which would warrant conclusions to be drawn as the court has made them. At the point where the accident occurred the plaintiff, from the side of Broadway on which he was traveling, had the remaining width of that street between him and the corner from which the car emerged, to observe the car which struck him. He testified that when about 22 feet from the rail nearest him of the track upon which the car traveled he first saw the car at a standstill at the entrance of Daly street into Broadway, and that he saw it start up; that the motorman could have seen him easily, had he looked, and that had the motorman slowed down his car or stopped, plaintiff could have made the crossing without mishap. Observing the car continue on its course, and it being too late to cross in front of it, plaintiff testified that he endeavored to swing into Daly street to the east, and had partially succeeded when the right front corner of the car struck the left door of the automobile. He testified that he was going about 6 or 7 miles per hour, and that he thought the car was going about the same rate. There was other testimony that plaintiff was traveling 14 or 15 miles per hour, and that the car made the crossing at 3 or 4 miles per hour.

There was testimony that plaintiff's automobile skidded sidewise into the street car, striking it almost broadside. Plaintiff testified that he heard no alarm sounded by the car as it emerged from Daly street into Broadway; the motorman and conductor testified that the gong was sounded twice. As has been before noted, it was shown without dispute that the pavement was wet and consequently, we may assume the court concluded, slippery. Plaintiff testified that he had almost new "nonskid" tires on his rear wheels, and that up to that point, at least, he had been able to control his car without skidding. The fact that the automobile did skid, however, appeared by some of the testimony. This brief summary of the testimony, we think, is sufficient to show that the finding of the court as to the contributory negligence of the plaintiff does not lack for support in the evidence. The minds of men may differ as to the conclusion on the matter as to whether, under a given set of circumstances, a person has acted with reasonable care. In the field of negligence it is an unusual case, indeed, which presents as to that matter such a clear and unconflicting state of facts as to compel a single conclusion.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 278

THOMAS v. FURSMAN et al.

(Civ. 2557, S. F. 8283.)

(District Court of Appeal, First District, Division 1, California. Dec. 26, 1918. On Rehearing in Supreme Court, in Bank, Feb. 24, 1919.)

1. APPEAL AND ERROR ⇨1052(2)—CURING ERROR.

Error in allowing plaintiff to introduce in evidence an assignment, certificate of acknowledgment of which was insufficient, was cured by subsequent testimony of witness for defendant, who testified as to execution of instrument.

2. ASSIGNMENTS ⇨134—DELIVERY OF INSTRUMENT.

Production by plaintiff of an assignment of a cause of action raises a presumption of proper delivery of such instrument to plaintiff.

3. ALTERATION OF INSTRUMENTS ⇨12—BLANKS.

Blanks of any description left in writings not under seal, may, except as prohibited by the statute of frauds, be filled in pursuance to parol authority.

4. ASSIGNMENTS ⇨41—BLANKS IN INSTRUMENT—EFFECT OF DELIVERY.

If one signs an assignment containing blanks, he must intend it to be filled in by person to whom it is delivered.

5. ASSIGNMENTS ⇨73—CONSTRUCTION.

An assignment of all of assignor's right, title, and interest in and to any claims or demands of any nature whatever held by him against the defendants, together with all moneys that might be received or collected on account of said claims, was not narrowed by the further assignment of demands against the defendants arising between certain dates.

6. ATTORNEY AND CLIENT ⇨70—RELATION—PROOF.

An attorney's authority to appear for the person, whom he holds himself out as representing, is presumed.

7. ASSIGNMENTS ⇨45—DELIVERY TO ATTORNEY FOR ASSIGNEE.

Where an assignment covered claims in suit and the action was mentioned in the assignment, a delivery of assignment to plaintiff assignee's attorney was sufficient delivery to plaintiff.

8. WORK AND LABOR ⇨24(1)—PLEADING—VARIANCE—"MATERIALS."

Where a person was engaged to perform certain personal services, and furnished automobiles to carry men to do work on placer mining claims, and to haul water and supplies, which were necessary in the desert country, he could recover for use of automobiles in an action for value of services rendered and "materials furnished."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Materials.]

9. EXECUTORS AND ADMINISTRATORS ⇨449—ACTION AGAINST ADMINISTRATOR.

In an action against an administrator, plaintiff need not prove nonpayment of his claim, where the administrator appeared and contested the claim, but did not set up payment in his answer.

10. PRINCIPAL AND AGENT ⇨123(3)—EVIDENCE—AGENCY—HIRING AUTOMOBILE.

In an action against owners of mining claims for services and materials furnished, evidence *held* to support a finding that defendants' agent had authority to hire plaintiff's automobile for the transportation of materials and men.

11. PRINCIPAL AND AGENT ⇨116(1)—APPARENT AUTHORITY.

An understanding between a general agent and his principal that the agent was to pay for certain things himself was not binding upon third persons dealing with the agent as such, unless called to their attention.

12. ASSIGNMENTS ⇨132—ACTION BY ASSIGNEE—ISSUES AND PROOF.

In action on assignment of claim to Floyd C. Thomas, court properly sustained objection to admission in evidence by defendants what purported to be assignment of same claims to Eloyd C. Thomas, in absence of allegation that plaintiff was not real party in interest; a simple denial of assignment to plaintiff not being sufficient.

13. ASSIGNMENTS ⚷3—WAGES—CONSENT OF WIFE—STATUTE.

Civ. Code, § 955, providing that married person cannot make valid assignment of wages without consent of spouse, was not retroactive, and consent was not necessary to an assignment of wages earned prior to taking effect of such act.

14. PRINCIPAL AND AGENT ⚷99—AUTHORITY OF AGENT—APPARENT AUTHORITY.

A principal may either expressly or impliedly confer authority.

15. APPEAL AND ERROR ⚷882(12)—INVITED ERROR—REQUESTED INSTRUCTIONS.

Where defendants requested that court instruct that, before plaintiff could hold them liable, jury must find that they, either expressly or impliedly, authorized the expenditure with which they were charged, such request was tantamount to a request that words "expressly or impliedly" be inserted in other requested instructions, relating to authority given agent.

16. TRIAL ⚷296(2)—INSTRUCTIONS—CURE OF ERROR.

Where to requested instruction that before plaintiff could recover, it must be shown that automobiles were hired from plaintiff by defendants, court added words "or their agent," there was no error, where jury was explicitly instructed in other parts of charge that agent must have acted in scope of his apparent authority before plaintiff could recover.

On Rehearing in Supreme Court.

17. EXECUTORS AND ADMINISTRATORS ⚷448—SUBSTITUTION OF PERSONAL REPRESENTATIVE—PLEADING.

Where in action ex contractu defendant dies pending determination in trial court, Code Civ. Proc. § 1502, contemplates serving and filing of a supplemental complaint, alleging presentation of claim against estate.

18. APPEAL AND ERROR ⚷1041(5) — HARMLESS ERROR.

Where in action ex contractu defendant died pending determination in trial court and no supplemental complaint, alleging presentation of claim against estate was served or filed, as required by Code Civ. Proc. § 1502, such failure was harmless, where administrator was substituted as party defendant and appeared and contested claim and there was no controversy as to fact of due presentation of claim, and no point as to such is made in the petition for hearing.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Floyd C. Thomas, substituted for M. A. Varney, against H. C. Fursman and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

See, also, 171 Pac. 301.

Welles Whitmore, of San Francisco, Charles L. Chandler, of Los Angeles, and Harry C. Davis, for appellants.

Walter Slack, of San Francisco (Joseph K. Hutchinson, of San Francisco, of counsel), for respondent.

BEASLY, Judge pro tem. This is an appeal from a judgment entered on a verdict in favor of the plaintiff and against the appellants, namely, W. Huff, E. Thompson, H. A. Baker, and Charles L. Chandler, administrator. The action was commenced on the 2d day of July, 1913, by M. A. Varney, as plaintiff. Mr. Varney died in Los Angeles on the 15th day of March, 1914, and afterwards, on the 18th day of May, 1914, Floyd C. Thomas was substituted as plaintiff; the cause of action having been assigned to said Thomas.

The action was prosecuted for a balance of $3,670 alleged to be due for the reasonable value of services rendered and materials furnished to the defendants between the 17th day of December, 1911, and the 26th day of February, 1912, by M. A. Varney.

The complaint contains a second count, alleging that the defendants agreed to pay the sum of $4,170 upon the same considerations as those set forth in the first count, of which it is alleged that $500 has been paid.

[1] The case was tried by a jury, and resulted in a verdict of $2,810 against the appealing defendants. On the trial of the case the plaintiff offered, and the court admitted, in evidence a purported assignment from M. A. Varney to Floyd C. Thomas, as the basis for the plaintiff's right to recover. The proof of execution of the instrument which constituted the foundation upon which its introduction was predicated was a certificate of acknowledgment before a notary public which it is claimed was insufficient for this purpose because of failure to conform to the provisions of the Code as to the contents of such certificates. But Mrs. Varney testified substantially to the execution of this instrument by her husband, the assignor; and, although this evidence was introduced as a part of the defendants' case and long after plaintiff's case had been closed, it still cured any defect of foundation for the introduction of the assignment in evidence.

[2-4] It is contended that the assignment, at the time it was executed by Varney, was made in blank, that is to say, the name of the assignee was omitted therefrom. This name was afterward inserted. Varney received $1,000 for the assignment. The assignment was produced by plaintiff's counsel. Who, if any one, was authorized to deliver this to the plaintiff does not appear. But the fact that he did have it in his possession, and produced it at the trial, was evidence of its delivery in the form in which it was offered. And further it has been held that blanks of any description left in writings not under seal may, except so far as they may be pro-

hibited by the statute of frauds, be filled in pursuant to parol authority, and it has been laid down generally that if one signs an instrument containing blanks, he must intend it to be filled in by the person to whom it is delivered. 2 Corpus Juris, § 119, p. 1242; Hunt, Adm'r, v. Adams, 6 Mass. 519. This is just in this case, for Varney received $1,000 in money for the assignment and unquestionably intended to convey his interest in the contract in suit by the assignment.

[5] The assignment covers a claim against the defendants from December 10, 1911, to the 1st day of February, 1912. The action is to recover on a claim for services rendered from the 17th day of December until the 26th day of February, 1912. It is claimed that the action omits 7 days' services, from December 10, 1911, to December 16, 1911, at $60 per day, the amount claimed, and which the evidence showed was the contract price for the services counted upon in the action. It is also contended that the action includes 26 days' services not covered by the assignment. Upon this statement it is contended that M. A. Varney retained an interest in the claim and in this suit, and that the representative of his estate is a necessary party to the action for a final determination of the same. But the assignment covers all of Varney's right, title, and interest in and to any claims or demands of any nature whatsoever held by him at the time against the defendants, or either or any of them, together with all moneys that might be received or collected on account of said claims by legal proceedings or otherwise. The provision of the assignment thus paraphrased is broad enough to include all of the claims of Varney against the defendants under the contract, nor are these provisions of the assignment narrowed by the further assignment of all Varney's demands against the defendants arising between the dates mentioned in the later paragraph of the assignment.

[6] An objection was made to the substitution of plaintiff in this action on the ground that the attorney who asked the substitution showed no authority to appear for the assignee, Thomas, plaintiff in the action. His authority to so appear is presumed in the absence of evidence to the contrary.

Plaintiff also now objects to the appearance of the attorney on the ground that the estate of Varney still retains an interest in the suit. That point is covered by the above-recited provisions of the assignment.

[7] It is also contended that there was no evidence that the assignment was delivered, but, as has been said, its production by the plaintiff's attorney raises a presumption of delivery that is sufficient in the absence of any evidence to the contrary. Objection is made to the sufficiency of the delivery on the ground that it was not delivered to Thomas, the plaintiff, personally. But it appears in evidence that it was delivered to his attorney, and as this action was mentioned in the assignment and as the assignment covered the claims herein sued upon, a delivery of the assignment to the attorney was a sufficient delivery to his client, the plaintiff.

[8] It is contended that the evidence shows that Varney did not furnish any materials in the sense that the term is generally used, but it appears in evidence that he did furnish two automobiles, driving one himself and an employé driving another, and that they used the automobiles to carry men to Searles Lake to do certain work on placer mining claims located by the defendants, and that Varney also, with these machines, hauled supplies to the men, carried them back and forth from the camp to the place where their labor was performed, hauled water for them, and did other necessary work of transportation in connection with assessment work being done for the defendants at Lee's direction. It appears that the country where the work was being performed was a desert country; that the water had to be hauled for the men from a distance, and it is fairly shown that the work done by Varney with his machine was necessary for the accomplishment of the assessment work, and also that it was of the reasonable value provided for in the contract. We think this brings the claim within the allegations of the complaint, even if no material, such as merchandise, was furnished.

H. C. Fursman, named originally as one of the defendants in the action, died pending the action and after the complaint was filed. Upon his death, his administrator was substituted in his place as the defendant, and a claim, duly verified, was presented to the administrator for the demands declared upon in plaintiff's complaint. The complaint was not amended after this claim was presented to the administrator so as to show its presentation, and it is claimed that this is a fatal omission from the complaint, and that therefore the judgment should be reversed. The proceedings for substitution of his representatives, upon the death of a defendant pending an action, are set forth clearly in sections 385 and 1502 of the Code of Civil Procedure. It was proper for the court, upon the death of Fursman and the appointment of his administrator, and upon the suggestion of the death, to permit the substitution of his administrator in his place as a defendant. Code Civ. Proc. § 385. And it is provided in section 1502, Code of Civil Procedure, that if an action is pending against the decedent at the time of his death, the plaintiff must file his claim with the clerk, or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases. And it is further provided that no recovery shall be had in the action unless proof be made of such filing or presentation.

It is nowhere provided in the Code that the original complaint must be either amended or supplemented to show this presentation of the claim. The purpose of a pleading is to advise the defendant of the cause of action claimed against him. The presentation of the claim to the administrator of the estate leaves nothing further to be desired, it seems to us, in the way of notice of the plaintiff's claim, where action is pending upon it, and the omission from the Code of a provision for the amendment of the pleadings, or the filing of supplemental pleadings to show the presentation of the claim in such cases, seems to us, under these circumstances, to be therefore both significant and proper, and we are of the opinion that the Legislature did not intend to make it necessary to file such amendment or supplemental pleading, and if it had so intended it would have so stated in the Code.

[9] It is further contended that the judgment must be reversed, because it does not appear that the claim was not allowed. If there was anything in this point, it seems to us that the answer would be that Fursman's administrator is here contesting this claim without having alleged that it was allowed, or having made any claim in the trial court that it had been allowed. The allowance of the claim by the administrator, if it had been allowed, was a matter of peculiar knowledge upon the part of the administrator, and, if he had allowed the claim, he should have set that fact up in his answer, or by way of amendment thereto. Appellants further contend that there is no proof of the nonpayment of this claim. Proof of the negative allegation of nonpayment of such a claim is not necessary. Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Miller & Lux v. Dunlap, 28 Cal. App. 313, 152 Pac. 309.

[10, 11] It is contended that the hiring of Varney's cars was not within the scope of Lee's authority. The facts on this subject are these: Lee located 175 placer mining claims of 160 acres each on or in the neighborhood of Searles Lake, in San Bernardino county, in the names of and for the benefit of the defendants in this action. They left him absolutely a free hand in dealing with the claims. According to their own testimony, they fully trusted him to do everything in and about the location of these claims, and for the protection of their rights therein. Huff, in his testimony, said that he left the assessment work to Lee to do, and Thompson testified that she requested Lee to do whatever was required in California as her agent. Without going into the details of these facts, it is clear that Lee was the general agent of the defendants for the purpose of doing the assessment work yearly, necessary to the preservation of the title to these claims. The three living defendants, Huff, Thompson, and Baker, testified that they had an understanding with Lee to the effect that he was to furnish the money to pay for the assessment work on these claims, and they contend that this limitation upon his authority was binding upon plaintiff's assignor, Varney. If it be conceded that this is true, there was still evidence sufficient to support a conclusion by the jury that their statements on the witness stand as to this agreement with Lee that he should pay for the assessment work were untrue, for it appeared in the verified complaint, filed in certain other litigation by the parties some time before their depositions were taken, that Lee paid $1,000 for them in their pro rata shares for this assessment work, and directed the further application by one Pack of the further sum of $1,836 "due and owing" to appellants, for the payment of this same work. This, in itself, negatives their statements that they had an agreement with Lee that he should bear the expense of the assessment work personally. But aside from this it has been held that such a limitation upon the powers of a general agent is not binding upon third persons dealing with him as such unless called to their attention. Whitton v. Sullivan, 96 Cal. 480, 31 Pac. 1115; Browning v. McNear, 158 Cal. 525, 111 Pac. 541.

[12] Defendants offered in evidence what purported to be an assignment of these same claims identical in form with the plaintiff's assignment, except that it ran to Eloyd C. Thomas instead of Floyd C. Thomas. Objection of the plaintiff to this was sustained. There was no allegation that plaintiff was not the real party in interest in this case except a denial of the assignment to him. There was nothing in the pleadings to apprise the plaintiff that this assignment to Eloyd C. Thomas, identical in all respects with the one offered by plaintiff, but for the slight difference in the spelling of the Christian name of the assignee, was in the possession of defendants or their counsel. It was not within the issues made by the pleadings. Objection was therefore properly sustained. Selleck v. Manhattan Fire Alarm Co. (Sup.) 117 N. Y. Supp. 964.

[13] Plaintiff moved to strike out the assignment after it had been admitted in evidence on the ground that the claim was for wages, and that Mrs. Varney's written consent was not attached thereto, and for the validity of this objection stand upon section 955 of the Civil Code, the material portion of which reads:

> "No assignment of, or order for, wages or salary made by a married person shall be valid unless the written consent of the husband or wife of the person making such assignment or order is attached to such assignment or order."

Section 955, Civil Code, became a law and took effect on August 10, 1913. The cause of action sued upon here accrued in February, 1912. The section was not retroactive. The claim under the contract constituted property in Varney acquired before section 955 took effect, and the section not being retroactive, Mrs. Varney's consent to the assignment was not necessary. Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Duncan v. Duncan, 6 Cal. App. 404, 92 Pac. 310.

[14, 15] Appellants complain of many errors which they claim were committed by the court in instructing or refusing to instruct the jury. The first objection is that the court modified two instructions asked by the defendants, to the effect that the defendants might authorize the hiring of automobiles, by inserting thereafter the words "expressly or impliedly." This is not an incorrect statement of the law, and, besides, at appellants' request the court instructed the jury that before they could hold the defendants liable, they must find that they either expressly or impliedly authorized the expenditure with which they were charged. This was tantamount to a request by themselves for an instruction in effect like those modified by the court.

[16] To the instruction that before the plaintiff could recover, it must be shown that the automobiles were hired from Varney by the defendants, the court added the words "or their agent," and it is contended that this was erroneous because the court did not, in addition thereto, add that the agent must be acting within the scope of his agency.

The jury was explicitly instructed in other parts of the charge that Lee must have acted within the scope of his apparent authority before the plaintiff could recover. This covers the point.

It seems to us that the many other objections to the instructions given or refused by the court are all covered by the fact that the court gave these instructions in perhaps different form, but in effect. The jury was elaborately instructed, and it seems to us, after reading the entire charge, that no valid complaint can be made on this score.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

On Rehearing in Supreme Court.

PER CURIAM. [17, 18] In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, we deem it proper to say that we do not approve of that portion of the opinion which substantially declares that where in an action ex contractu the defendant dies pending determination in the trial court, the law does not contemplate the filing of a supplemental complaint alleging the presentation of a claim against the estate as required by section 1502, Code of Civil Procedure. The proper practice undoubtedly is to serve and file such a complaint, alleging compliance with the statute. Proof of presentation of the claim as required is made by the statute essential to recovery, and this implies an allegation of the fact upon which issue may be joined if desired, and a finding where issue is joined. No point as to this is made in the petition for hearing, and the opinion shows that there is no controversy as to the fact of due presentation of the claim. No such prejudice appears as would justify a reversal on account of this matter.

All concur.

39 Cal. App. 289

DAMERON v. ANSBRO. (Civ. 1879.)

(District Court of Appeal, Third District, California. Dec. 27, 1918. Rehearing Denied by Supreme Court Feb. 24, 1919.)

1. PHYSICIANS AND SURGEONS ⚿18(8)—MALPRACTICE—EVIDENCE.

A verdict for damages against a physician for malpractice in treatment and rebreaking of a fracture *held* not without substantial support from evidence.

2. EVIDENCE ⚿553(2)—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS.

That a hypothetical question did not contain certain important facts did not render it erroneous, where it does not appear that their recital was necessary to enable the expert to form and express an intelligent opinion upon the matter at issue, particularly since additional facts may be brought out in the cross-examination.

3. TRIAL ⚿83(1)—HYPOTHETICAL QUESTIONS—OBJECTIONS.

Objection to a hypothetical question for failure to contain essential facts must specify the additional facts which ought to have been included.

4. EVIDENCE ⚿506, 553(1)—HYPOTHETICAL QUESTIONS—PHYSICIANS.

It is better practice to eliminate from a hypothetical question directed to a physician statements not a part of the treatment, and assume inferences therefrom as facts, and the question should not call upon the witness to interpret the meaning of statements which should be interpreted by the jury.

5. EVIDENCE ⚿125, 553(3)—ACTIONS FOR MALPRACTICE—RES GESTÆ.

In an action against a physician for malpractice, the declarations of the defendant at the time of the treatment are admissible as a part of the res gestæ, and may be included in hypothetical questions, but such questions should be carefully framed, where the jury must depend largely upon the answers.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Physicians and Surgeons 🔑18(7)—Witnesses 🔑376—Malpractice—Evidence—Admissibility.

In a cross-action against plaintiff physician for malpractice, defendant's evidence as to whether plaintiff was a member of a county medical association was inadmissible to show whether plaintiff was indemnified against actions for malpractice; but if a question thereon was proper to show the interest or bias of the witness who was also a member, the statement of counsel as to insurance was likely to be prejudicial, and plaintiff should have been permitted to show that no such indemnity existed.

7. Witnesses 🔑252—Explanation of Testimony—Skeletons.

Whether a physician as an expert witness be allowed to illustrate his testimony by means of a human skeleton is a matter left to the sound discretion of the court, but where its use could not have aided the jury, denial of permission was not abuse of discretion.

8. Evidence 🔑558(7, 8)—Cross-Examination of Expert.

In a cross-action against a physician for malpractice, the exclusion of a question asked a physician on cross-examination, intended to show that there was no bony union in the fracture which a doctor had rebroken, was error; the question being calculated to test the witness' competency and discredit his statement on direct examination that he had found such osseous callous.

9. Physicians and Surgeons 🔑18(10)—Actions for Malpractice—Instructions.

In a cross-action against a physician for negligence in treatment of defendant, an instruction that the plaintiff was required to use that degree of skill and learning possessed and used by physicians in the same school practicing in the same or similar localities was proper.

10. Trial 🔑260(8)—Instructions—Refusal of Instructions Covered by Others.

A requested instruction on the degree of skill and learning required of a physician *held* substantially covered by fair implication from several other instructions construed together, so that its refusal was not error.

11. Physicians and Surgeons 🔑18(10)—Actions for Malpractice—Evidence—Instructions.

As to the nature of the treatment and required amount of force that might be exercised to break adhesions in fractured bones, only an expert could properly determine and testify, but a requested instruction, implying that only an expert could testify as to the amount of force that actually was used and the method of treatment that was actually employed, was properly refused.

12. Physicians and Surgeons 🔑21—Actions for Compensation—Malpractice—Instructions.

In an action by a physician for professional services and for room, board, and nurse hire, in which defendant brought cross-action against plaintiff for malpractice, plaintiff was entitled to recover the reasonable value of the use of the room and board and nurse hire, regardless of whether he exercised ordinary care and skill in the treatment of defendant.

13. Physicians and Surgeons 🔑18(10)—Actions for Malpractice—Instructions—Negligence.

In a cross-action for malpractice against a physician suing for services, an instruction *held* erroneous as permitting the jury to apply its own standard of care, or that of each individual juror, to the treatment accorded the defendant by plaintiff, and completely ignoring the test fixed by law based upon the methods and practice of the school of medicine to which plaintiff belonged.

14. Trial 🔑296(1)—Instructions—Cure of Error—Conflicting Instructions.

An erroneous instruction as to the standard of care required of a physician is not cured by correct, but conflicting, instructions.

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Actions by J. D. Dameron against James T. Ansbro for medical services, and for room, board, and nurse hire, and by James T. Ansbro against J. D. Dameron for damages for malpractice, were consolidated by consent and tried together; the complaint in the latter case being treated as a counterclaim and cross-complaint in the former. Judgment for defendant, and plaintiff appeals. Judgment and order reversed.

Lafayette J. Smallpage, of Stockton, and Hartley F. Peart, of San Francisco, for appellant.

A. L. Levinsky, of Stockton, for respondent.

BURNETT, J. On the night of September 18, 1912, respondent while asleep in his buggy, was crossing the railroad track of the Southern Pacific Company about 16 miles from the city of Stockton, and he collided with a steam train traveling at the rate of 30 or 35 miles per hour. He was immediately taken at his request to the Dameron hospital in said city. He was examined by Dr. Dameron, the plaintiff and cross-defendant herein, and by Drs. L. E. and Harry Cross. One of the witnesses described Mr. Ansbro's appearance and condition as follows:

> "His clothes were torn, dirty, and blood-marked. His face was skinned, grimy, and covered with blood from a wound in the forehead. His hand was also cut and bleeding. His legs were displaced and distorted; he was dazed and confused, suffering from traumatic shock. He constantly called for water and cigarettes."

After giving him the usual hypodermic treatment, the physicians made an examination to ascertain the extent of his injuries. It was found that he had, at least, ten fractures of the legs and arms as follows: A compound fracture of the left fibula; a comminuted fracture of the left fibula; a fracture of the internal malleolus of the left foot;

an oblique comminuted fracture of the left femur; a piece of bone had been broken off from one of the segments of this fractured femur, and this loose piece intervened between the separated parts; a comminuted fracture of the right femur, the injury being similar to that of the left femur; a multiple fracture of the fibula of the right leg consisting of two separate distinct fractures; a transverse fracture of the right tibia and a comminuted fracture of the right radius of the right arm. The legs of the patient were badly bruised and discolored; the compound fracture of the left fibula constituted an open wound, the fractured ends of the bone protruding through the flesh of the leg. His condition was very grave, and it was subsequently aggravated by the appearance and development of ether congestion of the lungs and also cystitis, which persisted for ten days with intense severity. Indeed, it is quite apparent that the case was a serious one, and to a layman it would seem somewhat remarkable that in a comparatively short period of time Mr. Ansbro was restored substantially to his former condition of health and strength. However, the final treatments were given by another physician at another hospital, after respondent became dissatisfied with Dr. Dameron; and the contention that the recovery was delayed by the negligence and carelessness of the latter merits attention and consideration. No complaint is made of the treatment in the early days of the trouble, but fault is found with the manner in which the fracture of the left femur was attempted to be reduced and corrected on September 30th, and, also, with the conduct of appellant in breaking up the adhesions in respondent's knees on November 25th. These are the two specific acts of negligence upon which respondent bases his claim for damages. They were alleged in his pleadings, and to these specified acts the evidence was addressed.

As to the first of these claims, we need say but little. The contention is that there was "bad apposition and also overlapping" of the fragments after the operation was performed by Dr. Dameron. The result was stated by Dr. Ellis Harbert as follows:

> "There is about two inches overlapping there, and the bones are entirely displaced one on top of the other."

Incidentally involved in this affirmation of negligence is the further claim that Dr. Dameron made an erroneous diagnosis of the osseous union of the fracture, and that he negligently failed to adopt the "Lane plate" method of treatment. It is admitted by respondent that all of the remaining fractures were reduced and set in proper apposition, and that the treatment as to them by Dr. Dameron and his assistants was in accordance with the requirements of the best surgical skill. On the other hand, appellant asserts that the left femur was set in as nearly perfect apposition as was possible in view of the nature of the condition of that fracture and of the other fractures in the same leg.

We may state that respondent in his brief seems to attach little importance to this assignment of negligence, and it is quite apparent that it was a circumstance of slight moment in the determination of the cause. As a basis for affirmative relief it was, indeed, eliminated by reason of the fact that the operation was performed more than a year before the action was instituted by respondent. Section 340, Code Civ. Proc., subd. 3.

It is true that the court instructed the jury that it might be considered as a defense to appellant's claim for compensation, and it is possible that it had some effect upon the amount of the verdict. The stress, however, was laid upon the other assignment of negligence, and we deem it sufficient to say that it is a close question whether there is sufficient support for the claim that appellant in his treatment of said fracture failed to exercise that care and skill which the law and the accepted standard of professional competency demand of the physician and surgeon.

[1] On November 25th, Mr. Ansbro was etherized, and Dr. Dameron, assisted by Dr. Knight, who participated in the reduction of the fractures on September 30th, made a careful examination of all of the fractures which had existed as before stated.

It was ascertained that seven of the ten fractures had united and healed perfectly, but they concluded that the right tibia and the right and left femurs had failed to make an osseous and satisfactory union. As to this, though, we may say it is the contention of respondent that a mistake was made in the diagnosis and, as a matter of fact, a bony union had taken place in all the fractures. At any rate it was found that very dense adhesions had been formed in Mr. Ansbro's knees, due to the passive condition in which they had been kept for eight weeks and to the shock and force of the blow causing the fractures. After consultation, Dr. Dameron determined to reduce the adhesions before resetting the fractures. As to these adhesions, we may say that there is no doubt they existed, and all the expert evidence shows that it was of great importance that they be broken up. The showing is, also, that it was an opportune time for such treatment, and the particular method adopted by appellant to accomplish the purpose is sanctioned by the approved standard of surgical skill. It is not disputed that Dr. Dameron by manipulation overcame these adhesions in both knees. He then stimulated the fractures of the right femur and right tibia by rubbing together the ends of the bones, after which he set the fractures in apposition and placed a plaster of paris cast upon the leg. There can be no controversy that such treatment of these fractures is considered proper by those competent to decide the question. He determined, so he testified, that it would not be advisable to attempt to secure apposition in the left femur by using a plaster of paris cast, but that the same should be Lane plated.

He did not desire to perform this latter operation, however, without the express consent of Mr. Ansbro, and he, therefore, placed the fracture in a good temporary position while awaiting the patient's recovery from the effects of the anæsthetic. As we have already stated, his failure to thus plate this fracture is condemned by respondent, but appellant gives a plausible explanation of his conduct in that matter, and it appears from his statement that by reason of respondent's dissatisfaction with his condition, and the consequent change to the care and treatment of another physician and surgeon, appellant did not put in the Lane plate. There are some minor matters discussed in connection with this treatment of November 25th, but the only material and vital claim of respondent, as we understand it, is that all the ten fractures had made an osseous and permanent union, and that Dr. Dameron, in overcoming the said adhesions, was so careless and negligent in the amount of force which he used, that he refractured the right and left femurs and the right tibia in the same places as originally fractured. Indeed, respondent admits in his brief that Dr. Dameron is a good surgeon, and so recognized in the community, but he asserts:

> "He was careless and negligent in his attempt to reduce the adhesions, and he used such force that he rebroke the fractures. He may have been skillful, but he was careless and negligent, and by reason thereof Ansbro is entitled to recover in this action."

The evidence offered in support of this claim consisted of certain admissions and statements of appellant, the testimony of eyewitnesses as to the manner in which the manipulation was performed and the opinion of experts based upon hypothetical questions. It is earnestly insisted by appellant that the evidence is totally inadequate to support the conclusion that in said treatment he failed to manifest "that reasonable degree of learning and skill ordinarily possessed by others of his profession," or that he did not use or exercise ordinary care and diligence in the application of the skill and knowledge to accomplish the purposes for which he was employed. It is further claimed that in view of the entire record it is preposterous to assert that Dr. Dameron was guilty of malpractice, and that the verdict of the jury is manifestly wrong and unjust. It must be admitted that a remarkably strong defense to the charge was made by appellant. His witnesses put an entirely different construction upon certain circumstances and conditions from the view presented by respondent, and they negatived the existence of any fact that would have indicated negligence on the part of Dr. Dameron. It may be added that such an imposing array of expert witnesses as were called by appellant is seldom seen. They embraced some of the most eminent surgeons in California, and at least one of the most distinguished in the world, the late Dr. John B. Murphy of Chicago, and these experts were emphatic that the treatment of respondent by appellant, as disclosed by the facts recited in the hypothetical questions to said witnesses, was in accordance with the highest surgical skill and entirely beyond censure or reproach.

One carefully and impartially reading the voluminous record can hardly resist the conclusion that the verdict ought to have been the other way, but, without reciting the evidence, we think it cannot be said that the verdict of the jury against appellant has no substantial support.

[2, 3] Among the asserted errors of the trial court is its action in overruling an objection by appellant to a hypothetical question addressed to Dr. Harbert. The grounds of the objection to the question are stated by the appellant as follows:

> "It is not based upon all the essential, vital and undisputed facts in the case, and hence is absolutely unfair. (2) It included conversations and statements which constitute hearsay and which required the expert witness to whom the question was addressed to determine the meaning and application of such statements, and to resolve and determine facts not specifically assumed. (3) The question included a purely hearsay statement attributed to the assisting surgeon."

The question is manifestly an important feature in the showing made by respondent. It constitutes the basis for substantially the only expert evidence offered on his behalf, and it, therefore, merits serious consideration. It is too long to quote in full, but we may state generally that it attempts to recite what was done and said by appellant in relation to the treatment of respondent, beginning with the 30th day of September and including the successful effort to break up the adhesions on the 25th of November, and it concludes with this interrogation:

> "Assuming the statement I made to you to be true, how long, in your opinion, was the patient delayed in being restored?"

This was followed by a similar hypothetical question concluding as follows:

> "Assuming that the facts I have stated to you are true, state whether or not, in your opinion as a physician and surgeon, that it was good surgery."

No doubt the appellant in the foregoing grounds of objection has suggested certain principles that are recognizable by the authorities as applicable to hypothetical questions. Farrell v. Haze, 157 Mich. 374, 122 N. W. 197; Miller v. Leib, 109 Md. 414, 72 Atl. 466; Dexter v. Hall, 82 U. S. (15 Wall.) 9, 21 L. Ed. 73; Swanson v. Hood, 99 Wash. 506, 170 Pac. 135. However, they must, of course, be regarded in the light of the particular facts of each case.

As to the first ground, it is true that certain important facts were omitted, as suggested by appellant, such as the condition of the patient, the existence of other fractures, the results obtained, the date of the injuries, and others, but it does not appear that the recital of these was necessary to enable the expert to form and express an intelligent opinion as to the treatment of the case. Considerable latitude must be allowed in the choice of facts as the basis of hypothetical questions, and if the question is fair, and understandable by the witness, it is not to be excluded because it does not comprehend all of the important facts in the case. Of course, additional facts may be brought out in the cross-examination, as was done herein, that might cause modification of the answer of the expert. Besides, appellant in his objection in the trial court did not specify any additional facts which ought to have been included. He should have done so if he desired to insist upon the point.

[4] The second and third grounds probably possess more merit. It is apparent that the question is somewhat faulty in the respects thus indicated. It included a statement alleged to have been made by Dr. Dameron "that there was good union, good results," and furthermore, that he stated, "It is broke," and again:

> "Whereupon one of the persons in the room asked the physician in charge, or stated to him, 'Didn't you break that bone, in the leg,' and he said, 'No, that is the giving way of the adhesions.'"

The question also included the statement:

> "Whereupon the physician who was assisting the physician in charge said: 'It is broken above the knee,' and the physician in charge of the patient made an examination of the place above the knee and said, 'It is broken,' whereupon those two physicians agreed that they would place a plaster of paris cast on the right leg."

Other statements of the assisting physician, "to go easy," and "I think you have worked long enough this time, I would put him under an anæsthetic some other time and reduce the adhesions gradually," were included in the question. These statements were not a part of the treatment, and they do not necessarily imply what was done. Of course, it is clear that the fact that these various statements were made could not possibly have affected the condition of the patient, nor in any manner have prolonged his recovery. It is only by interpreting these statements as evidence of careless conduct on the part of appellant could they be of any assistance to the witness in forming an opinion as to the character of the treatment. The better practice would have been to eliminate the conversations and assume the inferences therefrom as facts and upon that basis interrogate the expert. By the form of the question, the witness was called upon to interpret the meaning of these various statements, and thus to act in the place of the jury. This is not his province.

> "The question should be so framed as to clearly present the state of facts which the counsel claims to be proved and which the testimony on his part tends to prove." Jones on Evidence (2d Ed.) § 370.

[5] It is true that declarations of the physician at the time of the treatment are admissible as part of the "res gestæ" and may be included in a hypothetical question. Mayo v. Wright, 63 Mich. 32, 29 N. W. 832.

We do not say that it was prejudicially erroneous to so include them, but we think the other method the better practice. At any rate, the statements of the attending physician "to go easy," etc., should have been left out, as they were incompetent.

It was important that great care should be exercised in framing these hypothetical questions, as the jury undoubtedly based the verdict largely upon the answers of this expert.

[6] Dr. Priestly, a witness for plaintiff and appellant, testified that he was a member of the San Joaquin County Medical Association, and he was asked if Dr. Dameron and Dr. Fitzgerald were members. To this question an objection was made, and in reply to the court's inquiry as to the purpose of the question, counsel for respondent stated:

> "The purpose of showing whether or not the association protects any member in litigation brought against him in a case of the present character."

It was not admissible for that purpose, as is virtually conceded by respondent. In Pierce v. United Gas & Electric Co., 161 Cal. 188, 118 Pac. 706, the Supreme Court said:

> "Evidence that a defendant in an action for damages is insured against loss by reason thereof is not admissible (Roche v. Llewellyn Iron Works Co., 140 Cal. 563 [74 Pac. 147]), and it would undoubtedly be improper for counsel for plaintiff to endeavor to get such a fact before the jury by question designed solely for that purpose."

In Shay v. Horr, 78 Wash. 667, 139 Pac. 604, it was said:

> "We have held in these cases [supra] that it is improper to either directly or indirectly get before the jury any fact which conveys information that the defendant is insured against loss in case of a recovery against it, and that the striking of the answers conveying such informa-

tion, and the instructing of the jury not to consider it, will not save the error."

It is altogether probable that the jury would be more inclined to find a verdict against appellant if it were believed that he was indemnified than if it were understood that he was to bear the burden alone.

Granting that the question was proper to show the interest or bias of the witness, the statement of counsel was likely to be prejudicial, and the court should, at least, have permitted appellant to show as a matter of fact that no such indemnity really existed. It has been held that even in examining jurors such questions are highly improper. Pierce v. United Gas & Electric Co., supra.

[7] The court refused to allow Dr. Dameron to illustrate his testimony by means of a human skeleton. We do not understand that appellant was thereby denied any legal right. It is a matter left to the sound discretion of the court. No doubt, such object may often be properly used to make more intelligible the testimony of an expert. Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520. It falls within the same category as pictures and diagrams. While we think permission might well have been granted, we cannot say that the use of the skeleton would have aided the jury in any manner, or that the court abused its discretion in denying the request.

[8] We think the court should have allowed the question asked of Dr. Harbert on cross-examination:

> "Doctor, suppose an osseous callous had been thrown out around the seat of that fracture in the left femur prior to the time you Lane plated it, would it not have been good surgery—and assuming that the osseous callous had been distributed some week or nine days before, would it not have been good surgery to have placed the fragments in apposition and let nature's process of bone repair continue without putting on the Lane plate?"

The question was calculated to test the competency of the witness and discredit his statement on direct examination that he had found such osseous callous or, at least, it might have revealed the extent of such formation. The cross-examination had particularly in view the point that there was no bony union in that fracture. This was an important feature of appellant's position. If there had been no such union there could, of course, have been no refracture. From the direct testimony of Dr. Harbert, the jury would get the impression that there was an osseous union instead of a fibrous, as contended for by appellant, and any question calling for an answer that would modify or remove this impression was proper cross-examination. An objection was also sustained to several other similar questions on the same ground. The questions were asked, for the reason stated by counsel for appellant, "to show that if conditions existed as from the testimony of this witness that good surgery would have prompted a different course than that that was pursued." If good surgery would have prompted a different course upon such contingency, it could assuredly be argued that no such condition existed. The questions were somewhat similar to the cross-examination as to custom in Meyer v. McNutt Hospital, 173 Cal. 156, 159 Pac. 436.

[9, 10] Appellant complains of the action of the court in refusing certain instructions requested by him to the effect "that the question of whether Dr. Dameron was negligent in his treatment of Mr. Ansbro was to be determined by finding whether or not he possessed and used that degree of skill and learning possessed and used by physicians of the same school practicing in the same or similar localities." Such standard is clearly established by the authorities and the trial court might well have given that specific instruction. It is claimed by respondent that it was substantially covered by others which were given, and this is probably true. At least, it is a fair implication from several of them, construed together, that the measure of appellant's responsibility for his treatment of respondent is the standard for which he contends.

[11] Appellant contends that the court erred in refusing this instruction:

> "As to whether or not Dr. Dameron, in breaking up the adhesions in the knees of Mr. Ansbro, on the 25th day of November, 1912, exercised ordinary care and skill in the method of breaking up said adhesions and in the amount of force used therefor are questions that you must look solely to the testimony of the medical and surgical expert witnesses to determine."

In support of his claim he cites McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870, and Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128. In the former it is said:

> "The authorities are practically uniform in holding * * * that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony."

In the latter case, referring to whether plaintiff's elbow was dislocated, the court said:

> "Whether or not defendant should, under the circumstances, in the exercise of ordinary and reasonable care and skill, have discovered such condition, assuming it to have existed, was a question for expert testimony, and none was offered."

As to the nature of the treatment required and the amount of force that might be exercised to break such adhesions as existed in this case, manifestly, only an expert could properly determine and testify. But the instruction proposed was faulty as implying that only an expert could testify as to the amount of force that actually was used and the method of treatment that was actually employed. As to what occurred, of course, the nonexpert was as competent as the expert witness. If there had been no dispute as to the facts it would have been a question solely for the physicians and surgeons. But as we view the record, we think it was not error for the court to refuse the instruction; there being a conflict as to the facts.

[12] We think the court should have instructed the jury as requested by appellant, that Dr. Dameron was entitled to recover the reasonable value of the use of the room and of board and nurse hire, regardless of the question whether he exercised ordinary care and skill in the treatment of the defendant. It appears that the complaint filed by Dr. Dameron embraced two causes of action, one for his professional services in the sum of $250 and the other for room, board and nurse hire furnished to Mr. Ansbro at his request in the sum of $490. Another action was brought by Mr. Ansbro against Dr. Dameron for damages for malpractice, and these two actions were consolidated by consent and tried together, the complaint of Mr. Ansbro being treated as a counterclaim and cross-complaint. There was no contention that the board and nurse hire, etc., were not reasonably worth the amount charged, and their value to respondent was not affected by any question of the correct treatment of the fractures. The jury should have been instructed to allow plaintiff credit for those items.

[13] Probably the most serious error consisted in giving the jury the following instruction:

> "It is not necessary for James T. Ansbro, the defendant and cross-complainant in this case, to prove gross culpability on the part of the plaintiff, Dr. Dameron, but proof of any failure to exercise proper care on the part of Dr. Dameron or any carelessness or negligence in the discharge of the duty assumed by Dameron is sufficient to enable the defendant and cross-complainant Ansbro to recover in this action, if you believe from a preponderance of the evidence that Dr. Dameron was unskillful or careless or negligent, and that James T. Ansbro was injured thereby."

The instruction permitted the jury to apply its own standard of care or that of each individual juror to the treatment accorded the defendant by plaintiff. It completely ignored the test fixed by the law based upon the methods and practice of the school of medicine to which appellant belonged. In the recent case of Hesler v. Cal. Hospital Co. (Sup.) 174 Pac. 654, this instruction was condemned:

> "To sustain an action it is not necessary to establish gross culpability; mere evidence of want of proper or ordinary care or attention and advice in the discharge of duty by a physician is sufficient to take the case to the jury."

[14] It is true that in that case some other objectionable instructions were given, but they could hardly be considered more confusing or misleading than the one given herein. According to the instruction the jury may have believed that Dr. Dameron possessed and exercised that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing practicing in that locality, and yet that he did not treat the case in a proper manner according to the views of the jurors, and, therefore, was liable for damages. It makes no difference that other instructions may have presented the correct standard, as that would simply be an instance of an irreconcilable conflict.

We think the judgment and order should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

185 Cal. 797

FIDELITY & CASUALTY CO. OF NEW YORK v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(L. A. 5997.)

(Supreme Court of California. Jan. 7, 1919.)

In Bank.

Petition for writ of review by the Fidelity & Casualty Company of New York, a corporation, against the Industrial Accident Commission of California, E. C. Gise, and Wesley Clark. Application denied.

Robert P. Jennings, of Los Angeles, for petitioner.

Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. We are of the opinion that the Industrial Accident Commission correctly construed the policy in this matter, and that its decision is correct.

The application is denied.

ANGELLOTTI, C. J., and SLOSS, MELVIN, LAWLOR, and LENNON, JJ., concur.

179 Cal. 772

SANTA BARBARA COUNTY v. TWITCHELL et al. (L. A. 4580.)

(Supreme Court of California. Feb. 17, 1919. Rehearing Denied March 17, 1919.)

OFFICERS 🔑100(2) — INCREASING COMPENSATION DURING TERM—ROAD COMMISSIONERS—STATUTE AND CONSTITUTION.

Inhibition of Const. art. 11, § 9, against increasing compensation of county officer after election or during term, applies to compensation of road commissioners, whether or not county officers in a strict sense, since, under Pol. Code, § 4290, salaries and fees paid in full compensation for work of county officers apply to all services of every kind performed either as officers or ex officio officers.

Department 2.

Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by the County of Santa Barbara against F. C. Twitchell and the United States Fidelity & Guaranty Company, a corporation. From a judgment for plaintiff, defendants appeal. Affirmed.

Canfield & Starbuck and R. B. Canfield, all of Santa Barbara, for appellants.

U. S. Webb, of San Francisco, and E. W. Squier, Fred H. Schauer, and G. H. Gould, all of Santa Barbara, for respondent.

MELVIN, J. Defendants appeal from a judgment against them for $2,002.02. The suit was for money illegally paid by the plaintiff to defendant Twitchell, who was a supervisor and ex officio road commissioner of the county.

With the exception of the amount involved, the case is exactly similar to the four cases in which judgments were affirmed by the District Court of Appeal of the Second District. County of Santa Barbara v. Rucker et al., 35 Cal. App. 676, 170 Pac. 860. This court refused to transfer those cases, but counsel for appellants suggest that a re-examination of the questions involved may cause this court to change the views heretofore entertained by its members and to disapprove the conclusions of the District Court of Appeal.

After a study of the briefs and a re-examination of the admirable opinion of that court, written by Mr. Presiding Justice Conrey, we are still convinced that it correctly declares the law, and upon that authority the judgment in the case before us should be affirmed.

In one of his briefs learned counsel for appellants contends that road commissioners are not county officers, and that, therefore, the inhibitions of the Constitution do not apply to their compensation.

It makes no difference whether, as road commissioners, they are in a strict sense county officers or not, because salaries and fees paid in full compensation for the work of county officers apply to all services of every kind, performed either as officers or ex officio officers. Section 4290, Pol. Code. The compensation, therefore, is paid to the county officer, and is made to cover all services.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

179 Cal. 748

MERKELEY et al. v. FISK et al. (Sac. 2724.)

(Supreme Court of California. Feb. 17, 1919.)

1. CONTRACTS 🔑164 — CONSTRUCTION TOGETHER.

Under Civ. Code, §§ 1642, 1647, two or more separately executed instruments may be considered as one contract only when on their face they deal with same subject-matter, and are by reference so connected they may be said to be interdependent, a rule not absolutely unyielding in face of suggestion in writing itself that it is not complete, or of circumstances calling for application of exception that contract may be explained by reference to circumstances under which made and matter to which it relates.

2. BROKERS 🔑54, 82(1)—REALTY BROKERS—RIGHT TO COMMISSION — PROCUREMENT OF PURCHASER—PLEADING.

Realty brokers, to have cause of action for commission on sale of land, were required to procure purchaser ready, able, and willing to pay precise price provided in brokers' contract with sellers, and then to allege fact in direct and precise terms.

3. BROKERS 🔑82(1) — REALTY BROKERS — RIGHT TO COMMISSION—PLEADING.

Realty brokers' complaint for commissions on sale of land for executrices *held* deficient as failing to aver that brokers had procured purchaser ready, able, and willing to pay price fixed in brokers' contract with executrices, though written contract did not in terms disclose precise price.

4. BROKERS 🔑82(1) — REALTY BROKERS — ACTION FOR COMMISSION—PLEADING.

Brokers' complaint for commissions for having procured for executrices, under contract not disclosing precise price, purchaser for lands of estate, *held* deficient as failing to aver precise price at which sale was authorized, and then to allege that such price was that which purchaser procured had agreed to pay.

5. PLEADING 🔑214(2) — DEMURRER — ADMISSION.

Demurrer to complaint admits truth of all facts pleaded.

6. BROKERS 🔑44 — REALTY BROKERS — WRONGFUL REVOCATION OF AUTHORITY — EFFECT.

Wrongful revocation of authority of realty brokers could not have operated to deprive them of compensation contracted for, or its equivalent in damages for nonperformance of owner's contract, if, pursuant to their contract of employment, and within time specified, they had procured purchaser able, ready, and willing to buy at price and on terms prescribed.

7. BROKERS 🔑11 — REALTY BROKERS — RIGHT TO DAMAGES—PREVENTION OF PERFORMANCE—COMPLAINT.

Realty brokers' complaint if considered as seeking damages to extent of commissions on sale of realty of estate because of alleged prevention of performance, *held* insufficient as failing to allege that brokers, within specified time, either before or subsequent to revocation of their authority by executrices, procured or could have procured purchaser ready, able, and willing to buy at price and on terms fixed.

Department 2.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by A. A. Merkeley and others, copartners doing business under the firm name of Merkeley, Chittenden & Keller, against Katherine B. Fisk and others. From judgment for defendants, plaintiffs appeal. Affirmed.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellants.

Dunn & Brand, of Sacramento, for respondents.

LENNON, J. In this action to recover a commission of $3,227.55 for the alleged sale of real estate, the plaintiffs' cause of action arises out of the execution by and between the plaintiffs and defendants of two written agreements. The first one, executed and dated November 19, 1913, is as follows:

"This agreement, made this 19th day of November, 1913, between Katherine B. Fisk, Emma T. L. Beardslee, and Ovedia A. White, as executrices of the last will and testament, and of the estate of W. E. Lovdal, deceased, the parties of the first part, and Merkeley, Chittenden & Keller, a copartnership, the parties of the second part, witnesseth:

"That the last will and testament of said W. E. Lovdal, deceased, gives the executrices authority to sell property of the estate at private sale but subject however to confirmation by the superior court of the county of Sacramento, state of California, and

"Whereas the estate of W. E. Lovdal, deceased, is the owner of an undivided one-half interest in 661.1 acres or thereabouts standing in the name of T. T. C. Gregory and said T. T. C. Gregory is the owner of the other undivided one-half, subject however, to trust deed to said land executed by said Gregory to certain trustees to secure payment of the balance of the purchase price to George Swanston, and

"Whereas the estate of W. E. Lovdal, deceased, is the owner of an undivided one-half interest in a number of contracts for the purchase on the installment plan of certain lands in reclamation district No. 785 in Yolo county, California, which contracts are executed, four signed by C. H. Goethe, one signed by H. J. Goethe, one signed L. M. Goethe and two signed by H. T. Goethe, said contracts covering about 619.315 acres, and

"Whereas the said estate of W. E. Lovdal owns a one-half interest in 2.42 acres in Colony A, Goethe subdivision, which said deceased purchased from Guy Foley, and

"Whereas the estate is willing to sell its said interest in said property for the amount that the said parties of the first part as executrices of said estate have paid upon the same which are as follows:

Goethe Lands.

Acreage.	Contract.	Purchase Price.	Payments.	Interest.	Taxes.	Imp's.
24.475	1	$ 7340.00	$ 2060.00	$ 158.40)		$ 494.00
9.23	2	2772.00	772.00	60.00–	$ 91.50	
21.1	3	7130.00	1994.00	154.08)	on 1-2 & 3	
2.42			This piece goes with C. MG.			
			Colony A Contracts 1-2-3.			1000.00
146.	4	36500.00	10950.00	3561.13	236.00	285.00
51.94	5	12985.00	3895.50	1272.38	88.30	
284.33	6	71082.50	21324.75	7017.08	528.16	1640.00
70.24	7	17560.00	5268.00	1733.79	109.75	
12.00	8	3000.00	900.00	296.00	24.97	2570.00
			Swanston Land.			
661.1	9	165280.00	48820.00	13282.00	1238.14	1211.00

Summary.

		Full Amt.	One-half Int. G. M. C. Colony A
Goethe Land Contracts 1-2-3	54.805 acres	$ 5783.92)	
	2.42 acres	1000.00)	$ 2941.99
Goethe Land Contract 4	146.00 acres	15032.13	7516.06
Goethe Land Contract 5	51.94 acres	5266.18	2628.09
Goethe Land Contract 6	284.33 acres	30509.99	15254.995
Goethe Land Contract 7	70.24 acres	7111.54	3555.77
Goethe Land Contract 8	12.00 acres	3780.97	1895.49
Swanston Land Contract 9	661.1 acres	64551.14	32275.57

"Whereas the parties of the second part are anxious to sell said property for first parties upon commission of five per cent. of the selling price or such lesser amount as they may accept.

"Now therefore the parties of the first part hereby authorize the parties of the second part to sell the estate's interest in any of the above described contracts for the amount that first parties or said estate has paid on said contract or contracts, plus the amount of the commissions charged by second party for making such sale and that this contract shall be in full force for the period of sixty days from the date hereof and to remain in full force and effect thereafter until the expiration of ten days' notice, which notice shall be served in writing upon said second parties, and if at any time during the continuance of this contract the parties of the first part shall have an opportunity to sell said contracts, or any of them, the party of the first part shall have the right to sell this property upon giving the party of the second part ten days' notice in writing that they have an opportunity to sell the property and unless second parties make a valid sale within said ten days this contract shall expire at end of said ten days and first party can then sell the property.

"It is understood however that any sale of said property will be reported by first parties to the superior court of the county of Sacramento, state of California, for confirmation and it is not binding unless confirmed by said court.

"In case of sale first parties are to furnish abstract of title to property to date. (Showing clear title.)

"It is further understood and agreed that the purchaser shall, and will, hold first parties and the estate of Wm. E. Lovdal, deceased, free and harmless from all liability on said contracts.

"Witness the signatures of the first parties as executrices as aforesaid the day and year first above written.

"Emma T. L. Beardslee, Executrix.
"Ovedia A. White, Executrix.
"Katherine B. Fisk, Executrix."

The second memorandum of agreement, dated and executed December 12, 1913, is as follows:

"In consideration of the sum of one hundred ($100.00) dollars the receipt of which is hereby acknowledged, the undersigned hereby agree to accept the payment of the amount due upon the purchase of the real property hereinbefore described as the Swanston land upon the following terms:

"Five thousand ($5,000) dollars upon the delivery of a good and sufficient conveyance of the title of said land;

"Seven thousand ($7,000) dollars six (6) months from that date;

"One-half the balance one (1) year thereafter, and the remaining one-half one (1) year from the date of the last mentioned payment.

"Notes to bear interest at six (6%) per cent. and to be secured by a mortgage upon said property, subject to the trust deed now existing on said property in favor of C. F. Dillman and F. H. Pierce.

"Also subject to existing leases and leases heretofore agreed upon with lessees.

"Ovedia A. White.
"Emma T. L. Beardslee.
"Katherine B. Fisk.

"December 12, 1913."

In addition to setting forth the foregoing agreements in hæc verba, the plaintiffs' complaint alleged that the second memorandum was by the defendants executed and delivered by the plaintiffs as "a modification and addition to said agreement entered into November 19, 1913." Further, in support of the cause of action relied upon the plaintiffs' complaint alleged that:

On or about the 12th day of December, 1913, "the plaintiffs found and procured a purchaser for the land described in said 'Exhibit A' (the first memorandum) described as follows:

"An undivided one-half interest in 661.1 acres or thereabouts standing in the name of T. T. C. Gregory and said T. T. C. Gregory is the owner of the undivided one-half, subject, however, to trust deed to said land executed by said Gregory to certain trustees to secure payment of the balance of the purchase price to George Swanston.

Swanston Land.

Acreage	661.1
Contract 9—	
Purchase price	$165,280.00
Payments	48,820.00
Interest	13,282.00
Taxes	1,238.14
Improvements	1,211.00

—including the land described as follows."

The defendants demurred to the second amended complaint, generally, upon the ground that it did not state facts sufficient to constitute a cause of action, and, specifically, that several causes of action were improperly joined and that the complaint was uncertain and ambiguous in many specified particulars. The demurrer by a general order was sustained, and, the plaintiffs refusing to further amend within the time granted for that purpose, judgment was accordingly entered for the defendants, from which the plaintiffs have appealed upon the judgment roll. It is argued, here, primarily, that both agreements evidenced the result of the ultimate negotiations of the parties which all the while related solely to a single subject-matter and were, notwithstanding the fact that they were separately made and contained no reference, express or otherwise, to one another, sufficiently shown as a matter of pleading, to be but a single indivisible contract which, when supplemented by all the allegations of the complaint, sufficed to support plaintiffs' cause of action.

[1-3] "Several contracts relating to the same matters between the same parties and made as parts of substantially one transaction are to be taken together." Civ. Code, § 1642. Obviously, the most certain criterion of the completeness of an individual writing will

be found within the writing itself. It is therefore the general rule that two or more separately executed instruments may be considered and construed as one contract only when upon their face they deal with the same subject-matter and are by reference to one another so connected that they may be fairly said to be interdependent. Of course, this rule is not so rigid as to be absolutely unyielding in the face of a suggestion contained in the writing itself that it is not complete, or of circumstances which call for the application of a well-defined exception to the rule that "a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647. This is so, we apprehend, because while ordinarily the subject-matter and identity of the parties to several instruments will be disclosed by a reference to the instruments themselves, nevertheless "the question as to whether or not several instruments between the same parties were * * * intended * * * to cover a single transaction, oftentimes cannot be ascertained from an inspection of the instruments themselves; and consequently, if the intention of the parties be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments." Torrey v. Shea, 29 Cal. App. 313, 155 Pac. 820. It will be noted that the second agreement in controversy here recites the fact of "the purchase of the real property hereinbefore described as the Swanston land," but in that particular instrument the "Swanston land" was not theretofore or subsequently described, and consequently it may be fairly said that there is to be found in the second instrument itself a suggestion that, standing alone, it is not a complete expression of the intention and ultimate agreement of the parties concerning its subject-matter, and, therefore, under the exception to the general rule permitting the coupling of single separate contracts and then considering and construing them as one; the allegation of the complaint in the case before us that the second agreement in controversy was a modification of, and an addition to the first, might properly have been held as a matter of pleading to be good and sufficient as against a general demurrer. But even so, the complaint was otherwise deficient in its failure to aver those particulars of the transaction in suit, which, if existent, were vitally essential to the creation and pleading of a cause of action in the plaintiffs.

Thus it will be observed that the complaint, while first alleging that "the plaintiffs found and procured a purchaser for the land" described in the first agreement and later alleged that the plaintiffs had notified the defendants "that plaintiffs had procured a purchaser who was ready, able, and willing to purchase said land and pay the purchase price to said defendants," still it stopped short of alleging in terms, and we cannot say that it clearly follows by necessary implication from the complaint as a whole, that the plaintiffs had procured a purchaser who was ready, able, and willing to purchase the precise property designated in either or both agreements for the amount and upon the terms stated therein. In this behalf it will be observed that the first agreement expressly stipulated "that the purchaser shall and will hold first parties and the estate of Wm. E. Lovdal, deceased, free and harmless from all liabilities on said contract," and that the second agreement specifically set forth further terms upon which the sale was to be made; and the complaint does not allege that the purchaser procured was ready, able, and willing to purchase upon these terms. It is manifest that standing alone the allegation that "plaintiffs had found and procured a purchaser for the land described in said Exhibit A" will not suffice as an averment that the purchaser was ready, able, and willing to pay the amount designated and upon the terms specified in the contract, and that allegation is not effectively aided by the other and later allegation of the complaint that the plaintiffs "immediately notified the defendants that plaintiff had found and procured a purchaser who was ready, able, and willing to purchase said land and pay the purchase price to defendants." The latter allegation is no more, and evidently was not intended by the pleader to be anything more, than an averment of the fact that notice had been given the defendants of what the plaintiffs had done in the matter of procuring a purchaser, and that, we take it, is materially different from a direct and positive averment that the plaintiffs had in fact, as they said when notifying the defendants, "found and procured a purchaser who was ready, able, and willing to purchase said land and pay the purchase price to the defendants." But if it be conceded for argument's sake that the latter allegation may be fairly construed to be a positive averment of the fact that the plaintiffs had found a purchaser for the property, rather than merely an allegation, as the pleader intended, that the plaintiffs had given notice of the fact, still, and even though it be coupled with the first allegation and both allegations then considered and construed as a single averment, nevertheless, neither allegation separately or conjunctively, expressly nor by necessary implication, avers that the purchaser procured, was ready, able, and willing to pay the precise price provided in the first contract, namely, "the amount that said first parties, or said estate, had paid on said contracts, plus the amount of the commissions charged * * * for making such sale" at the times and in the manner and upon the terms prescribed in either or both contracts. This, the plaintiffs were required to do, and then allege in direct and precise terms the doing of it, in order to have a good cause of action upon the contract. The doing of anything less than, or different from, that designated in the contract, will not suffice, and the material fact of the procurement of a purchaser at the price and upon the terms fixed by the contract must be stated in unequivocal language and not be left to inference. Moore v. Besse, 30 Cal. 570, 572; Booth v. Moody, 30 Or. 222, 46 Pac. 884; Jacobs v. Shenon, 3 Idaho (Hasb.) 274, 29 Pac. 44; Hayden v. Grillo, 26 Mo. App. 289; Hardy v. Sheedy, 58 Or. 195, 113 Pac. 1133; Wright v. Beach, 82 Mich. 469, 46 N. W. 673; Newton v. Donnelly, 9 Ind. App. 359, 36 N. E. 769; Weitbrec v. Morris, 62 Colo. 345, 163 Pac. 1119. This is so because the contract in suit fixed the right of the plaintiffs to remuneration (Merriman v. Wickersham, 141 Cal. 567, 570, 75 Pac. 180), and a "broker's contract for the sale of real estate is not performed, nor is his commission earned, until it affirmatively appears that he had procured * * * a purchaser ready, willing, and able to buy the property offered for sale upon the terms * * * and at the price fixed by the" contract (Douglas v. Spangenberg, 23 Cal. App. 294, 137 Pac. 1103; Newton v. Donnelly, supra; Masten v. Griffing, 33 Cal. 111; Dolan v. Scanlon, 57 Cal. 261).

[4] While it is true that prima facie the contract in suit does not in terms disclose the precise price for which the defendants' interest in the property was authorized to be sold and may be said to be uncertain to the extent that extrinsic evidence would be required to show what was "the amount" the defendants had paid for their interests in the property to be sold, nevertheless, that "amount," whatever it may have been, was presumably within the knowledge of the pleader, and therefore it was incumbent upon him by appropriate averments to plead the price paid for defendants' interest in the property, and then allege that was the price which the purported purchaser had agreed to pay. Not having done so, and the contract having been pleaded in hæc verba, the complaint as a whole is permeated with the uncertainty of the contract and the fact that evidence might have been admissible to remove that uncertainty, will not suffice to cure the defect in pleading. Durkee v. Cota, 74 Cal. 313, 16 Pac. 5.

The complaint not measuring up to the requirements of the contract in the particulars stated, the defendants' demurrer was properly allowed for that reason alone, and therefore it will be unnecessary for us to show, as we might readily do, that the complaint was sadly obnoxious to the many assignments of obvious uncertainty and ambiguity in many material matters presented by the demurrer, all of which might have been easily corrected by several simple allegations.

[5-7] Counsel for appellants urge that even though it cannot be held that the complaint states a cause of action in the particulars previously stated for a commission because it does not show that the plaintiffs had performed in precise pursuance of the terms of the contract, still it is insisted that the complaint sufficiently states a cause of action for the sum sued for upon the theory that "on or about" December 12, 1913, the defendants, when notified of plaintiffs' procurement of a purchaser, had, as is, in effect, alleged in the complaint, expressly stated that they would not consummate a sale with any purchaser the plaintiffs might procure and did "on or about" the 20th day of December, 1913, within the time limited as the life of the contract, sell and convey to the city of Sacramento the land described in the complaint without giving at any time prior to said December 20, 1913, the 10 days' notice in writing to the plaintiffs called for by the first agreement, that they, the defendants, had an opportunity to sell the property described in that agreement. These facts, admittedly true for the purposes of the demurrer, show that the defendants had in effect wrongfully revoked the agency created by the agreement—that is to say the defendants having by the agreement undertaken not to exercise their inherent power to revoke the agency save upon certain prescribed conditions, the exercise of that power without compliance with those conditions was in violation of the agreement and therefore wrongful. But it will be observed that the complaint does not allege that such revocation operated to retard or prevent the plaintiffs' performance of the contract, and, of course, it could not have operated to deprive the plaintiffs of the compensation contracted for or its equivalent in damages for the nonperformance of the contract if, in keeping with the contract and within the time therein limited, they had notwithstanding the revocation, procured a purchaser who was ready, able, and willing to purchase at the price, and upon the terms prescribed by the contract; or if it had been made to appear that plaintiffs, within the time limited by the contract, "had in good faith expended money and labor in advertising for, and finding a purchaser," and were at the time of the revocation "in the midst of negotiations which were evidently and plainly approaching success." Mechem, Law of Agency, § 209; Blumenthal v. Goodall, 89 Cal. 251, 26 Pac. 906; Hawley v. Smith, 45 Ind. 183; Lane v. Albright, 49 Ind. 275;

Stewart v. Murray, 92 Ind. 543, 47 Am. Rep. 167. In other words, the defendants would not be relieved from the liability of the contract by a capricious refusal to consummate a sale of the property or by their voluntary act which precluded the possibility of performance on their part, and this is so "upon the familiar principle that no one can avail himself of the nonperformance of a condition precedent, who has * * * occasioned its nonperformance." Moses v. Bierling, 31 N. Y. 462; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441. So, therefore, whether the complaint be considered as proceeding upon a cause of action on the one hand for commissions earned and on the other hand for damages to the extent of such commissions, because of the alleged prevention of performance, it fails in either event to state a cause of action, in this, that it does not allege that the plaintiffs did, within the time limited by the agency contract, either before or subsequent to its revocation, procure or could have procured, within the time limited, a purchaser ready, able, and willing to purchase for the price and upon the terms stated in the contract. Waterman v. Boltinghouse, 82 Cal. 659, 23 Pac. 195.

The judgment is affirmed.

We concur: WILBUR, J; MELVIN, J.

179 Cal. 787

GREEN v. CARIBOU OIL MINING CO.

(S. F. 7971.)

(Supreme Court of California. Feb. 19, 1919.)

1. Corporations ⚷108—Issue of Stock to Officer—Remedies as to Invalid Stock—Bona Fide Purchaser.

Where a certificate representing shares of stock purporting to be owned by a corporation's secretary and bearing the signature of its vice president and secretary and its seal was accepted as collateral security for a loan made to the secretary, and the certificates were false and fraudulent, the company must suffer rather than the innocent purchaser.

2. Corporations ⚷108—Issue of Certificates — Invalid Stock — Bona Fide Purchaser.

One accepting as collateral security a stock certificate purporting to be owned by the secretary of the corporation, could rightly rely upon the secretary's honesty, the signature of the vice president, and upon the verity of the instrument bearing the corporate seal, and where the certificate was false, the company and its officers were negligent in permitting its issue, and the company was liable in damages therefor.

3. Corporations ⚷104—Transfer of Stock —Entry upon Corporate Books.

The provision of Civ. Code, § 324, to the effect that a transfer of shares of stock "is not valid except as to the parties thereto until the same is" properly entered on the books of the corporation, cannot be made to justify a corporation in disputing the authority of its own officers to issue certificates of stock within the apparent scope of their authority, which it is admitted they did issue.

4. Corporations ⚷104 — Denial of Officers or Agents' Authority—Issue of Corporate Stock.

A corporation is estopped from disputing the authority of its officers to issue a certificate of stock within the apparent scope of their authority after it has passed to an innocent purchaser for value, although not estopped from disputing the validity of a transfer, or from refusing to enter the same on its books.

5. Corporations ⚷108 — Sale of Stock — Bona Fide Purchasers.

The rule that a third person dealing with an officer of a corporation concerning corporate property for a consideration wholly personal to such officer is put upon inquiry does not apply to the taking of a certificate of stock as collateral security for a loan to the corporation's secretary, where the certificate on its face appeared to have been the personal property of the secretary for more than two months prior to the pledge.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by P. R. Green against the Caribou Oil Mining Company, a corporation. Judgment for defendant, and plaintiff appeals. Upon rehearing after judgment by the District Court of Appeal. Judgment of the superior court reversed.

Byrne & Lamson, of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

H. U. Brandenstein, of San Francisco, amicus curiæ.

SHAW, J. From further consideration of this case upon the rehearing, after decision in the District Court of Appeal, we are satisfied with the opinion of that court written by Mr. Justice Beasly, and we now adopt it as the opinion of this court. It is as follows:

"This is an appeal from a judgment which followed an order of the court sustaining a demurrer to plaintiff's second amended complaint, the plaintiff declining to further amend.

"The complaint charges, in substance, that one James H. Lewis executed his promissory note to the plaintiff in the sum of $1,750, for which plaintiff loaned Lewis the sum named, and secured the note by what purported to be a certificate representing 3,500 shares of stock in defendant company. Lewis was at the time of this transaction the secretary and transfer agent of the defendant. The certificate was taken from the company's stock certificate book, bore the signature of Lewis as secretary, and of J. H. Dearin as vice president, the president of the company being unable at the time to act, and also bore the company's corporate seal. The consideration for the note was paid to Lewis by the plaintiff upon the faith and security of this certificate, and because he believed it to be a valid certificate of stock in the defendant company. The note was never paid, but has been reduced to judgment, and the stock was at all times worth more than the principal and interest of the note. Lewis is insolvent. By reason of the fact that the certificate is fraudulent the plaintiff is unable to sell the certificate as pledgee and thus realize the amount of his note. It is further charged that the stock was fraudulent, and that the execution and issuance of the certificate were unauthorized by the defendant; that Lewis procured the issuance of the stock for the purpose of enabling him to hold himself out as the owner thereof; that for a long time prior to the date of issuance of this certificate the president and vice president and directors of the defendant corporation negligently failed to examine or supervise the certificate books and records of stock transfers of the corporation; that an examination of those books and records, if made, would have disclosed to those officers before that date that numerous other fraudulent stock certificates had been in like manner issued by Lewis; that Dearin, the vice president, negligently affixed his signature to the certificates without trying to ascertain or knowing whether they were regularly issued or fraudulent or not, or whether issued from the treasury of the defendant pursuant to authority, or in exchange for surrendered certificates, and without making any inquiry or investigation whatever. The prayer of the complaint was for judgment for the $1,750, and some other relief not important at this time.

[1, 2] "The case is one of first impression in this state, but the question has been determined in favor of the plaintiff in well-reasoned opinions in the following cases, among others, namely, Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' National Bank of Cincinnati, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777, National Bank of Webb City v. Newell-Morse Royalty Co., 259 Mo. 637, 168 S. W. 699, and Havens v. Bank of Tarboro, 132 N. C. 214, 43 S. E. 639, 95 Am. St. Rep. 627. It seems hardly necessary to recite the facts of those cases, as they were substantially the same as the facts of this case. In each of them the court placed its decision upon the application of the simple and just principle of the law that whenever one of two innocent parties must suffer by the action of a third, he who by his negligence has enabled such third person to occasion the loss must bear it; and in Havens v. Bank of Tarboro, supra, it was added that where the secretary issued the certificate and delivered it to a third party who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificate were truthful, and not false and fraudulent, and, the company having confided to him the trust of executing the business the agent was held out to the public as competent, faithful, and worthy of confidence; and that though he deceived both his principal and the public by forging and issuing false certificates, it is but reasonable that the principal, who placed him in the position to perpetrate the wrong, should suffer the loss. These cases are rich in quotable arguments supporting the doctrine that the defendant company, under the circumstances of this case, is liable to the pledgee of its stock where the stock was fraudulently issued by its officer intrusted to issue it. The plaintiff in this case relied, and had a right to rely, upon three things in taking this certificate in pledge. He had first the right to rely on the honesty and fidelity of Lewis as secretary of the corporation; second, he had the right to rely upon the signature of the vice president of the corporation; and, third, he had the right to rely upon the verity of the instrument presumed from the fact that the corporate seal was attached thereto. One purpose of the signature of the vice president to the certificate was, among others, to protect the public and the company against possible fraudulent acts of the secretary. That the vice president of this company was culpably negligent, as were the officers of the company also, in not looking to their books appears from the allegations of the complaint. It is therein alleged that they negligently permitted the secretary to issue this stock, and negligently failed to examine their books theretofore, and that had they so examined them the fraud would have been discovered, and the company and the plaintiff protected against it.

"In order to escape the logic and rule of the cases cited the defendant relies upon three or four cases, the first of which is Moores v. Citizens' National Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385. That case is distinguishable from the case at bar in this, that the court found, according to the fact, that the offending secretary was the authorized agent of the plaintiff in securing the issuance to her of certain stock of the corporation. From a misconception of the facts of that case and the rule therein laid down by the Supreme Court of the United States have arisen three or four other cases and numerous text-book quotations, where the general rule of law, that where one deals with an agent concerning a matter affecting his personal interest he is not justified in relying on the agent's statements and actions as being those of the principal, but must inquire of the principal himself, or of some disinterested agent having the power to speak for him, is applied to conditions of fact very like those now under consideration. But the application of this principle of law to such facts has been brought about, as we have said, by a misapprehension of the scope of the case of Moores v. Citizens' National Bank, supra, and of the facts with which it dealt. We do not deem it necessary to discuss those cases further than to say that they have in our judgment unduly extended the application of that rule, and that it is not applicable to the facts of the case at bar.

"It follows that the demurrer should have been overruled."

[3, 4] In its petition for rehearing the defendant insists that the doctrine stated in the foregoing opinion is contrary to the provision of section 324 of the Civil Code, to the effect that a transfer of shares of stock "is not valid, except as to the parties

thereto, until the same is" properly entered on the books of the corporation. In support of this claim it refers to Whitfield v. Nonpareil, etc., Co., 67 Wash. 286, 123 Pac. 1078, 41 L. R. A. (N. S.) 187, a case which, though cited in the briefs, is not noticed in the opinion of Justice Beasly. That case supports the respondent's claim, but we cannot agree with its reasoning. It rests in part on the fact that the Washington statute (Rem. & Bal. Code, § 3693) similar to section 324, was enacted long after the rule was established holding a corporation liable in damages for issuing a false certificate of stock, from which the inference was deduced that the purpose of the statute was "to relieve the corporation of the hardship of the rule as well as to protect it from liability from fraudulently issued stock." The fact stated may have been true of the Washington statute, but it is not true of the California statute on the subject. Section 324, enacted in 1872, was, so far as this provision is concerned, but a re-enactment of the statute of 1853. So far as we are aware or have been advised, the rule referred to was not established by any decision until many years later than 1853. The statute could not have been intended to change a rule that had never been announced. Furthermore, we think the Washington court mistook the basis of the liability of the corporation for fraudulently issued stock. It does not arise from anything that occurs in the making of a subsequent transfer. It comes from the false issue itself, which is the act of the corporation officers within the apparent scope of their authority, which, in effect, is a representation by the corporation itself to the purchaser from the original holder that the false stock is genuine. The rule does not estop the corporation from disputing the validity of a transfer or from refusing to enter the same on its books, but only from disputing the authority of its own officers to issue stock which it is admitted they did issue.

[5] The main reason for ordering a rehearing was a doubt whether the rule could be applied to a case where the officer to whom the stock had been issued pledged it to borrow money for his own use. We are satisfied that this has no bearing on the question. Where a third person deals with the officers of a corporation concerning the property of the corporation for a consideration personal to such officer and not for the benefit of the corporation, such third person, being aware of, or having reasonable cause to believe, the fact, is bound to inquire as to the authority of such officer to make such disposition of the corporate property. But here the stock was not the property of the corporation. On its face it appeared to have been the property of Lewis for more than two months prior to the pledge. The fact that it had been issued to Lewis, and that he was then the secretary of the corporation, did not give cause for suspicion that it belonged to the corporation, for it is usually the fact that the leading officers of a corporation own stock therein, and the certificate was itself the solemn declaration of the corporation, under its seal, that the stock belonged to Lewis, a declaration on which third persons had the right to rely. 1 Morawetz on Corporations, § 185.

The proposition that a corporation is estopped to deny that its officers were authorized to issue stock after it has passed into the hands of an innocent purchaser for value, and the proposition that the mere fact that it was issued to one of its own officers, raises no suspicion of their want of authority to issue it, are both decided in Smith v. Martin, 135 Cal. 251, 67 Pac. 779. See, also, Anglo-California Bank v. Granger's Bank, 63 Cal. 364.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; LENNON, J.; LAWLOR, J.

179 Cal. 759

J. B. HILL CO. v. PINQUE. (S. F. 8173.

(Supreme Court of California. Feb. 17, 1919.)

1. LANDLORD AND TENANT 🔑55(2), 111—FORFEITURE OF TENANCY—WASTE.

Commission of waste is not ground for forfeiture, the landlord's remedy being an action for damages.

2. LANDLORD AND TENANT 🔑108(1)—FORFEITURE OF TENANCY—NONPAYMENT OF RENT—DEMAND.

Where a lease provided for a monthly rental of $100 and landlord had agreed to a reduction and had for some months accepted such reduced rent, landlord's demand for rent, without specifying particular amount, was not the specific demand required by law on which to base forfeiture where lessee refused payment.

3. LANDLORD AND TENANT 🔑108(1)—FORFEITURE OF LEASE—DEMAND.

Lessee's refusal to pay rent does not authorize forfeiture of lease, in the absence of a proper demand for rent.

4. LANDLORD AND TENANT 🔑108(1)—FORFEITURE OF LEASE—DEMAND—WAIVER.

A waiver of proper demand for rent will not be implied for the purpose of forfeiture of lease because a forfeiture from its very nature cannot take place by consent and is not favored by law.

5. LANDLORD AND TENANT 🔑105, 134(3)—RESCISSION OF LEASE—USE OF PREMISES.

Under Civ. Code, § 1930, where lease provides that premises are to be used for fruit and vegetable business, lessee's use of the premises for other purpose renders lessee liable in damages, or authorizes lessor to rescind lease.

6. LANDLORD AND TENANT ⚷134(3)—USE OF PREMISES—GARAGE.

Where lease provided that premises were to be used for a fruit and vegetable business and that other business might be conducted with specified exceptions, lessee's use of the premises for a garage was authorized under the lease, where such use was not expressly excepted.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the J. B. Hill Company against Mary E. Pinque. Judgment for plaintiff, and defendant appeals. Reversed.

Everts & Ewing and South & Ross, all of Fresno (W. E. Simpson, of Fresno, of counsel), for appellant.

Harris & Hayhurst, A. M. Drew, and Drew & Drew, all of Fresno, for respondent.

SLOSS, J. This action was brought to recover the possession of certain premises, together with damages. The complaint was in two counts. The first set up, in ordinary form, a cause of action in ejectment. The second alleged that the premises, consisting of a storeroom, had been held by the defendant, Pinque, under a written lease from one Keosheyan, and that the plaintiff, who had acquired the interest of Keosheyan, had elected, under the terms of the lease, to terminate it, and forfeit the rights of the defendant.

Judgment went in favor of the plaintiff for the recovery of the premises, for $300, the value of the use and occupation, and for damages in the further sum of $509. The defendant, Pinque, appeals.

The lease from Keosheyan to Pinque was dated February 1, 1915, and ran for a term of nine years at a monthly rental of $100. It contained the following provisions material to this appeal:

> "That said storeroom is to be used by lessee for the wholesale, retail, and commission fruit and vegetable business in all its branches. * * *
>
> "It is further agreed that in the event lessee desires to make changes or improvement for the convenience of any business she desires to conduct, that she has the right so to do at her own expense, except lessee agrees not to change or conduct any business, like in kind to business in lessor's property at time of change, or conflicts with any lease in force at date hereof, between lessor and other persons, or open up shoe or clothing store within three months from March 1, 1915.
>
> "It is further understood and agreed in the event lessee shall make default in the payment of rent or refuse to comply with the terms, covenants and conditions of this lease on her part to be kept and performed, then said lessor reserves the right to terminate this lease and oust and eject lessee therefrom and that all moneys theretofore paid shall be retained by lessor as damages and rental on said premises."

[1] The second count sets up a forfeiture of the lease on the ground of nonpayment of rent. It also alleges that plaintiff has been damaged in the sum of $2,000 by the defendant's failure to keep the premises in good repair, by her occupation of them as an automobile garage, and by her removal of a portion of the foundation of the building, thereby causing the floor to settle, and injuring and damaging the premises. The only ground of forfeiture asserted in the complaint is the nonpayment of rent. The other acts charged against the tenant are set up merely as a basis for the recovery of damages. They could not, in any event, justify a forfeiture. There is neither allegation, proof, nor finding that the tenant was under any obligation to repair. The defendant had the right, as we shall show hereafter, to use the premises as a garage. The commission of waste is not a ground of forfeiture, the landlord's remedy being an action for damages. Chipman v. Emeric, 3 Cal. 273.

The findings follow the allegations of the complaint, except that they assess the damage for failure to repair, for use as a garage, and for injury to the building, at $509.

It was the settled rule at common law that a demand for payment of the exact sum due was a necessary prerequisite to a forfeiture of a lease for nonpayment of rent. 24 Cyc. 1355. The same rule was laid down in this state at any early date (Gage v. Bates, 40 Cal. 384; O'Connor v. Kelly, 41 Cal. 434), and these decisions have never been questioned (Mossi v. Fairbanks 19 Cal. App. 355, 125 Pac. 1071). The finding of the court is:

> "That there came due as rent, August 1, 1916, * * * the sum of $100, and said plaintiff did on August 1, 1916, demand payment thereof; that said defendant wholly failed, neglected, and refused to pay said rent."

[2, 3] The appellant contends that the evidence does not sustain the finding that such a demand was made, and the record, we think, requires that this contention be upheld. It appears without conflict that some months prior to August, 1916, the defendant had begun to use the premises as a garage. The portion of the building above the leased store was occupied as a lodging house, and its tenants were disturbed by the noise resulting for operations in the garage at night. The plaintiff agreed with the defendant that, if she would maintain quiet in the garage during the night hours, a reduction of $15 monthly in the rent would be made, and for three or four months prior to August the

sum of $85 per month had been paid and received as the rent of the premises. On August 1st the vice president of the plaintiff corporation called to collect the rent. According to his own testimony, he did not demand any specified amount, but "just asked for the rent." Under the strict rules governing attempts to enforce forfeitures, this was not the specific demand required by the law. It was at least doubtful whether the plaintiff was demanding the payment of $100 a month, as specified in the lease, or of the lesser sum fixed by the subsequent agreement of modification. At any rate, it certainly cannot be interpreted as a precise and specific demand for $100 per month, and this is the demand which the court found to have been made. Cases holding that a demand is not necessary where the defendant denies the relation of landlord and tenant (Smith v. Shaw, 16 Cal. 88; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237) have no application here. The defendant did not at any time deny the tenancy. On the contrary, she alleged, in her answer a tender of the rent due, and repeated the tender at the trial. The respondent argues than any defect in the demand became inconsequential because, as the court finds, the defendant refused to pay the rent. The plaintiff's own evidence shows that the refusal was not absolute, but that the tenant merely declined to pay pending an adjustment of a dispute concerning the plaintiff's right to make certain changes in the premises. But, even if the defendant had flatly refused to pay the rent, this would not authorize a forfeiture of her lease, in the absence of a proper demand. "Nor for the purpose of forfeiture, will a waiver of the demand ever be implied, because a forfeiture, from its very nature, cannot take place by consent, and it is not favored by the rules of law." Gaskill v. Trainer, 3 Cal. 334, 340.

[4] The plaintiff therefore failed to establish a ground for the forfeiture of the lease and recovery of the premises for nonpayment of rent. The judgment for damages for withholding the premises must fall, of course, with the judgment for restitution.

[5, 6] We find ourselves unable, likewise, to sustain the part of the judgment awarding damages in the sum of $509. By the lease the premises were let to be used for the fruit and vegetable business. If the instrument had stopped with this provision, it might well be claimed that any other use by the lessee would render her liable in damages, or authorize the lessor to rescind the lease. Civ. Code, § 1930. But the lease contains the further clause, above quoted, that the lessee may change the premises or conduct any other business, except certain specified kinds. The prohibited occupations thus excepted do not include the maintenance of a garage (in the absence, at least, of any claim that such business "conflicted with any lease" to other persons), and it is perfectly clear, therefore, that the lessee was not precluded from using the premises as a garage.

If the defendant was liable for waste in removing a portion of the foundation of the building, there is no separate finding of damage resulting from this act. The court finds that the plaintiff has been damaged in the sum of $509 by the defendant's occupation of the premises as a garage and her removal of a portion of the foundation. There is no way in which we can determine what portion of this damage the court attributed to one or the other of the supposed wrongful acts. Since, as we have seen, the defendant did not violate the terms of the lease by using the premises as a garage, the award of damages based in part on that ground cannot stand.

A number of other points are raised by the appellant, but the views we have expressed render any extended discussion of them unnecessary. The question of the sufficiency of the complaint may be obviated by an application to the court below for leave to amend. Any error that may have been committed in admitting in evidence the assignment of the lease from Keosheyan to the plaintiff without laying the proper foundation is not likely to recur upon a second trial.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LAWLOR, J.

179 Cal. 780

PEOPLE'S LUMBER CO. v. McINTYRE & PETERS et al. (L. A. 4516.)

(Supreme Court of California. Feb. 18, 1919.)

PARTNERSHIP ⚷55—EXISTENCE OF RELATION —EVIDENCE.

In an action against defendants as partners for materials furnished to one of them, evidence *held* insufficient to sustain a finding that a partnership existed.

In Bank.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by the People's Lumber Company against McIntyre & Peters, a copartnership, and others. Judgment for plaintiff against G. T. McIntyre and William L. Peters for material furnished to McIntyre, from which William L. Peters appeals. Reversed.

Purington & Adair and McFarland & Irving, all of Riverside, for appellant.

George E. Farrand, of Los Angeles, and Bowker & Sheridan, of Ventura, for respondent.

WILBUR, J. Plaintiff recovered a judgment against McIntyre & Peters for material furnished to McIntyre, it being alleged that Peters was a copartner of McIntyre, and the court so finding. Peters appealed from the judgment. At the time of the contract between the plaintiff and McIntyre the plaintiff had never heard of the alleged partnership, and its claim is therefore not based upon the theory of an ostensible partnership, but upon the character of the actual agreement between Peters and McIntyre. The finding that such partnership existed is attacked for lack of evidence to sustain it. The evidence is substantially without conflict. Both Peters and McIntyre were witnesses in the case, but neither testified to the existence of a partnership agreement between them. Their business relations were fixed by a written contract dated October 9, 1911. This contract did not of itself create a copartnership, but it is claimed that the subsequent letters and dealings between the parties justify the conclusion that a copartnership existed at the time plaintiff contracted with McIntyre.

To understand the relations of the parties it will be necessary to consider the terms of the written agreement and the evidence of subsequent dealings between the defendants. The written contract provided for a tentative arrangement between defendants for the doing of certain street work under the Vrooman Act, by contract, in the city of Pomona, and for the subsequent formation of a partnership, at the option of appellant, if the profits of such contracting in Pomona were sufficiently persuasive. The agreement also provides that, if no one of the street contracts at Pomona is awarded to McIntyre, that contract should terminate at once at the option of said Peters, or that "it may be continued in force until a contract other than the Pomona contract is secured by McIntyre satisfactory to said Peters, in which case the agreement and conditions of this contract in relation to the Pomona contracts shall be in force as to the new contract so far as they can be made to apply."

In pursuance of the agreement, McIntyre bid upon the Pomona contract, and Peters advanced money in connection therewith, as required by said contract, $1,400 of which was in the form of certified checks to be deposited with the bid as required by law. The agreement provided that Peters furnish $3,500—$2,100 in addition to the certified check. This was done, and the $2,000 was used in Pomona. A part of it was used for the purchase of the equipment used at Pomona, and $450 was taken as the monthly salary of McIntyre. McIntyre failed to secure the Pomona contract, and the certified check was returned to Peters October 31, 1911, and, as the contract provided, the relation between the parties thereto might have been terminated at the option of Peters, but McIntyre later showed an intention to try to secure other contract work. On February 6, 1912, McIntyre wrote Peters from Ventura, "I have landed two contracts for two reservoirs. C. M. Miller and I are going to contract together. He has a great part of the necessary equipment," and asks for a draft of $1,400. This was sent February 8th, in a letter wherein Peters said, "This to apply on contract same as the $2,000 sent you at Pomona." On February 11th McIntyre acknowledged receipt of the $1,400 "to apply on contract of October 9th," this being the preliminary written contract between Peters and McIntyre. He also sent an account showing $2,805 cash on hand, which, with $120 worth of equipment, three months' allowance to McIntyre of $450, and attorney's fees paid on the street contracts at Pomona, aggregated $3,400, which was the total amount up to that time received from Peters, and added "in regard to the work here and our arrangement. The contracts are taken in the name of G. T. McIntyre and C. M. Miller. We will both give our time to the work and make an even split in the profits. When we get to going here there will be an abundance of this work." The next letter to Peters, eight months later, states:

> "I have been endeavoring to get things in such condition as would permit me to make some sort of statement to you in regard to my financial condition, but seemingly I have either been too busy or too tired to attempt the task. * * * My experience with Miller was very unsatisfactory. * * * I have finished my third job for the Del Norte Water Company and the engineer is now reconciling the account for this work. At present, rather than giving you a detailed statement of expenses and receipts, it may be sufficient to say that I have almost a complete equipment for this sort of work—all sizes of pipe tools from 6 inch to 20 inch, concrete mixer, engine and pump for serving the yard with water or elevating the same to reservoir sites for construction, 36-foot sand elevator, etc., * * * and, when things are balanced, about $600 in the bank. This is a very poor financial showing when compared with the talk we had in Riverside nearly a year ago but to me it seems very good, having put my foot in it with Miller as I did on the start. * * * Will try and be more decent in the future."

The next letter from McIntyre to Peters was January 11, 1913, and stated:

> "I have endeavored for some months past to acquire time to give you an idea of what we are doing in Ventura county. The little stake taken up in that country last April has not done so well as we at first anticipated, but during the season we have completed paying for an equipment such as is necessary there, amounting to

approximately $4,000, and have cash resources to more than clear the original stake put into that section. It seems that it is impossible for me to get time enough even to give myself an accounting, but think this will be not altogether discouraging to you."

Six months later Peters pressed for further information, and on June 14, 1913, wrote to McIntyre, stating:

"I have not heard from you for a number of months as to how you are getting along with the business. It is hardly business for me to allow things to drift so without at least keeping in some touch with matters. I wish you would send me a report of what you are doing, what your assets are, what are the prospects and a general account of things."

January 17th McIntyre replied, saying, among other things:

"I have frequently planned sending you an intelligent statement of conditions here and always put off for a time when an inventory could be taken and no liability on hand. That time is now at hand. I am finished or have practically finished the work for the Del Norte Company and the individual owners. Have done considerable business with fair results but not so good as I had hoped. I will get to you a definite statement by Monday or Tuesday of next week. At present I may say that roughly estimating I have an equipment worth about $4,000 up and may be more. And when cement bills are cleaned up for this camp will have about $1,400 cash in bank. I am moving now on to a very promising job." Then followed a statement of camp equipment, and reference is also made to a new job. "It is a $14,000 job. Will get you some definite matter by Tuesday next. I look for better results on the coming work."

June 23, 1913, McIntyre writes, saying it is impossible to get off the promised statement. October 24, 1913, McIntyre writes Peters, inclosing a statement of the financial condition of the business in Ventura county. He says:

"This showing is probably not as good as I have desired but on the whole under the conditions, it looks fair to me. Since we commenced operation in that county it has seemingly been very difficult to get a good organization. This you probably understand, as you have the same conditions to deal with at times. * * * No books have been kept. The segregated time sheets are filed and bills are paid by voucher when possible, but a great deal of money has been spent almost promiscuously, and I feel that the loss has been very great. * * * I frequently think that I would like to see you and give you more information regarding the investment, but somehow when I get into town every moment is taken," etc. "I trust the statement will not be discouraging and will endeavor to send you an itemized list during the coming week."

Then follows a statement in which is included the item of $1,700.71 due the plaintiff lumber company.

McIntyre, called as a witness, testified:

"I made profits on the contracts which I have had since I signed this agreement with Mr. Peters, but there was no division of profits made between Mr. Peters and myself, and no statement or statements of profits were made to Mr. Peters other than the statements introduced in evidence. Mr. Peters and I never had a settlement with reference to the contracts. I think that I had at times enough money to pay the debts incurred in the business carried on under my agreement with Mr. Peters. I believe at that time I had enough money in the bank to meet such indebtedness, but I am not positive."

It is obvious from this correspondence that McIntyre never asked Peters to exercise his option to enter into the copartnership. Peters was unable during all this time to get any adequate statement from McIntyre as to the condition of his affairs. Under the contract Peters had a right to wait for the performance of some contract which, in substitution for the Pomona contracts, was to determine the question as to whether or not the business was profitable. McIntyre entered into a partnership agreement with Miller for the doing of the work, and never made Peters any statement from which Peters could determine whether or not the business was profitable. The fact that Peters showed an interest in prospective contracts and apparently attempted to direct McIntyre's attention to possible contracts, in view of the written agreement between the parties and the investments already made by Peters, is of no significance. McIntyre never referred to Peters as a partner. He was transacting his business either in his own name or in the name of McIntyre & Miller. There is no evidence and no claim that Peters ever by any direct statement or agreement exercised the option given him to create a partnership. No partnership agreement was entered into between them. No adjustment of their rights under the first contract was ever made. In urging that there was a partnership the plaintiff is in no better position than McIntyre. The original agreement between the parties is ample explanation for the connection of Peters with McIntyre, and Peters was entitled to rely upon the fact as to third parties that he was not being held out as a partner, and therefore was justified in a continued effort to secure from McIntyre some evidence that a partnership would be profitable to him. One other transaction between McIntyre and Peters requires notice. In January, 1914, Mr. Peters went upon a contractors' bond for McIntyre, amounting to $5,000, and thereafter signed notes with McIntyre, but not in any firm name, for $4,000, for the purpose of financing the contract covered by the bond. Mr. Peters testified that he consented to sign the bond solely upon the representation of McIntyre that he would be able to finance the job without any assistance from Peters. A few days after the bond was signed, however, McIntyre came to Peters, stating that he could not finance the job and asking that he sign the above-mentioned notes, which was done. Apparently the notes were paid from the proceeds of the contract in question, with the exception of $778.89. Under the contract of October 9, 1911, it was agreed that Peters should advance money for the purchase of equipment, and that that equipment should be purchased in his name and be his property. On December 24, 1914, Peters suggested to McIntyre a settlement of their affairs, by the terms of which Peters was to convey all the equipment to McIntyre and take a chattel mortgage back for the $3,400 advanced and for the $778.89 remaining due on the note that was signed by Peters, making a total of $4,178.89. Mr. McIntyre apparently acquiesced in the plan, but never carried it out.

In considering whether or not Peters ever exercised his option to enter into a partnership with McIntyre under the terms of the contract of October 9, 1911, other provisions of that contract must be noted. It was recited in that contract:

> "Whereas McIntyre is desirous of engaging in the general contracting business, particularly that of street paving and cement contracting, and has not funds at his command to do so, and desires to interest Peters in said business with him, and said Peters wishes to engage in said business, if it is proven to be profitable to him and the conditions of same are proven satisfactory to him, and whereas said McIntyre represents himself as a person skilled in the estimation and execution in an economical and profitable manner of such contracting work, and whereas said McIntyre has estimated on two street paving jobs now being opened to bids at Pomona, Calif., and desires to submit bids on same, now therefore in order to determine whether the said contracting business is profitable enough and satisfactory so as to appeal to said Peters as a permanent investment, the said parties agree with each other as follows."

It was further agreed that the bids on the Pomona job should be made at a price that would net a profit of 20 per cent., namely, a profit of $4,000. Peters was to advance $3,400, $3,100 of which was to be used in the purchase of tools, "said equipment to be bought in the name of and remain the property of said Peters." Arrangement was then made with reference to the disposition of the assets in the event that Peters did not desire to continue. But it was provided, among other things, that if Peters desired to continue in the contract business, he was to receive the entire net profits until half his investment had been repaid, whereupon the equipment was to belong to the copartnership. These profits were to be paid upon the completion of each contracting job. Books of accounts were to be kept. Peters was to have the deciding voice as to all matters until he had received sufficient profits to repay him half of his investment. McIntyre never called upon Peters to elect whether he should or should not go on with the business. No showing of sufficient profits was made to justify Peters in entering into a copartnership. No books were kept of the affairs of the alleged copartnership. In short, the situation seems to be simply this: Under a preliminary contract Peters advanced, as he agreed to do, $3,400, which was, under the contract, to be employed in the purchase of equipment which thereafter belonged to Peters. McIntyre thereafter continued to use Peters' property, with meager and unsatisfactory reports of what he was doing, with no showing of profits and without requesting or suggesting or intimating to Peters that he should elect or had elected to be a partner. Peters in the meantime allowed McIntyre to continue to use his equipment, waiting with more or less patience the results of McIntyre's work. As between himself and the public, he had a right to rely upon the fact that he was not being held out as a partner, and as between McIntyre and himself he had a right to rely upon the fact that he never had elected to become a partner.

We therefore conclude that the finding that Peters was a partner of McIntyre is not sustained by the evidence.

The judgment against the defendant Peters is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; LAWLOR, J.; LENNON, J.

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179 Cal. 774

UNION COLONIZATION CO. et al. v. MADERA CANAL & IRRIGATION CO.
(Sac. 2664.)

(Supreme Court of California. Feb. 18, 1919.)

1. WATERS AND WATER COURSES ⚷247(1)—FINDINGS—CONSTRUCTION.

Finding that water to the extent of 200 cubic feet per second is reasonably necessary for the irrigation of defendant's lands *held* a finding on an issue raised by plaintiff's complaint that 100 cubic feet of water was all that was necessary for the irrigation of such land.

2. APPEAL AND ERROR ⚷994(3), 995—REVIEW—WEIGHT OF TESTIMONY—CREDIBILITY OF WITNESSES.

Questions of weight of evidence and credibility of witnesses are for the trial court.

3. APPEAL AND ERROR ⚷1011(1)—REVIEW—FINDINGS—CIRCUMSTANTIAL EVIDENCE.

Trial court's conclusions on disputed issues of fact are conclusive on appeal, where supported by substantial evidence.

4. WATERS AND WATER COURSES 🔑247(1)—APPROPRIATION—IRRIGATION.

In action to determine extent of defendant's right to divert water from certain river, the court, in determining the amount of water in fact used by defendant as an appropriator, should be liberal, to the extent at least that it should not deprive him of any portion of the amount of water that he had in fact used for the period necessary to gain title by prescription, unless it clearly appears that he has used more than was reasonably necessary.

5. WATERS AND WATER COURSES 🔑247(1)—IRRIGATION—RIGHT BY PRESCRIPTION.

An appropriator will be presumed to have used no more water for irrigation purposes than was reasonably necessary.

6. WATERS AND WATER COURSES 🔑247(1)—IRRIGATION—SUFFICIENCY OF EVIDENCE.

In action to determine extent of defendant's rights to divert water from certain river, evidence *held* to sustain finding that 200 cubic feet per second was reasonably necessary for irrigation of defendant's lands.

7. APPEAL AND ERROR 🔑1052(5)—REVIEW—HARMLESS ERROR—EVIDENCE.

In action to determine extent of defendant's right to divert water from river, introduction in evidence of judgment in other action determining amount reasonably necessary to irrigate the defendant's lands, if error, was harmless, where the court found that only 200 cubic feet per second was necessary as against 250 feet decreed by such judgment.

8. EVIDENCE 🔑546—EXPERTS—DETERMINATION AS TO COMPETENCY.

Whether witness is qualified to testify as an expert is for the trial court, in the determination of which the court has a wide range of discretion.

9. APPEAL AND ERROR 🔑1050(1)—REVIEW—HARMLESS ERROR.

In action involving right to divert water for irrigation purposes, the introduction in evidence of United States reclamation service reports relative to operation and maintenance of reclamation projects, some of them in other states, was not ground for reversal, where substantially similar testimony was admitted without objection.

In Bank.

Appeal from Superior Court, Madera County; George E. Church, Judge.

Action by the Union Colonization Company and others against the Madera Canal & Irrigation Company. From a portion of the judgment, plaintiffs appeal. Affirmed.

Short & Sutherland, of Fresno, and Edward F. Treadwell, of San Francisco, for appellants.

Robert L. Hargrave, of Madera, for respondent.

SLOSS, J. This action was brought in the superior court of Madera county by owners of lands riparian to the Fresno river to determine the extent of the right of the defendant to divert waters from said river. The suit was instituted in 1900 by California Pastoral & Agricultural Company, Limited, and others, then the owners of the lands alleged to be affected by the diversion complained of. A trial resulted in a judgment declaring that the defendant, Madera Canal & Irrigation Company, was entitled to divert and take from the Fresno river water to the extent of 250 cubic feet running per second when there was sufficient water to furnish that amount, and all of the waters flowing in the river at the point of diversion when there was less. The plaintiffs appealed from the judgment and from an order denying their motion for a new trial, and the judgment and order were reversed. Cal. Past. & Agr. Co. v. Madera Canal & Irr. Co., 167 Cal. 78, 138 Pac. 718. The court below had found that the amount of water allowed had been diverted by the defendant for the statutory period and beneficially used in the irrigation of lands lying under the flow of defendant's system of canals and ditches, but that a smaller amount would be sufficient to irrigate the lands which had been, during said period, irrigated by the defendant. In its findings, the court declared itself to be unable to determine the exact amount of water that would be sufficient for that purpose. Upon the appeal, this court held that the right of the appropriator was limited to the amount of water "reasonably necessary to be diverted from the river for the proper irrigation of the lands irrigated by defendant by means of its system." A finding of the amount reasonably necessary for this purpose was declared to be essential.

Following the judgment on the former appeals, the present plaintiffs were substituted as successors to the interest of the original complainants. There was a new trial, which resulted in a judgment declaring: (1) That the defendant is entitled to divert and take from the Fresno river water to the extent of 200 cubic feet per second when there is sufficient water in the river to furnish that amount, and all of the flow when there is less; (2) that the plaintiffs are entitled to the full flow of all of the waters of the river in excess of the amount awarded to the defendant; and (3) that the defendant be enjoined from taking or diverting from said Fresno river any water in excess of the amount to which it had been declared to be entitled. The plaintiffs appeal from the first part of the judgment, i. e., that declaring the defendant's right to divert water to the extent of 200 cubic feet per second.

The complaint alleged that—

> "One hundred cubic feet of water flowing per second is all the water which was or is reasona-

bly required for the irrigation of all of the lands irrigated from or under defendant's said canals."

[1] It is claimed that the court failed to find on the issue thus tendered. But finding 11 made by the court fully covers and disposes of this matter. That finding declares, in effect, that for more than five years next preceding the commencement of the action the defendant has continuously, openly, and uninterruptedly, and adversely to the plaintiffs and to all the world, appropriated, taken, and diverted from the Fresno river into and through its canals, water to the extent of 200 cubic feet running per second when there was sufficient water in the river to furnish that amount, and, when the water in the river was insufficient, has taken, diverted, and appropriated all the waters flowing in the river, and has distributed, sold, and used the same for the purpose of irrigation; that the water so appropriated and diverted has been by the defendant "distributed, rented, sold, and used beneficially for the purpose of irrigating a large body of land, viz., about 14,000 acres, lying under and irrigable from defendant's system of canals; and that the same and the whole thereof has been and is reasonably necessary for the due and proper irrigation thereof." The finding thus declares in terms that water to the extent of 200 cubic feet per second is reasonably necessary for the irrigation of the lands served by the defendant, and this is, of course, a direct negation of the averment that 100 cubic feet is all that is required for that purpose.

[2, 3] The principal question presented on this appeal is that of the sufficiency of the evidence to sustain the finding to which we have just referred. The appellants contend with great vigor that the evidence establishes that the company did not, during the five years preceding the action, irrigate in excess of 10,000 acres, and that a continuous flow of 200 cubic feet would be adequate to irrigate land far in excess of 10,000, or even of the 14,000 acres which the court finds to have been supplied by the defendant's system. We see no occasion to go into a detailed analysis of the great volume of evidence embodied in the bill of exceptions, which contains over 700 printed pages. The earnestness and zeal of appellants' counsel seems to have led them to the conviction that the court below should have given credence to the testimony supporting their contention, and rejected everything in conflict therewith. An argument based on such a view cannot, of course, receive favorable attention here. Questions of weight of evidence and credibility of witnesses are for the trial court, and its conclusion on disputed issues of fact must be accepted as controlling on appeal, where that conclusion has the support of substantial evidence. We are satisfied that the finding attacked has such support in this case. On the essential elements involved there was a sharp conflict. There was abundant evidence tending to show that for the statutory period preceding the commencement of the action the defendant had actually diverted a flow equal to, or exceeding, 200 cubic feet per second when that amount of water was flowing in the river. There was evidence to show that the amount of land actually irrigated by the canal system was almost, if not quite, equal to 14,000 acres. This sufficiently supports the finding, which, as we have seen, fixes the amount at "about 14,000 acres." The essential point in the finding is not whether the area irrigated equaled the exact amount stated, but whether the 200 feet allowed to the defendant was reasonably necessary for the irrigation of the area actually supplied, be that area a little more or less. On this last factor in the problem both parties introduced considerable evidence. Suffice it to say that the defendant presented abundant proof in support of the conclusion that the quantity allowed by the judgment was not more than enough, if, indeed, it was enough, to properly supply the land which had been taking water from the system.

[4, 5] In considering the evidence bearing on this issue, the court below was probably guided, as we must be now, by the views declared by this court on the former appeal. It was there said:

> "In determining how much of the water in fact used had been reasonably necessary for the purpose for which it was used, we believe that a court should be liberal with the appropriator to the extent at least that it should not deprive him of any portion of the amount of water that he had in fact used for the period necessary to gain title by prescription, unless it is clearly and satisfactorily made to appear that he has used more than was reasonably necessary. The presumption would appear to be in his favor, for ordinarily one would not take pains to use upon any land more than was reasonably necessary under all the circumstances."

[6] Bearing these considerations in mind, it must be held that the court below did not, in making the finding complained of, go beyond the point permitted by a fair and reasonable interpretation of the evidence.

It is further claimed that the court erred in several rulings.

[7] The defendant was allowed to plead by supplemental answer, and to offer in evidence, a judgment entered in an action brought in the superior court of Merced county by Miller & Lux (a corporation), which concededly was acting on behalf of all of the parties plaintiff in this case, against the defendant herein. That action, which was begun during the pendency of the present one, was brought to enjoin a threatened diversion of water, alleged to be in ad-

dition to that involved in this action. An appeal was taken from an order granting a preliminary injunction in the Merced county case, and the order was affirmed by this court. Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391. Thereafter the cause was heard on the merits, and the judgment now under discussion entered. That judgment enjoined the defendant from diverting more than 250 second feet from the Fresno river, but contained other provisions making it manifest that the court was not, in that action, attempting to pass upon the question in litigation in this action, viz., the extent of the prescriptive right of the defendant, but was merely fixing the amount of the permitted diversion provisionally, i. e., for the purposes of the Merced county suit, and pending the final determination of the present action. It may be that the court below should not have permitted that judgment to be pleaded or proven herein, but the error, if any was committed, was harmless. The judgment was certainly not treated as constituting an adjudication that the defendant was entitled to divert 250 second feet, for the judgment herein limits it to 200 feet. The court below seems to have entertained the idea that the Merced judgment established a prima facie case in favor of the defendant's right to divert 250 feet. But even this view, if erroneous, seems to have had no substantial effect upon the ultimate result, for the court, in cutting the amount allowed down to 200 feet, must have regarded the supposed prima facie showing as overcome by the evidence outside of the judgment.

[8] The other assignments of error are not of sufficient importance to merit extended discussion. The witness Smith was permitted, over the objection of the plaintiffs that he had not been shown to be qualified, to give an opinion regarding the amount of water reasonably required for the irrigation of lands under the defendant's system. We think there was no error in this ruling. Whether a witness is qualified as an expert is to be determined in the first instance by the trial court, and in so deciding the trial court has a wide range of discretion. Howland v. O. C. S. Ry. Co., 110 Cal. 513, 521, 42 Pac. 983; 25 A. & E. Ann. Cas. 817. In view of the witness' statements regarding his experience and study, the court did not abuse its discretion in permitting him to answer the question. In any event, the ruling was of slight importance, since the testimony was merely corroborative of that given by many other witnesses who testified without objection.

[9] Finally, it is urged that the court should not have permitted the defendant to introduce in evidence a report of the United States reclamation service relative to the operation and maintenance of reclamation projects, some of them in other states. These reports, and some testimony given in relation thereto, were, perhaps, not very directly relevant to the subject under inquiry here. But considerable evidence of substantially like import was introduced without objection, and the rulings in question were not of sufficiently serious import to constitute ground for reversal.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; LENNON, J.; LAWLOR, J.

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179 Cal. 764

MILLER & LUX INCORPORATED v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (S. F. 8853.)

(Supreme Court of California. Feb. 17, 1919.)

1. MASTER AND SERVANT 🔑417(3)—WORKMEN'S COMPENSATION ACT—FINDINGS BY INDUSTRIAL ACCIDENT COMMISSION—REVIEW.

Findings of fact by which Industrial Accident Commission determines itself clothed with jurisdiction are reviewable by Supreme Court on certiorari.

2. MASTER AND SERVANT 🔑347—WORKMEN'S COMPENSATION ACT—NATURE AND THEORY OF LIABILITY.

Workmen's Compensation Act 1913 is held constitutional only because it imposes a charge, not only upon individual employer, but upon branch of industry in which he is engaged, and gives employer opportunity to protect himself by proper insurance.

3. MASTER AND SERVANT 🔑363—WORKMEN'S COMPENSATION ACT—AGRICULTURE.

Under Workmen's Compensation Act 1913, § 14, if a worker upon farm may be reasonably classified as one engaged in agriculture, his employer is not liable under Compensation Act.

4. MASTER AND SERVANT 🔑363—WORKMEN'S COMPENSATION ACT—"ENGAGED IN FARM LABOR."

A workman whose sole duty is to repair wagons in shop operated on farm for purpose of keeping agricultural implements and vehicles used on farm in order is "engaged in farm labor" within meaning of Workmen's Compensation Act 1913, § 14.

In Bank.

Proceedings under the Workmen's Compensation Act by W. V. Fish, to obtain compensation for personal injuries, opposed by Miller & Lux Incorporated, the employer. There was an order of the Industrial Accident Commission in favor of the applicant, and the employer brings certiorari. Award annulled.

Edward F. Treadwell, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondent.

MELVIN, J. Certiorari to review an award of the Industrial Accident Commission in favor of W. V. Fish and against petitioner Miller & Lux Incorporated.

The findings of the Industrial Accident Commission upon which the attack of petitioner's counsel is directed, are as follows:

> "(1) That W. V. Fish, hereinafter called the employé, the applicant herein, was injured on the 15th day of December, 1917, at Buttonwillow, Kern county, Cal., while in the employment of defendant, Miller & Lux Incorporated, hereinafter called the employer, as a wagon maker in a shop operated by the employer for the sole purpose of repairing vehicles and implements used by the employer in its farming operations, the whole time of the employé being given to said occupation.
>
> "(2) That said injury arose out of and in the course of said employment, was proximately caused thereby, and occurred while the employé was performing service growing out of and incidental to the same, as follows: His right hand was caught in a moving planer, the wound becoming infected.
>
> "(3) That the time of said injury the employé was not engaged in any of the occupations or employments excluded by section 14 of the Workmen's Compensation, Insurance and Safety Act of 1913 from the provisions of said act, and that said injury was not caused by willful misconduct or intoxication of the employé."

[1] It is argued by the counsel for respondent that the third finding is conclusive—that in such cases we cannot go behind the determination of the commisioners upon matters of fact. In this behalf he cites Smith v. Coles (1905), 93 L. T. 754, 8 W. C. C. 116 (Minton-Senhouse). It is true that in that case, in which the county court judge had found that a carpenter employed about a farm as a handy man was a workman in agriculture, certain of the justices held that, there being evidence to support the finding, they might not upset it, but in the matter at bar the learned commissioners found as a probative fact that the applicant was employed "as a wagon maker in a shop operated by the employer for the sole purpose of repairing vehicles and implements used by the employer in its farming operations, the whole time of the employé being given to said occupation." It is clear, therefore, that the ultimate finding is really based upon the probative facts found, and if they fail to establish the jurisdiction of the commission petitioner must succeed. Findings of fact by which the Industrial Accident Commission determines itself clothed with jurisdiction are reviewable by this court. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35. The sole question, therefore, is whether or not a workman, whose sole duty is to repair wagons in a shop operated on a farm for the purpose of keeping the agricultural implements and vehicles used on the farm in order, is engaged in farm or agricultural labor within the meaning of section 14 of the Workmen's Compensation Act. St. 1913, p. 284.

[2-4] At the threshold of the inquiry we should keep in mind the fact that the Compensation Act is held constitutional only because it imposes a charge, not upon the individual employer, but upon the branch of industry in which he is engaged, and gives the employer opportunity of protecting himself by proper insurance. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398. The law of California has exempted the farming industry from the operation of this statute, and if a worker upon a farm may be reasonably classified as one engaged in agriculture, his employer is clearly entitled to the benefit of this exemption. While it is true that an employer may be engaged in several sorts of industry, some of them within and some of them without the purview of the Compensation Act, and that an employé may at different times do work of one kind or the other, it is equally a fact that, where from the great extent and complexity of farming operations on a given rancho the work of the farmers is classified, and each is given a limited, rather than a diversified, duty, that circumstance alone will not make some of them artisans rather than agriculturists. Numerous illustrations suggest themselves. If the mower who stops to use a whetstone on his scythe remains a farmer, is the boy who is set to work sharpening all the farming tools used on the place engaged in an occupation entirely outside of farming? Clearly not. So it has been held that a woodchopper or one removing stumps or brush from a farm is not an artisan within the contemplation of the act. Miller v. Algar, 2 I. A. C. Dec. 558; Martin v. Russian River Fruit & Land Co., 1 I. A. C. Dec. (part 2) p. 18; Whitney v. Peterson, 1 I. A. C. Dec. 306. Commenting upon two of the authorities last cited, this court (all the justices participating) has used the following language:

> "The Accident Commission has held that a woodchopper engaged in cutting and burning trees in clearing land for farming purposes is engaged in farm labor. Whitney v. Peterson, 1 Decisions of the Industrial Accident Commission of California, p. 306. It has also been held that when land has been cleared for agriculture, one who operates a saw to cut the wood on the cleared land into suitable lengths for sale is engaged in farm labor. Miller v. Algar, 2 Industrial Accident Decisions, 584. If Snow had been found to be an employé on the farm who, as part of his duties, was required to repair the tractor, we could not see how he could be adjudged not a farm laborer under those decisions."

Maryland Casualty Co. v. Pillsbury,

172 Cal. 748, at page 750, 158 Pac. 1031, at page 1032.

This aspect of the matter has been aptly discussed by the Supreme Court of New York in the case of Coleman v. Bartholomew, 175 App. Div. 122, 124, 161 N. Y. Supp. 560, 561 as follows:

> "It was the clear intent of the Legislature to exclude farm laborers from the benefits of the Compensation Law, and it only remains for us to define 'farm laborers.' The common hired man on a farm is required to perform a great variety of work. His duties are not confined to plowing, planting, and harvesting. Tilling the soil and garnering the crops may be the principal work of the farm laborer, but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harnesses, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is a part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new point on a plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market, and innumerable other familiar duties."

In that case the farm laborer was engaged, when injured, in repairing the roof of a barn.

But, at the outset of the argument in his brief, counsel for the Industrial Accident Commission insists that the question before us has been settled in California adversely to petitioner's contention, and cites in that behalf George v. Industrial Accident Commission, 174 Pac. 653, and Miller & Lux Incorporated v. Industrial Accident Commission, 32 Cal. App. 250, 162 Pac. 651. We cannot agree with that view. In the George Case the claimant was found to be engaged in two occupations for the same employer, and his duty at the time of the accident was found to be that of a gardener. This court sustained the Industrial Accident Commission upon the finding that in his capacity as a gardener the applicant might not recover —a conclusion which supports rather than opposes the argument of petitioner in the matter now before us. The other proceeding dealt with a case in which a man was and had been for many months engaged in the building of a house and was injured while so occupied. The Industrial Accident Commission found that petitioner was engaged in the business of wholesale and retail butcher, wholesale and retail merchandising, farming, horticulture, and real estate dealing. It did not appear that the house which the injured man was helping to build was to be used for any particular sort of fellow workmen. In this state of the record the learned District Court of Appeal used the following language in the opinion:

> "We are unable to follow the refinement of the petitioner's reasoning so far as to hold that because the operations of the petitioner are so diversified and extensive as to require regular employment of carpenters in the construction, improvement, and repair of buildings upon the ranch properties, that such artisans when so employed are to be regarded as engaged in farm labor."

In the matter now under discussion there was an entirely different record involving the employment of the workman upon repair of vehicles used in the farming operations of his employer alone.

While the authorities on this branch of the compensation statutes of the various jurisdictions are somewhat in conflict, the weight and the better reasoning support the contention of petitioner that the repairing of farming machinery on the farm, in a shop devoted to such repairs, is an agricultural pursuit, and is one of the employments excluded by provisions similar to section 14 of the Workmen's Compensation Insurance and Safety Act.

In Shafer v. Parke, Davis & Co., 192 Mich. 577, 159 N. W. 304, the workman was injured while engaged in caring for horses on a farm. While the farm was one owned by a manufacturer of chemicals and was conducted principally for the production of serums for the laboratory, the Supreme Court of Michigan held that the injured man was a farm laborer. Respondent's counsel insists that this case supports his contention that the statute does not classify the employé by the ordinary business of his employer, but by the kind of work he, himself, is employed to do. This is only partly true because in determining the class of labor in which an employé is engaged, it is often necessary to take into consideration the work ordinarily done by persons in the kind of business which the employer is conducting. A man repairing broken harness for use on a farm is, in a sense, doing the same sort of work to which he might be assigned in a saddler's shop in town, but that mere fact does not classify him as a person engaged in manufacturing because the custom of farmers, from time immemorial, has been to make minor repairs of that sort. There are good examples of the rule that laborers may be classified as farm workers, although not actually tilling the soil. Such illustrations are to be found in those decisions upon statutes giving to agriculturists liens for their work. A cook for a threshing crew, who asserted a lien as a farm laborer, was held to be entitled to it, as her work contributed directly to the garnering of the crops. Stevenson v. Magill, 35 N. D. 576, 160 N. W. 700, L. R. A. 1917D, 377. In Winslow v. Urquhart, 39 Wis. 260, a cook for a logging crew was held to be performing labor in cutting and moving logs; and in Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545, a cook for the men in a logging camp, and a blacksmith employed to mend the tools and sleds and to shoe the horses used in the logging business were both held to be entitled to liens under a like statute. Our own Industrial Accident Commission of California has decided that a cook employed on a cattle ranch to prepare meals for the workmen was engaged in farm labor and stock raising, and was excluded from the provisions of the Compensation Act. Olsen v. Rogers Development Company, 2 Ind. Acc. Com. 560.

In Sylcord v. Horn, 179 Iowa, 936, 162 N. W. 249, it was decided that one assisting in the operation of a corn shredder on a farm is a "laborer engaged in agricultural pursuits."

In State v. District Court of Watonwan County, 140 Minn. 398, 168 N. W. 130, a man who fell from a harvester upon which he had been making repairs was held to be a "farm laborer," the court following Sylcord v. Horn, supra, and citing without approval White v. Loades, 178 App. Div. 236, 164 N. Y. Supp. 1023, which was a case of a man injured while putting a threshing machine in a barn. While it is declared in the opinion in the case last cited that "a man who is traveling through the country with a machine, and stopping from place to place to thresh out the grain and beans of the farmers for a compensation, is not engaged in farming, and his employés are not farm laborers," compensation seems to have been awarded upon the theory that at the time of the accident the employé was engaged in the "operation of a vehicle," and was thus brought within the scope of the compensation statute of New York.

In Vincent v. Taylor Bros., 180 App. Div. 818, 168 N. Y. Supp. 287, a workman connected with a traveling thresher was injured while feeding bundles into that machine on a farm on which his employer had undertaken to do the threshing. The work was found not to be "milling," as the commission had declared it to be, and the award was therefore set aside. The court held that the facts did not bring the accident under the rule of White v. Loades as to vehicles, but followed that case upon the dictum that the employé was not a farm laborer. However, the case was sent back for further hearing, Mr. Justice Lyon, who prepared the opinion, using the following language:

> "Whether facts may have been disclosed by the investigation of the commission, which do not appear in the record, but which influenced the deputy commissioner, before whom the proofs were heard, to make the award—for instance, that the employers were in fact engaged in the milling business, and that the threshing was incidental to their acquiring the grain for such business—does not appear, nor has the commission so found."

In re Boyer (Ind. App.) 117 N. E. 507, holds squarely, however, that a man is not a farm laborer who works on a separator that goes from farm to farm, and is operated as an independent business, although the injury was received while the claimant was threshing wheat. The decision really rests upon an analogy between the threshing by an independent contractor and the work of a miller. The following sentence in the opinion illustrates well the fact that the "threshing machine cases" are of small value in deciding the question now before this court:

> "If farmers generally owned threshing outfits, and were in the habit of threshing their own grain, and the claimant had been employed by the farmer to assist in the work of threshing, and had been injured while doing such work, a more serious question would be presented."

That a farm laborer who assists his employer during the winter in getting out logs cut on the farm is nevertheless a farm laborer when so doing was held in Brockett v. Mietz, 184 App. Div. 342, 171 N. Y. Supp. 412.

It was held, however, that a country club which cut and sold lumber regularly from a large tract of land owned by it was engaged in logging for pecuniary gain, although the work was incidental to the main business of operating a country club. Uhl v. Hartwood Club, 221 N. Y. 588, 116 N. E. 1000.

From the foregoing it appears, we think, that the great weight of authority, as well as the better reasoning, brings the claimant who was repairing vehicles and implements on the farm within the class of persons excluded from the operation of the Compensation Act because engaged in "farm labor."

The award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.

39 Cal. App. 384

BENNETTS v. OCCIDENTAL LIFE INS. CO. (Civ. 2856.)

(District Court of Appeal, Second District, Division 2, California. Jan. 17, 1919.)

INSURANCE ⚿455—ACCIDENT INSURANCE—EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS.

In action on accident policy, evidence that insured undertook to help another to lift pipe out of sump hole, and in so doing did not slip or lose hold, while the pipe did not touch him in any way, after which he was taken ill and died, *held* insufficient to sustain plaintiff's burden to prove death resulted from bodily injuries through external, violent, and accidental means.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Hattie M. Bennetts, a widow, against the Occidental Life Insurance Company, a corporation, resulting in judgment for defendant. From an order granting new trial, defendant appeals. Reversed.

T. F. Allen, of Bakersfield, and Benjamin E. Page, of Los Angeles, for appellant.

F. E. Borton and Rowen Irwin, both of Bakersfield, for respondent.

THOMAS, J. This is an action brought by plaintiff against defendant to recover the sum of $2,000 upon an accident insurance policy. Defendant issued the policy set forth in the complaint, by the terms of which it insures William J. Bennetts against "death or disability, while sane, and resulting directly and independently of all other causes from bodily injuries, effected through external, violent, and accidental means." The policy was issued on the 26th day of June, 1909, to be in force for a period of 12 months from said date. The insured died on August 11, 1909.

The ground upon which this action was brought was that the death of the insured "resulted directly and independently of all other causes from bodily injuries, effected through external, violent, and accidental means." This contention was denied by defendant. There were two other defenses interposed by defendant, but as no evidence was offered in support thereof, they are immaterial here.

The case was tried by the court without a jury. The court found "that the death of said William J. Bennetts did not result directly and independently of all other causes from bodily injuries effected through external, violent and accidental means," and further found that the death of said William J. Bennetts did not result from "external means, * * * violent means, * * * or accidental means," and judgment went for defendant accordingly. This appeal is from the order granting a new trial.

On the day of the alleged accident it appears without conflict that the said insured was assisting one M. R. Craig in pulling out of a sump hole a swing pipe, which had gotten clogged therein. The said insured took hold of the pipe a little ahead of the place where said Craig had hold thereof, and with said Craig pulled on it. The said Craig cautioned him to pull slowly, and told him that the pipe "would have to come slow." While so engaged both men were leaning in front of a rail, pulling, and while so doing Craig heard the insured "give a kind of a grunt, but didn't say anything then." Then they continued to pull, and, in the language of Craig, "pulled it out easily." That night, or the next morning, the insured was taken ill. From this illness, regardless of the cause, he never recovered, his death occurring on August 11, 1909.

It appears that his physical condition and state of health prior thereto for a long time, with one exception, had been very good. That exception was that either in 1905 or 1906 he had undergone a successful operation for appendicitis, since when "he had never made any complaint of illness; never had an ache or pain."

After being taken from the hospital, on the occasion of his last illness, another operation was performed by the attending physician and surgeon, within the abdominal cavity, where there was found "a band surrounding a portion of the small intestine, and which condition was relieved by the operation"; but the insured died on the fifth day thereafter.

Two points urged by appellant need our consideration. The proper answer to the question, "Did the death of the insured, under the circumstances disclosed by the evidence here, result from bodily injuries effected directly and independently of all other causes, through external, violent, and accidental means?" will dispose of both. Obviously, if the answer be in the affirmative, the order granting a new trial herein was properly made; otherwise, it must be reversed.

The Supreme Court of this state, in the well-considered case of Rock v. Travelers' Insurance Co., 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196, in a learned opinion written by Justice Sloss for and adopted by that court, sitting en banc, has, as we view it, construed the phrase "bodily injury effected through external, violent, and accidental means." The facts in that case were more favorable to the plaintiff there than are the facts in the case at bar to the plaintiff here. The views there expressed are, we believe, determinative of the points here involved.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Paraphrasing some of the language of that case to fit the facts here, briefly stated, the case at bar is simply this: Bennetts undertook to help Craig, the foreman, to lift a pipe out of the sump hole. In doing so he did not slip, or lose his hold, or become unbalanced; nor did the pipe, or anything else, strike or touch him in any way. The record does not disclose that anything of an unusual or unexpected nature occurred in the course of lifting the pipe out of the sump hole. The entire operation, so far as disclosed by the evidence, was carried out in precisely the manner intended by Bennetts. The subsequent happenings have already been set forth.

On these facts, which in the case at bar are without conflict, we are of the opinion that the plaintiff failed to sustain the burden, which was upon her, of proving that the death "resulted directly and independently of all other causes, from bodily injuries, effected through external, violent and accidental means." On the authority, therefore, of Rock v. Travelers' Insurance Co., supra, we conclude that the answer to our question must be in the negative.

It follows, therefore, that the findings of the trial court were sustained by the evidence, and that a new trial should not have been granted.

Order granting a new trial reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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39 Cal. App. 244

PEOPLE v. MEYERS. (Cr. 733, 2233.)

(District Court of Appeal, First District, California, Division 1. Dec. 21, 1918. On Hearing in Supreme Court in Bank, Feb. 19, 1919.)

1. CRIMINAL LAW ⚷147—LIMITATIONS.

Under Pen. Code, § 801, one charged with grand larceny cannot be convicted of petit larceny, where crime was committed more than one year before information was filed, although felony was not barred.

On Hearing in Supreme Court.

2. CRIMINAL LAW ⚷1159(2) — REVIEW—WEIGHT OF EVIDENCE.

Mere fact that appellate court is of opinion that certain evidence is susceptible of two reasonable inferences, one looking to guilt of defendant and other to his innocence, does not warrant interference by appellate court with a conviction.

3. CRIMINAL LAW ⚷565—PETIT LARCENY — SUFFICIENCY OF EVIDENCE—TIME.

Evidence *held* insufficient to warrant a finding that crime of petit larceny was committed within one year before information was filed as prescribed by Pen. Code, § 801.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Carlos D. Meyers was convicted of petit larceny, and he appeals. Reversed.

John D. Rutledge, of San Francisco, and W. H. L. Hynes, of Oakland, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen. (James F. Brennan, of San Francisco, of counsel), for the People.

BEASLY, Judge pro tem. The defendant was charged with the crime of grand larceny. An information charging the offense was filed on the 29th day of May, 1917, in the superior court of Contra Costa county. A demurrer to this information was sustained, and subsequently, on the 11th day of September, an amended information charging the same offense was filed. Defendant was arraigned on this amended information, and was thereafter tried and convicted of the crime of petit larceny. From the judgment and order denying a new trial defendant appeals.

[1] In seeking a reversal of the judgment it is not contended, nor could it be, that there is not sufficient evidence in the record to prove that the stolen property was taken by defendant, the evidence upon that subject being ample; but it is claimed as grounds therefor that the evidence fails to show that the crime of petit larceny, of which the defendant was convicted, was committed within one year before the information was filed as prescribed by the statute. Pen. Code, § 801.

The felony here charged included the lesser offense of which defendant was convicted. In such a case, though the felony be not barred, where the statute has run as to such lesser offense, it cannot be evaded by the indictment of the defendant for the felony. Letcher v. State, 159 Ala. 59, 48 South. 805, 17 Ann. Cas. 716; 8 Rul. Case Law, p. 133. It was incumbent, therefore, upon the prosecution to prove, not only the commission of the offense, but also that it was committed within the statutory period. The jury was instructed that, in order to find the defendant guilty of petit larceny, the property must have been taken within one year preceding the filing of the information. The verdict is therefore tantamount to a finding that the misdemeanor was committed within the period limited. There is no positive or direct evidence in the record as to the exact date of the commission of the theft, but it is claimed in support of the conviction that there is sufficient evidence to justify the inference that the crime was committed within one year.

It appears from the record that the defendant Meyers entered the employ of the Great Western Electro-Chemical Company, a corporation, of Pittsburg, Cal., as a draughtsman, in March, 1916. One of his duties was to see that none of the maps, plans, or blueprints were taken from the office of the company. Defendant left the employment of the company on February 1, 1917. Throughout the year of his employment defendant had charge of the blueprints and worked on some of them, and during his employment he appropriated a number thereof, comprising about 70 per cent. of a complete set of the plans. Part of the set appropriated, 28 sheets in number, were found concealed in defendant's residence in Pittsburg. These sheets are the subject of the misdemeanor for which he was convicted. The company first missed its property in December, 1916, within six months before the date of the filing of the information. On March 1, 1917, during a conversation between himself and one Mooser at a restaurant in Oakland, defendant admitted that he had all the blueprints of the company. On March 31, 1917, he first denied and later admitted to one Shedler, superintendent of the company, that he had some of the blueprints of the company in his possession. He also pointed to a little report which he had made up, and said:

> "You should have pulled this off two months ago. The damage is done. The work is complete."

In a former decision in this case we concluded that this statement indicated a recent acquisition of the blueprints and some evidence that they were taken about two months prior to March 31, 1917, the date of the foregoing conversation. Upon further consideration of this evidence, we are of the opinion that it is equally susceptible of the inference that the purpose for which the property was taken had been accomplished, or other inferences having no relation to the time of the commission of the offense, and that the evidence on this point does not measure up to the requirements of the law to uphold a conviction.

Counsel further contend that there is no evidence showing that the property stolen by defendant had any value, and that defendant having the custody of the prints could have reproduced them without committing any crime for a few dollars. Considering the conclusion we have reached, a discussion of this and other questions becomes unnecessary.

The judgment is reversed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

On Hearing in Supreme Court.

PER CURIAM. [2, 3] The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

In denying the petition we deem it proper to say that the mere fact that an appellate court is of the opinion that certain evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence, does not warrant interference by the appellate court with the conclusion of the jury on the point. It is for the jury and the trial judge to determine the question of fact in such a case, and their conclusion will be sustained by an appellate court if it finds sufficient support in the evidence, including such inferences as may reasonably be drawn therefrom. The difficulty in the case at bar, taking the facts stated by the District Court of Appeal as the facts of the case, is that there was no testimony reasonably warranting an inference by the jury that the property alleged to have been stolen was stolen within one year prior to the filing of the information.

ANGELLOTTI, C. J., and SLOSS, MELVIN, and LENNON, JJ., concur.

(39 Cal. App. 365)

AALWYN'S LAW INSTITUTE v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 2307.)

(District Court of Appeal, First District, Division 1, California. Jan. 8, 1919.)

APPEAL AND ERROR 🔑82(3)—ORDER APPEALABLE—INTERLOCUTORY AND CONDITIONAL ORDER.

Conditional order granting motion of city and county of San Francisco to set aside default and default judgment in action to recover taxes paid in excess of dollar limit, as provided by Charter, art. 3, c. 1, § 11, being interlocutory in its nature, and contemplating further order granting or denying motion absolutely on payment or nonpayment of costs, *held* not appealable.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Aalwyn's Law Institute against the City and County of San Francisco, a municipal corporation. From a conditional order granting motion to set aside default and default judgment, plaintiff appeals, and defendant moves to dismiss. Appeal dismissed.

See, also, 179 Pac. 220.

Arthur Crane, of San Francisco, for appellant.

George Lull, City Atty., and R. T. Ainsworth, Asst. City Atty., both of San Francisco, for respondent.

WASTE, P. J. Defendant moves to dismiss the appeal.

From the record it appears that this is an action brought to recover the sum of $9,592.50 for taxes alleged to have been paid in excess of the dollar limit as provided in section 11, c. 1, art. 3, of the charter of the city and county of San Francisco. Defendant suffered default for failure to answer, after demurrer sustained, upon which a judgment was entered by the clerk of the court on July 13, 1915. Thereafter, upon motion of defendant, the default judgment was vacated and set aside by an unconditional order of the superior court to that effect made December 20, 1915. On the day following the court made an order amending the order of December 20th, which amended order is in words and figures following, to wit:

> "In this action it is ordered that order made herein on the 20th day of December, 1915, granting defendant's motion to set aside the default, and judgment entered against defendant, be amended so as to read as follows, viz.: It is ordered that defendant's motion to set aside default and judgment herein be granted upon the payment by defendant to plaintiff or its attorney, within five days after notice of this order, the sum of $10 costs, and that defendant have 10 days in which to answer. It is further ordered that if said payment be not made or tendered said motion be denied."

On December 24, 1915, a tender of the said sum of $10 specified in said conditional order was duly made by defendant and by plaintiff's counsel refused. The court thereupon, on April 1, 1916, made its final order vacating said default and default judgment. From this order of April 1st an appeal was taken to the Supreme Court on the 9th day of June, 1916, but said appeal was thereafter dismissed by said court on the 7th day of August, 1916, on the ground that it had been taken too late. The present appeal is from the order hereinbefore set forth and dated December 21, 1915, which we shall hereafter term the conditional order granting the motion to set aside the default and default judgment.

Defendant's motion to dismiss the present appeal, as stated in the notice, is as follows:

> "(1) That the order appealed from is not an appealable order for the reason that it is a conditional order and does not constitute a final disposition of the motion before the trial court to vacate and set aside the default order and judgment therein.
>
> "(2) That the appeal is premature because it does not appear from the record that the condition recited in the order appealed from has ever been complied with by the respondent."

That respondent's contention is correct and that this order is a conditional and a nonappealable order is settled by a long line of decisions. The order was interlocutory in its nature, and contemplated a further order granting or denying the motion absolutely upon the payment or nonpayment of the costs required. As was said in Armstrong v. Superior Court, 63 Cal. 410:

> "An order that a motion be granted upon the payment of certain costs is an order denying the motion, unless the costs be paid. We are not authorized to exclude the condition, and thus make the order the reverse of, or distinctly different from, what it was evidently intended to be."

In Wolff v. Canadian Pacific Co., 123 Cal. 535, 56 Pac. 453, a case in which the identical question now presented on this motion was considered, the Supreme Court says:

> "It is conceded that the order of January 25, 1889, granting the motion to set aside the default on condition of payment of counsel fees and costs was not a complete disposition of the motion, and it would seem to follow necessarily from this, as was held by the court below, that the motion remained pending until finally disposed of * * * unless it had been abandoned by the defendant."

The order appealed from falls squarely within the ruling of these decisions. For these reasons the appeal is dismissed.

We concur: KERRIGAN, J.; RICHARDS, J.

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39 Cal. App. 367

FISCHER et al. v. HAYES. (Civ. 2623.)

(District Court of Appeal, First District, Division 1, California. Jan. 10, 1919.)

APPEAL AND ERROR ⚷1011(1)—REVIEW—FINDINGS—CONFLICTING EVIDENCE.

The appellate court will not disturb court's finding on conflicting evidence.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by C. F. Fischer and others against Anna W. Hayes. Judgment for plaintiffs, and defendant appeals. Affirmed.

De Lancey Smith, of Oakland, for appellant.

C. L. Colvin, of Oakland, for respondents.

WASTE, P. J. This is an appeal from the judgment of the lower court foreclosing certain mechanics' liens and directing the sale of the property affected thereby to satisfy the same. The court found that the work, consisting of certain alterations and repairs to the buildings on the premises, was done with the full knowledge and consent of the appellant, and that the appellant did not, within 10 days after obtaining knowledge thereof, give notice that she would not be responsible for same, by posting on the premises, or filing for record, the verified copy of the notice in the office of the county recorder.

From the record it appears that the appellant obtained knowledge of the work on or about the 5th day of November, 1915, and that she remained quiescent until December 4th, which date was subsequent to the time when all of said alterations and repairs had been completed.

Appellant admits in her opening brief that—

> "The sole question presented by this appeal is whether or not there is sufficient evidence to support the finding of the trial court."

The most that can be said in favor of the appeal is that there is a direct conflict in the testimony of the witnesses. This conflict was apparent to the trial judge who considered and discussed with counsel the varying testimony of the witnesses, in giving his decision from the bench. He resolved the conflict in favor of the plaintiffs, the respondents here. This court will therefore not review the action of the lower court in that regard.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(39 Cal. App. 376)

GULICK v. E. CLEMENS HORST CO.
(Civ. 1888.)

(District Court of Appeal, Third District, California. Jan. 15, 1919.)

APPEAL AND ERROR ⚿1011(1)—CONFLICTING EVIDENCE—FINDINGS.

Findings of lower court sustained by conflicting evidence *held* binding upon appellate court.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Fred Gulick against the E. Clemens Horst Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Carlin, of Marysville, for appellant. Henry Ingram, of Gridley, and George F. Jones, of Oroville, for respondent.

BURNETT, J. The action was brought to recover the value of a certain number of horses and mules alleged to have been sold by plaintiff to defendant. There is no dispute that appellant was engaged in the purchase of certain animals for the use of the "Entente" Powers in the prosecution of the war against Germany, nor is it disputed that one W. Hill was the authorized agent of the defendant for the purchase of horses and mules for such purpose.

The only serious contention made by appellant is that the sale was a conditional one, dependent upon the approval and acceptance of said stock by the representatives of said Allied Powers, and that plaintiff and said Hill were parties to a conspiracy to defraud appellant by imposing upon it animals that were unsuitable and unfit for the purposes for which they were to be purchased.

As to these contentions, it may be said that both plaintiff and Hill testified positively that the sale was absolute and not conditional, that there was no understanding or agreement that the payment of the purchase price was to depend upon the approval and acceptance by said representatives. They both also testified to facts from which the inference necessarily follows that neither had any purpose or intention to defraud appellant in the respect indicated or, indeed, in any manner at all, and that the sale and purchase were made in good faith and as claimed by respondent.

The case is, indeed, one of conflicting evidence and wherein the findings of the lower court by reason of a sufficient showing are binding upon the appellate court.

We have read the record and find therein sufficient evidence to support the material findings. There is no necessity for reciting said evidence, as it must be familiar to both parties.

The judgment is, accordingly, affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(39 Cal. App. 372)

HARMS v. GRANT. (Civ. 1941.)

(District Court of Appeal, Third District, California. Jan. 14, 1919.)

APPEAL AND ERROR ⚿1011(1)—FINDING BASED ON CONFLICTING EVIDENCE—REVIEW.

Where the only issue of fact in the case was resolved by the trial judge against defendant's contention on a conflict in the evidence, the court on appeal is not at liberty to disturb the finding.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Frone Patrick Harms against William Grant. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Zimdars and William H. Bryan, both of San Francisco, for appellant.

Bacigalupi & Elkus, of San Francisco, for respondent.

CHIPMAN, P. J. Foreclosure. On May 16, 1913, defendant executed and delivered to plaintiff his promissory note for the sum of $5,000, payable one year after date, at 8

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

per cent. interest per annum, and, at the same time, to secure the payment thereof, executed and delivered to plaintiff a deed absolute to certain real property. Contemporaneously the parties entered into a written agreement setting forth that the said deed was intended as a mortgage to secure the payment of said promissory note, and incorporating in the agreement substantially the provisions found in long-form mortgages.

The only defense to the action, as shown by the answer, was an alleged oral agreement by the parties, made on July 23, 1915, more than a year after said promissory note had become due and payable. In effect, this alleged agreement was that in consideration of defendant's finding some person who would loan plaintiff $2,000 for the period of one year, to be secured by the assignment of said promissory note and mortgage to the person making such loan, plaintiff would not call upon defendant to pay said promissory note until the expiration of one year, and that defendant would pay said loan if made, which was to be credited on said promissory note for $5,000, and he would also then pay the balance of said note.

The cause was tried by the court, and findings and judgment went against defendant. The appeal is from the judgment on bill of exceptions.

It appeared that through defendant's efforts one Black loaned plaintiff $2,000, for which she gave her promissory note, by its terms payable "on or before one year after date," and secured the same by assigning to Black said note and mortgage, the subject of this action; that about three months thereafter she paid Black and thereupon demanded payment by defendant of said $5,000 note. Defendant refused, claiming that he had one year from July 23, 1915, in which to make payment under said oral agreement. The testimony of defendant tended to support his contention, but the testimony of both the plaintiff and her husband, who was acting in her behalf in the transaction, was, as testified to by plaintiff's husband, that defendant "promised not only to pay the $2,000 to Black within two or three months, but also to pay the balance of the $5,000 to the plaintiff herein." And, as testified by plaintiff:

> "The defendant promised to pay the money to plaintiff within two or three months after the obtaining of the money from Black, that is, the $5,000 due on the mortgage; that if Grant paid the $2,000 that was to be deducted from the $5,000, but that in any event the whole sum was to be paid within two or three months."

The trial court found in accordance with the facts as testified to by plaintiff and her husband, as it was within its power to do.

Defendant testified that he personally prepared the note executed by plaintiff and attended to other matters relating to the loan by Black. It is a fair inference that, had it been the intention of the parties to defer payment of defendant's note for one year, the note given by plaintiff for the loan of $2,000 would have been made payable one year after its date and not "on or before one year," etc. However, as the only issue of fact in the case was resolved by the trial court against defendant's contention on a conflict in the evidence, we are not at liberty to disturb the finding.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

39 Cal. App. 382

ANDREWS v. JACOBY. (Civ. 2613.)

(District Court of Appeal, First District, Division 1, California. Jan. 16, 1919.)

1. Judgment ⚷160 — Setting Aside Default—Affidavit—Sufficiency.

Affidavit of attorney, supporting motion to set aside default, alleging on information and belief that defendant fully and fairly stated all facts of case to attorney, who believed and advised defendant that he had a good and meritorious defense on the merits, *held* insufficient to justify setting aside default; statements of affidavit being mere hearsay.

2. Judgment ⚷143(14)—Setting Aside Default—Preoccupation of Defendant.

That defendant was busy and occupied with other affairs constitutes no excuse for his neglect to answer summons within time.

3. Process ⚷68—Valid First Service—Annulment by Second Service.

In cases of double service of process, where the first one was valid, and accomplished all the purposes for which summons is issued, it is not annulled by the second service.

4. Process ⚷68—First Service—Annulment by Second.

The rule that a valid service, once made, is unaffected by a second one, has no application to a case where the first was a substituted service, entitling plaintiff only to a judgment in rem; plaintiff, notwithstanding the first service, being entitled to serve defendant personally in order to be entitled to personal judgment.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by W. S. Andrews against Joseph R. H. Jacoby. From an order setting aside a default judgment, plaintiff appeals. Reversed.

A. E. Shaw and Leon Martin, both of San Francisco, for appellant.

John D. Rutledge, of San Francisco, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

KERRIGAN, J. This is an appeal from an order of the superior court of the city and county of San Francisco setting aside a default judgment.

The action was commenced in April, 1916, by plaintiff as the owner of a promissory note against the defendant as maker thereof. In October, 1916, an order of publication of service of summons was made, and the complaint and summons were received through the mail by defendant in Boston, Mass., about October 31, 1916. Thereupon defendant sent the papers to his attorney in San Francisco, Mr. John D. Rutledge, who noted the last day for defendant to answer as January 25, 1917. Defendant returned to California late in December, 1916, and was personally served with the summons and complaint in San Francisco on January 8, 1917. On the following day, January 9th, he handed these papers to Mr. Rutledge, stating that he had just been served therewith. On January 19th Mr. Rutledge asked plaintiff's attorneys for an extension of time to answer, and was informed that defendant's default had been entered and judgment taken against them that morning. Under this state of facts Mr. Rutledge immediately noticed a motion to set aside the default, basing his application upon an affidavit by himself, reciting the foregoing facts, and setting up in addition that defendant had left California on January 12th, and was still absent. As to the merits, the affidavit read as follows:

> "Affiant is informed and believes, and therefore alleges, that defendant fully and fairly stated all the facts of the case in the above-entitled action to affiant, and affiant believes and advised said defendant that said defendant had a good and meritorious defense on the merits of said action."

On the hearing of the motion Mr. Rutledge filed a further affidavit, the material portion of which is to the effect that on the 8th day of January, when he was served, defendant was very busy closing up his business affairs and preparing to move his family to Massachusetts, and that he left on the 12th.

[1, 2] The lower court was clearly in error in setting aside the default on the showing made. The attorney had no way of knowing whether his client had stated all the facts to him, nor could he tell whether or not the client believed he had a meritorious defense. As a full statement of facts by the client, and an honest belief by him in the existence of a meritorious defense, are essential to an affidavit of merits, it is obvious that the hearsay statements of Mr. Rutledge's affidavit above quoted are hopelessly insufficient in law as in fact. Bailey v. Taaffe, 29 Cal. 424; Jenkins v. Gamewell, etc., Co., 3 Cal. Unrep. Cas. 655, 31 Pac. 570. Furthermore, the mere fact that the client is busy and occupied with other affairs is never held to constitute an excuse for his neglect to answer a summons within time, although the courts will in a proper case relieve a client from the result of the neglect of his too busy attorney. If the rule were otherwise, few judgments by default would stand, for most men could plead their business as an excuse for not answering the summons of the court.

[3, 4] Finally, it cannot be seriously doubted that in cases of a double service of process, where the first one is valid and accomplished all the purposes for which a summons is issued, it is not annulled by a second service; but here there is no such proof of service of the first process as is required by the provisions of section 415 of the Code of Civil Procedure. Moreover, we think the rule sought to be invoked here, viz. that a valid service once made is unaffected by a second one, has no application to a case where, as here, the first was a substituted service entitling the plaintiff to only a judgment in rem. In such a case we think the plaintiff, notwithstanding the first service, would be entitled to serve the defendant personally in order to be entitled to a personal judgment against him.

For the reasons given, the order is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

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39 Cal. App. 374

KOHLER v. STEPHENSON et al.

(Civ. 2573.)

(District Court of Appeal, First District, Division 1, California. Jan. 15, 1919.)

NAMES ⚷10—DOING BUSINESS UNDER FICTITIOUS NAME—WHAT CONSTITUTES.

Where K. owned and conducted under her name as proprietor the K. laundry, and a driver engaged signed a contract to work for the K. laundry, *held* that though not named in the contract, K. was not doing business under a fictitious name so as to prevent recovery by her of money due by the driver on the ground that she was doing business under a fictitious name, without having complied with Civ. Code, §§ 2466, 2468.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Lottie A. Kohler against Clarke Stephenson and Ivan W. Stephenson and others. From a judgment for plaintiff, which also denied the cross-complaint of one of the defendants, both defendants appeal. **Affirmed.**

Irvine P. Aten, of Fresno, for appellants.
Geo. G. Graham, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor against

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both of the defendants for the sum of $475.95, money claimed by the plaintiff to have been collected by the defendants while in her employ as drivers in connection with a steam laundry operated by her and unaccounted for and unpaid to her. The defendants appear and defend separately, and each, in addition to his denials of the averments of the plaintiff's complaint, sets up as a separate defense that the plaintiff is not entitled to maintain the action, for the alleged reason that she was engaged in doing business under a fictitious name without having complied with provisions of sections 2466 and 2468 of the Civil Code. The defendant Ivan Stephenson also presented a cross-complaint, alleging certain breaches of the agreement of employment on the plaintiff's part. Upon the trial, the court held against the defendants upon their several defenses, and also against the defendant Ivan Stephenson upon his cross-complaint.

As to the special defense urged by the defendants upon the trial and insisted upon on the appeal, the facts are briefly these: The plaintiff is the owner of a steam laundry in the city of Fresno, which is called the "Kohler Steam Laundry," which the plaintiff personally conducts under her own name as the proprietor thereof. This appears from her own direct testimony and also from the face of the bills, receipts, and other printed matter made use of in the business of the laundry. The original arrangement by which the defendants came into the relation of drivers and collectors for some of the laundry routes was made with the defendant Clarke Stephenson by the plaintiff personally, but a memorandum thereof in writing was made out by said Clarke Stephenson, signed by him and handed to the bookkeeper of the laundry, who placed it among her files. This unilateral document begins as follows:

> "I, the undersigned, agree to stay with the Kohler Steam Laundry as driver for a period of one year from date, also to be responsible for all bills and credits allowed for laundry."

It nowhere appears in this paper with whom this agreement was made, but the plaintiff testified and the said defendant did not deny that the actual agreement was made with the plaintiff personally.

This being the state of the record, we think it sufficiently appears: First, that the plaintiff was not doing business under a fictitious name, and, second, that the agreement which forms the basis of this action was not made, nor the transaction in question had under a fictitious name. Spreckels v. Grace, etc., Ass'n, 28 Cal. App. 646, 153 Pac. 718.

Upon the merits of this controversy we find that the evidence is sufficient to fully justify the findings of the court as to the liability of both defendants to the extent of the sum found to be due the plaintiff by said findings and the judgment of the trial court, and is also sufficient to have justified said court in its finding that there was no merit in the cross-complaint of the defendant Ivan Stephenson.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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39 Cal. App. 377

TANN v. WESTERN PAC. RY. CO.

(Civ. No. 2451.)

(District Court of Appeal, First District, Division 1. California. Jan. 16, 1919.)

1. DEATH 🔑10—SURVIVAL OF CAUSE OF ACTION OF DECEDENT.

Where an adult injured by the negligence of a railroad company brought action, but subsequently died, his right of action died with him, and a new and independent cause of action for damages for his death by defendant's wrongful act immediately arose in favor of the heirs, personal representatives of deceased, under Code Civ. Proc. § 377.

2. ABATEMENT AND REVIVAL 🔑8(6)—ACTION FOR WRONGFUL DEATH — OTHER ACTION PENDING.

An action by a widow under Code Civ. Proc. § 377, for the wrongful death of her husband may be maintained notwithstanding the pendency of a former action brought by the husband to recover for the injuries from which he subsequently died; the two actions not being between the same parties for the same cause of action.

3. DEATH 🔑49(1)—ACTIONS FOR WRONGFUL DEATH—PLEADING—SUFFICIENCY.

In an action by a widow under Code Civ. Proc. § 377, to recover for the wrongful death of her husband, a complaint which fails to state that deceased was an adult and left heirs does not state a cause of action.

4. PLEADING 🔑225(1)—SUSTAINING DEMURRER—AMENDMENT.

In an action by a widow under Code Civ. Proc. § 377, to recover for the wrongful death of her husband, it was error to sustain a demurrer to the complaint without leave to amend, on the ground that the complaint did not state that decedent had heirs.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Delia Tann against the Western Pacific Railway Company, a corporation. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

John H. Leonard, of Santa Cruz, and E. M. Leonard, of San Francisco, for appellant.

Charles W. Slack, of San Francisco, for respondent.

WASTE, P. J. This action is one brought by the plaintiff to recover damages for the death of her husband, Emil Joseph Tann. From the complaint, it appears that the decedent was injured through the negligence of defendant corporation on January 16, 1913. Within one year from the date of his injury he commenced an action against said defendant for damages for the injury alleged to have been received. That action was at issue and ready for trial at the time of his death, which occurred on April 29, 1914.

On June 25, 1914, plaintiff, as "the surviving widow and heir of" said decedent, commenced the present action. After the commencement of the suit an amendment to the complaint was allowed, whereby Frank G. Drum and Warren Olney, Jr., receivers of the Western Pacific Railway Company, were made defendants.

Defendants demurred to the amended and supplementary complaint generally and specifically. In support of the special demurrer, the defendants urged that the action was barred by subdivision 3, section 340 of the Code of Civil Procedure, to wit, the limitation of one year; also, that if the cause of action for injury sustained by the said Emil Joseph Tann survived to his widow, the complaint showed that there was then pending another action between the same parties and for the same cause. The lower court sustained the demurrers and refused leave to the plaintiff to amend. Judgment was entered in favor of defendants, and plaintiff appeals.

Admittedly, this action is one brought, and sought to be maintained, under the provision of section 377 of the Code of Civil Procedure, which provides as follows:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Construing this section, our Supreme Court has said:

> "Our statute gives a right of action for damages for the death of a person, not a minor, caused by the wrongful act or neglect of another, to his heirs or his personal representatives, against the person causing the death." Clark v. Goodwin, 170 Cal. 529, 150 Pac. 357.

At common law there was no action for torts causing death. The right of action died with the injured person. Accordingly, it is universally held that statutes like section 377 of the Code of Civil Procedure, giving an action for wrongful act or neglect causing death, create a right entirely distinct from that which was vested in the injured person before his death. Western Metal Supply Co. v. Pillsbury, 172 Cal. 414, 156 Pac. 491, Ann. Cas. 1917E, 390.

[1] The right of action vested in the decedent, Tann, against the defendant corporation for the injuries alleged to have been received by him died and abated (Clark v. Goodwin, supra), and a new and independent cause of action for damages for the death of Tann, caused by the wrongful act or neglect of defendant corporation (if he was not a minor at the time of his death), immediately arose in favor of the heirs or personal representatives of the deceased under section 377 of the Code of Civil Procedure. The action here is of this character, and as such could be instituted within one year. Ruis v. Santa Barbara Gas Co., etc., 164 Cal. 190, 128 Pac. 330. It was therefore not barred by the provisions of subdivision 3, section 340, of the Code of Civil Procedure.

[2] This action being one solely for the benefit of the heir by which she seeks to be compensated for pecuniary injury suffered to her by reason of the loss of her relative, it is not the action brought by the decedent during his lifetime. It is not an action pending between the same parties for the same cause of action as in the former suit. Ruis v. Santa Barbara Gas Co., supra; Clark v. Goodwin, supra; Western Metal Co. v. Pillsbury, supra. The lower court was in error, therefore, in sustaining the demurrer on the special grounds urged.

On the appeal, however, respondents present a brief in support of the general demurrer, which was not urged in the court below. They contend that the complaint should allege that the deceased was an adult at the time of his death; otherwise it does not state facts sufficient to bring the action within the provision of section 377 of the Code, supra; that if the decedent was a minor the action was one authorized by section 376 of the Code of Civil Procedure, which can only be brought by the "father, or in case of his death or desertion of his family, by the mother."

[3] The only reference in the complaint relative to the heirs of decedent, Tann, is found in the allegation that "the plaintiff, Delia Tann, is the surviving widow and heir of Emil Joseph Tann, deceased." There is no allegation that the decedent was an adult at the time of his death. Undoubtedly, the complaint does fail to state a cause of action if it fails to allege that deceased was an adult and left an heir, or heirs, an allegation absolutely essential in an action of this character. Ruis v. Santa Barbara Co., supra; Webster v. Norwegian Mining Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181. As the widow of decedent, plaintiff was given no right of action by the statute. Bennett v.

North Carolina Railroad Co., 159 N. C. 345, 74 S. E. 883; Code Civ. Proc. § 377.

If the deceased, at the time of his death, was a minor, the action could not be brought by the plaintiff as heir at law, but should have been instituted under section 376 of the Code of Civil Procedure. If under the latter section, the action was brought by the father, it would be necessary to allege that the deceased was a minor at the time of his death, and that plaintiff was his father. If brought by the mother, it would be necessary for her to allege, not only that deceased was a minor, but that the father was dead or had deserted his family. In other words, these actions being purely statutory, it is necessary to allege sufficient facts to bring plaintiff within the provisions of the particular statute under the authority of which the action may be maintained.

[4] As aforestated, the action of the court below, in sustaining the demurrers to the amended and supplementary complaint on the two grounds considered, was erroneous. Conceding that the allegation in the complaint as to the heirs of decedent is insufficient, the further action of the trial court, sustaining the demurrer without leave to amend, was incorrect. Plaintiff intended, and attempted, to state the necessary facts, and her complaint was clearly susceptible of proper amendment.

The "complaint or declaration may be amended as in other actions where the amended pleading does not state a new cause of action; and such amendment, although made after the expiration of the period of limitation, will relate back to the commencement of the suit. Thus, an amendment may be made * * * which adds an allegation that deceased left a wife and children." Ruis v. Santa Barbara Co., supra.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: RICHARDS, J.; KERRIGAN, J.

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39 Cal. App. 369

KARST v. FINN, Sheriff, et al. (Civ. 2493.)

(District Court of Appeal, First District, Division 1, California. Jan. 13, 1919.)

1. APPEAL AND ERROR 🔑933(4)—ORDER GRANTING NEW TRIAL—GROUNDS—PRESUMPTION.

Where one of the grounds upon which motion for new trial was made is insufficiency of the evidence to justify the verdict, the court on appeal, where it has the evidence before it, will, in support of order in general terms granting new trial, assume that it was made upon the ground of insufficiency of the evidence.

2. APPEAL AND ERROR 🔑979(2)—NEW TRIAL 🔑72—ORDER GRANTING NEW TRIAL—DISCRETION—REVIEW.

The superior court is authorized to grant a new trial if in its opinion the verdict is against the weight of the evidence, and its action in so doing is the exercise of a legal discretion which can be reviewed on appeal only when it is made to appear that the discretion was abused.

3. EXECUTION 🔑471—WRONGFUL EXECUTION—EVIDENCE—SUFFICIENCY.

In action for conversion of an automobile sold to satisfy a judgment, evidence *held* insufficient to warrant verdict for plaintiff.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by C. K. Karst against Thomas F. Finn and another. From an order granting defendants' motion for new trial after verdict for plaintiff, plaintiff appeals. Affirmed.

G. C. Ringolsky, M. H. Wascerwitz, and H. A. I. Wolch, all of San Francisco, for appellant.

Arnold C. Lackenbach, R. Porter Ashe, and Ralph W. Duval, all of San Francisco, for respondents.

KERRIGAN, J. This is an action in conversion. Plaintiff alleges in her complaint that she was the owner and entitled to the possession of a certain automobile, which she alleged was wrongfully taken away, converted, and sold by defendant Thomas F. Finn, sheriff of the city and county of San Francisco, to satisfy a judgment which the sheriff's codefendant, Cuyler Lee, had obtained against one E. J. White.

The trial was had before a jury, which returned a verdict for plaintiff in the sum of $750 damages against both defendants.

Thereafter defendants moved for a new trial, which was granted, and the plaintiff appeals from that order.

[1] One of the grounds upon which the motion for a new trial was made is the insufficiency of the evidence to justify the verdict, and the evidence is before us. The order of the court granting a new trial is in general terms, without specifying the grounds of its action; and in support of the order, we will assume that it was made upon the ground of insufficiency of the evidence. Weisser v. S. P. Co., 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288.

[2] It is also the rule, firmly established, that the superior court is authorized to grant a new trial if in its opinion the verdict is against the weight of evidence. Its action in so doing is the exercise of a legal discretion, which has been confided to it, and can be reviewed on appeal only when it is made

to appear that the discretion was abused. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019.

[3] It is abundantly apparent that the trial court in this case was dissatisfied with the sufficiency of the evidence to support the verdict; in fact a perusal of the record convinces us that the court could hardly have reached any other conclusion. In any event the records show that there was no abuse of discretion in granting a new trial, but, on the contrary, that the court exercised a sound discretion in making the order complained of. From the evidence, briefly summarized, it appears that on March 22, 1915, E. J. White entered into a contract of conditional sale with Don Lee for the purchase of a 1914 Cadillac automobile. Upon the execution of the contract White took possession of the machine, and thereafter had open, exclusive, and uninterrupted possession and control thereof until March 5, 1917. White during this period did business for a brief space of time under the names of "the White Star Line Auto Touring Company" and "the San Francisco Taxicar Company." He registered the car at the state motor vehicle bureau under the name of "the White Star Line Auto Touring Company," and received a 1915 license under that name. In 1916 he registered it under the name of "the San Francisco Taxicar Company," and received a 1916 license under that name. The car, during all of the time from March 22, 1915, until the levy of the execution by the sheriff in March, 1917, was insured against loss by fire or theft in favor of E. J. White. The car was assessed for taxes in 1916 to E. J. White; the assessment statement containing an affidavit of ownership executed by E. J. White. White testified that he made all the installment payments on the machine "but the last one." Twelve letters offered in evidence by the defendants conclusively show that the automobile was paid for by White; never a mention of plaintiff's name being directly or indirectly made. He partially paid cash for the car, and partially paid for it by transferring to Don Lee a 1913 Cadillac machine, receiving thereby a credit on the price of $540. The bill of sale to Don Lee for the 1913 Cadillac was executed by White. Finally White became financially involved. On February 19, 1917, Cuyler Lee obtained a judgment against him. While findings of fact were being prepared for submission to the trial judge, White took plaintiff to the office of Don Lee, made the final payment, and requested that Don Lee execute the bill of sale to the plaintiff, and it is under this bill of sale that the plaintiff claims to own the car. As to the contract entered into by White for the purchase of the machine, she claims that it was done "to start a business for her." And yet White and appellant both testified that during all of the time after the signing of the contract of conditional sale he (White) had exclusive and continuous possession of the machine; that not a word was said between them concerning the arrangement; that he agreed to pay no rental to plaintiff, nor did she ask any; that not a word was said by her when White received the car from Don Lee and thereafter retained exclusive control thereof for a period of two years; that no salaries were arranged for; that, while plaintiff had White purchase the car for her as an investment, not one word was ever breathed between the two concerning the plan of dividing the profits and losses.

As before stated, it is clear that the trial court arrived at the conclusion that this evidence was insufficient to warrant the verdict in plaintiff's favor.

The order granting a new trial should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

39 Cal. App. 388

MASSACHUSETTS BONDING & INS. CO. v. SAN FRANCISCO-OAKLAND TERMINAL RYS. (Civ. 2489.)

(District Court of Appeal, First District, Division 1, California. Jan. 17, 1919. Rehearing Denied by Supreme Court March 13, 1919.)

1. MASTER AND SERVANT ⚷389—WORKMEN'S COMPENSATION ACT—ASSIGNMENT OF CLAIM BY EMPLOYÉ.

Workmen's Compensation Act of 1913, §§ 31, 34, subd. "f," permit assignment of injured person's right of action against tort-feasor not previously sanctioned by law, and provide that making by injured employé of lawful claim for compensation under act against employer and latter's insurer shall operate as transfer of legal title to his claim for damages against tort-feasor to employer or to the latter's insurer paying claim.

2. MASTER AND SERVANT ⚷389—WORKMEN'S COMPENSATION ACT—PAYMENT OF CLAIM BY INSURER—RIGHT OF ACTION AGAINST TORT-FEASOR.

Use of the word "subrogated," in Workmen's Compensation Act of 1913, § 31, construable in connection with section 34, subd. "f," did not render right of action against tort-feasor acquired by employer's insurer, which paid claim of the injured workman, an equitable cause of action as against tort-feasor, though as between insurer and employé right of subrogation was equitable right arising out of payment of employé's claim.

3. COURTS ⚷120—SUPERIOR COURT—JURISDICTIONAL AMOUNT—LEGAL CLAIM.

Workmen's compensation insurer, which paid claim, and thereby under Workmen's Com-

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pensation Act of 1913, §§ 31, 34, subd. "f," acquired legal cause of action against tort-feasor which injured employé, could not sue for $212.82, the amount of the payment, in the superior court; jurisdiction being in justice's court.

4. COURTS ⟹121(5)—SUPERIOR COURT—JURISDICTIONAL AMOUNT—CLAIM FOR ATTORNEY'S FEES.

Plaintiff in superior court cannot confer jurisdiction on that tribunal by including in his claim for damages, amounting to less than $300, a demand for attorney's fees augmenting his claim to more than such sum.

5. ACTION ⟹22—LEGAL OR EQUITABLE.

Legal cause of action of workmen's compensation insurer which paid claim of injured employé against tort-feasor *held* not given nature and qualities of action in equity, so as to invest superior court with jurisdiction, though amount was less than $300, by averment that the tort-feasor, in settling with employé and taking full release, knowing employé had made claim for compensation against employer, had done so with intent to destroy insurer's right to further recovery.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the Massachusetts Bonding & Insurance Company against the San Francisco-Oakland Terminal Railways. From judgment for plaintiff, defendant appeals. Reversed, with directions to enter order dismissing the action.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco, for appellant.

John Ralph Wilson, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $212.82 and costs of suit. The facts of the case, so far as pertinent to the determination of the main question presented upon this appeal, are these: On October 1, 1914, one Manuel Silva was an employé of one A. H. Kopperud, and was engaged in work for his employer on Fourteenth avenue in the city of Oakland, when a street car, operated by or for the defendant, coming along said Fourteenth avenue, came in contact with an auto truck which was standing near where said Silva was at work, and caused said auto truck to strike the latter and severely injure him. At the time of said injury Silva's employer, Kopperud, was carrying insurance for his employé pursuant to the provisions of the Workmen's Compensation Act of 1913 (St. 1913, p. 279); the plaintiff herein being his insurer. Immediately after said injury the plaintiff caused said Silva to be removed to a hospital, and there provided with medical and surgical treatment and medicines, amounting in all to the sum of $212.82. Thereafter, and on the 16th day of January, 1915, Silva undertook to make a settlement of his claim for damages for its alleged negligent acts and his consequent injuries with the defendant herein, in the course of which the defendant paid to him the sum of $300, receiving therefor from said Silva a full receipt and discharge of all claims and demands on account of said injury. Thereafter said Silva filed an application for an award against his employer, Kopperud, and the latter's insurer, said plaintiff, before the Industrial Accident Commission, which came on for decision in the month of July, 1915. From the decision of the commissioner then rendered it appears that a showing was made as to the acceptance by said Silva of the sum of $300 from the defendant herein, and of the execution by him of the receipt purporting to be a full release of said defendant from all liability on account of his said injury. The commission thereupon made an award in favor of said applicant in the sum of $103.07, which the plaintiff herein paid, and which, with certain sums which it had already expended for medicines, etc., made up the aggregate of $212.82, for which it brings this action.

The complaint herein is denominated a complaint in equity, and in it the plaintiff avers substantially the foregoing facts, and further avers that the defendant herein, in making the aforesaid settlement with said Silva, did so with knowledge that said Silva had a lawful claim for compensation against his employer and the latter's insurer which was presentable before the Industrial Accident Commission, and that the intent of the defendant in making such settlement and in taking said full receipt and release thereon was to destroy any right which the plaintiff, as the insurance carrier of said Silva's employer, had or might have to commence and prosecute this action against said defendant, pursuant to the provisions of the Workmen's Compensation Act. The plaintiff also included in its complaint a demand for the sum of $100 as attorney's fees.

The defendant appeared in this action and demurred upon the ground of a want of jurisdiction in the superior court over the subject-matter of the action, and, this demurrer being overruled, it answered, again urging the objection as to the court's want of jurisdiction. It also pleaded the making of the settlement with Silva above referred to, and set forth in its answer the receipt in terms.

The trial court gave judgment for the plaintiff for the amount claimed in accordance with the award of the Industrial Accident Commission, but denied the plaintiff's right to recover any sum as attorney's fees.

The first and main question raised by appellant on this appeal is that of the jurisdiction of the trial court over the subject-matter of this action. The appellant contends that the plaintiff's claim, if it exists at all, is for the total sum of $212.82, and that its cause of action therefor is purely a legal, as distinguished from an equitable, claim, and hence that its action should have been commenced in the justice's court. The determination of this question depends upon the construction to be placed upon section 31 of the Workmen's Compensation Act of 1913. That section reads as follows:

> "The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment to the employer of any right to recover damages which the injured employé, or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party. The amount of compensation paid by the employer, or the amount of compensation to which the injured employé or his dependents is entitled, shall not be admissible as evidence in any action brought to recover damages, but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employé or other person entitled."

The foregoing section is, in respect to its application to the instant case, to be read in connection with subdivision "f" of section 34 of the same act, which reads as follows:

> "Where any employer is insured against liability for compensation with any insurance carrier and such insurance carrier shall have paid any compensation for which the employer was liable, or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer and may enforce any such rights in its own name."

[1] A proper construction of these provisions of the Workmen's Compensation Act in our judgment is that they were intended to permit what has not heretofore been sanctioned by law, viz. an assignment of an injured person's right of action against his tort-feasor, and to provide that the making by him of a lawful claim for compensation under the terms of the Workmen's Compensation Act against his employer, and the latter's insurer, should operate as a transfer of the legal title to his claim for damages against his said tort-feasor to his employer, or to the latter's insurer, paying such claim. This has in effect been so held by this court in the recent case of Bassot v. United Railroads, 177 Pac. 884.

[2] The respondent insists, however, that the use of the word "subrogated" in the foregoing provisions of the Workmen's Compensation Act rendered the right of action acquired by the plaintiff thereunder an equitable cause of action as against the defendant herein. We do not agree with this contention; for, while it is true that as between the plaintiff and Silva the right of subrogation would be an equitable right arising out of the payment by the former of the latter's claim for damages, still, when such payment had been made, and the assignment of Silva's cause of action against the defendant herein consummated by such subrogation, the right thus accrued in the plaintiff was that of maintaining, as the assignee of Silva, the same action which Silva could have maintained against this defendant had no such assignment been made.

[3, 4] If we are correct in these views, then it follows necessarily that the plaintiff in this action, having paid the amount of the lawful claim of Silva against his employer, Kopperud, as the latter's insurer, became thereby invested with Silva's right of action for damages against the defendant in this action. Such right of action, if any, existing in Silva was essentially a legal, and not an equitable, action; and, had the same been commenced by him to recover an amount less than $300, it must have been commenced in the justice's court; and it may here be said that, had Silva commenced his said action in the superior court, he could not have conferred jurisdiction upon that tribunal by including in his claim for damages, amounting to less than $300, a demand for an attorney's fee, augmenting his claim to an amount in excess of said sum; and it need hardly be added that the plaintiff herein, assuming its right of action to be nothing more nor less than Silva's assigned right of action, could not give the superior court jurisdiction over it by asserting a claim for the recovery of attorney's fees which are not allowable by law in such actions.

[5] The respondent, however, insists that it has given this action the nature and qualities of an action in equity by the averments in its complaint to the effect that the defendant, in making its settlement with Silva, and taking his full release knowing that Silva had or had made a lawful claim for compensation against his employer, had done so with the intent and purpose of destroying or attempting to destroy any right which this plaintiff, as the insurer of Silva's employer, might have to a further recovery against the defendant in the event of its payment of such lawful claim pursuant to the provisions of the Workmen's Compensation Act. We are unable, however, to perceive that the legal status of the plaintiff's right of action is in any wise changed by this averment. If at the time of the defendant's alleged settlement with Silva he had a lawful claim against his employer arising out of his injury, the making of such claim had operated, under the foregoing clauses of the Workmen's Compensation Act, to transfer to his employer or the latter's insurer Silva's right of action for damages against the de-

fendant as fully as though he executed a written assignment of his cause of action. This being so, no settlement which the defendant made with Silva could have been effectual to destroy or impair the already transferred right of action in the employer or insurer, no matter what the defendant's intent or purpose might have been in any settlement which it might thereafter make with Silva; and hence the averment of such intent or purpose would be immaterial as affecting the nature of the plaintiff's right of action.

If, on the other hand, the said Silva did not have or had not made a lawful claim against his employer or the latter's insurer at or prior to the time of his said settlement with the defendant, then his said settlement and receipt and release in full of all his claims for damages would have been effectual to destroy any subsequently assigned right of action; and in such event the plaintiff's averment of the defendant's intent and purpose as to that effect would be equally immaterial to its asserted cause of action.

Our conclusion from the foregoing views is that the plaintiff's assigned right of action against the defendant to recover the sum of $212.82 upon a claim which had its origin in the damages which its assignor Silva was entitled to recover by reason of his injuries suffered through the defendant's negligence was strictly a legal action for damages in a sum less than $300, over which the superior court had no original jurisdiction, and hence that the defendant's demurrer on that ground should have been sustained.

This view of the case renders immaterial the other points discussed upon this appeal.

The judgment is reversed, with direction to the trial court to enter an order dismissing the action.

We concur: WASTE, P. J.; KERRIGAN, J.

CALIFORNIA REPORTER

179 PACIFIC REPORTER

179 Cal. 806

NOROIAN et al. v. BENNETT et al.
(S. F. 7660.)

(Supreme Court of California. Feb. 24, 1919.)

ACTION 🔑50(3)—JOINDER—PARTIES INVOLVED.

Causes of action to cancel and enjoin collection of promissory notes secured by fraud may not be united in one action against the same defendants, so as to avoid a multiplicity of suits, where proof of each fraudulent promise to each plaintiff must be distinct and independent, as must also be the proof of reliance and inducement in each of the 20 causes sought to be united.

In Bank.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by George Noroian and others against F. A. Bennett and another. Judgment for plaintiff, and defendants appeal. Reversed.

B. F. Stone, Jr., of San Francisco (Harrison & Harrison, of San Francisco, of counsel), for appellants.

Ohannesian & Ohannesian and C. K. Bonestell, all of Fresno, and U. S. Webb, Atty. Gen., for respondents.

SHAW, J. The defendants appeal from the judgment.

The sole question presented for our consideration is whether or not the complaint states facts sufficient to constitute a cause of action in favor of the plaintiffs against the defendants.

The facts alleged may be briefly stated. The plaintiffs were engaged in farming in the vicinity of Reedley, each conducting a separate farm on his own account. Each had been accustomed to purchase the supplies necessary for his farming operations from merchants in Reedley, and the business of each required that he should obtain these supplies on credit until he should realize money from his crops with which to pay for them. A corporation known as the California Rochdale Company, being about to purchase the business of the persons from whom plaintiffs had theretofore purchased their supplies on credit, at different times solicited the trade of each of the plaintiffs represented to each of them that it was about to purchase the business of said other persons and intended to establish a large general merchandise store in Reedley, and—

> "promised to each of the plaintiffs that, if he would become a stockholder to the extent of one share in said Rochdale Company and would execute a promissory note in the sum of $90, payable to said Rochdale Company, and would transfer his purchasing to said Rochdale Company, he would get at least as much and as long credit as he had been receiving theretofore from any person from whom he had been purchasing his supplies."

Relying upon these representations, and in consideration of the said promise made to each of them by said company that it would extend credit as aforesaid to each of them, each of the plaintiffs, respectively, in the months of March and April, 1913, executed to the company a promissory note for $90. The shares of stock in said company were not and never have been of any value whatever "to any of the parties to this action." All of these notes were executed in the county of Fresno. Some of them specified that they should be paid in the county of Fresno, and others specified no place of payment. Each plaintiff thereupon transferred his custom to the Rochdale Company; said company gave each plaintiff credit up to and until June 1, 1913, but no longer, and thereafter refused any credit whatsoever to any of the plaintiffs, and required each to pay cash for any purchase made by him. At maturity of the notes the company transferred the same to the defendants, who have begun separate actions thereon against 11 of the plaintiffs, and are about to commence such actions against the other plaintiffs, respectively, in the justice's court of the city and county of San Francisco. In each action a writ of attachment was issued and levied upon the property of the respective plaintiffs in the county of Fresno. Each of the plaintiffs resides, and at all times mentioned has resided, in the county of Fresno. It is alleged that "all of the plaintiffs have the same defense to said actions," but nothing further is stated on that subject. Each plaintiff is poor, and the trials of the cases in San Francisco will impose great hardship and expense upon each of them. It is alleged that the merits of each of the said actions can be determined in this action, and thereby avoid a multiplicity of suits.

The prayer of the complaint is that the court take jurisdiction of the cause, determine the matters alleged, and render judgment perpetually restraining defendants from further prosecuting the actions, and requiring that the same be dismissed, and enjoining them from beginning other actions against the plaintiffs upon the said promissory notes.

The representations and promises which constituted the inducement to the several plaintiffs to execute their respective notes were not made jointly to all of the plaintiffs. The allegation is that they were made at different times to each plaintiff. The sum and substance of the plaintiffs' reason for the joinder of all of them in this action is that each plaintiff has executed a separate note to the Rochdale Company, which was obtained by said company by means of an act of fraud on each, consisting of a promise by the Rochdale Company to give such plaintiff credit upon his purchases of goods from said company, which promise the company had no intention of performing.

The plaintiffs base their claim that the law allows a case of this kind, upon the statement of Professor Pomeroy wherein he says that equity jurisdiction of bills of peace to prevent a multiplicity of suits—

> "may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. * * * Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy." 3 Pom. Eq. Jur. (3d Ed.) § 269, p. 445.

These passages illustrate the difficulty of stating a legal principle in abstract terms without a concrete illustration to show their application. In speaking of "a community of interest" in the questions of law and fact involved, the author was referring to cases where a single fact was decisive of the claim of all the parties concerned, as where persons owning separate rights in the waters of a stream are injured by a diversion of the water higher up on the stream by another person, or where a single fraudulent conveyance operates to the injury of several separate judgment creditors in the collection of their judgments, in each of which cases a single fact is the sole subject of the inquiry, or cases where owners of separate tracts of land unite in an action to quiet title against another claiming under a single land grant adversely to all of them, or where residents of a city, owning vehicles therein, unite to enjoin the enforcement of an illegal ordinance imposing taxes on such vehicles, or a suit by several lot owners to enjoin an illegal assessment upon all their lots for the improvement of a street, in each of which cases the same question of law may determine the rights of all the parties.

It is clear, from a consideration of the facts alleged in the complaint, that the present case is not included in any of the classes to which the rule stated by Mr. Pomeroy is applicable. There is no single fact or act, the determination of which will determine the rights of all the plaintiffs. There is no community of interest between the plaintiffs in the facts which are involved in the several actions on the promissory notes mentioned in the complaint, or in the defenses to such actions. Each plaintiff has a cause of action, though imperfectly alleged, to cancel a promissory note on the ground that the same was procured by fraud. The causes of action so far are similar. But the facts in the several cases are not shown to be the same, nor capable of proof by the same evidence. The promise made without intention of performance was not a single promise made to all the plaintiffs. Separate promises were made to each of them, and at different times. The proof of each promise must of necessity be distinct, independent, and not determinative of any other. To constitute such fraud the party must have relied on the promise made to him, and must have been induced thereby to enter into the contract. Such reliance and inducement would be the subject of independent proof and contradiction as to each plaintiff. One may have been persuaded by one statement, by a look, tone, or gesture, and another by something entirely different, and so there might be required different proof as to the means of persuasion of each of the 20 plaintiffs. The trial of the facts with respect to each note would not be an endeavor to prove a single act of the Rochdale Company as a common cause of a separate injury to each of the plaintiffs, as in the cases to which the doctrine of Mr. Pomeroy is addressed, but would be the proof of a separate injury to each plaintiff by evidence relating to him alone, and requiring a determination of the fact with respect to him alone. The trial of this joint action would require 20 different trials respecting 20 different conditions, to determine the facts upon which the rights of 20 different persons would depend, and neither trial would be a determination of the rights of any of the others. There is no case to which Mr. Pomeroy refers, nor any in the books so far as we have been advised, to justify the exercise of this jurisdiction in cases of this character. It may be that the same principles of law would govern the decision in all of the cases. This might be said of any number of cases of similar character, whether between the same persons or not. But there is no case which holds that parties having separate causes of action against the same person, all claiming under the same rules of law, have a common interest which justifies the joinder of all in one action to obtain the separate relief to which they may be entitled. We are of the opinion that the complaint did not state facts sufficient to constitute a cause of action in favor of all of the plaintiffs, but that at most it merely stated 20 separate and distinct causes of action, each in favor of a different plaintiff, and that it presents no sufficient ground for joining them all in one action.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; LAWLOR, J.

(180 Cal. 1)

UTAH STATE NAT. BANK v. SMITH et al.
(L. A. 5791.)

(Supreme Court of California. Feb. 24, 1919.)

1. Bills and Notes ⟹145—Negotiability —Law of Place of Payment.

Negotiability of note dated and payable in Utah must be determined by law of place of payment.

2. Bills and Notes ⟹146—Negotiable Instruments Law—Construction.

It is duty of courts, in construing the negotiable instruments law, to have in mind purpose of securing uniformity in law of commercial paper.

3. Bills and Notes ⟹155—Negotiable Character—Acceleration of Maturity—Nonpayment of Interest—Statutes—"Determinable."

Under Comp. Laws Utah 1907, §§ 1553, 1556, providing that instrument to be negotiable must be payable at determinable future time, and stating when instrument is so payable, note which provided that if interest was not paid when due, both principal and interest should become due at option of holder, was negotiable; "determinable" meaning what may be determined, found out, definitely decided upon, or settled.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Utah State National Bank, a corporation, against F. Owen Smith and another. From judgment for defendants, plaintiff appeals. Reversed.

Joseph L. Lewinsohn and Percy V. Hammon, both of Los Angeles, for appellant.

R. Y. Williams and A. W. Rutan, both of Santa Ana, for respondents.

WILBUR, J. [1] Appellants, claiming to be bona fide purchasers for value of a negotiable promissory note, brought this action against the makers thereof to enforce its payment. The defendants, asserting that the note was nonnegotiable, interposed a defense valid against the payee therein. The court instructed the jury that the note was nonnegotiable, and that the defense, if established, would defeat recovery on the note. A verdict was rendered favorable to the defendants, and judgment thereon entered. This is an appeal from the judgment. The note in question was dated and payable in Utah, and its negotiability must be determined by the law of the place of payment. 1 Daniel on Negotiable Instruments (6th Ed.) §§ 865, 879; Wharton on Conflict of Laws (3d Ed.) 451d; notes, 61 L. R. A. 209; 19 L. R. A. (N. S.) 670, 671. The provision relied upon to establish nonnegotiability is the usual provision for accelerating the due date for default in the payment of interest, as follows:

> "If the interest is not paid when due, then both principal and interest shall become due at the option of the holder of this note."

At the time of the execution of the note and when it was payable the uniform negotiable instrument law was in effect in Utah, although not then adopted in California. The terms of the Utah statute are shown in evidence, and, so far as the question here involved is concerned, are substantially the same as the uniform negotiable instrument law enacted in California in 1917. The two sections of the Utah law involved are 1553 and 1556 of the Compiled Laws of Utah, which are identical in language with our Civil Code, sections 3082, 3085, as enacted in 1917 (St. 1917, pp. 1532, 1533), and to sections 1 and 4 of the uniform negotiable instrument law (Crawford's Annotated Negotiable Instrument Law, pp. 11, 19), and read as follows, viz.:

> "1553. *Negotiable Instruments, Requirements of.* An instrument to be negotiable must conform to the following requirements:
>
> "1. It must be in writing and signed by the maker or drawer;
>
> "2. Must contain an unconditional promise or order to pay a sum certain in money;
>
> "3. Must be payable on demand, or at a fixed or determinable future time;
>
> "4. Must be payable to the order of specified person or to bearer; and,
>
> "5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."
>
> "1556. *Time Payable.* An instrument is payable at a determinable future time, within the meaning of this title, which is expressed to be payable:

> "1. At a fixed period after date or sight; or
> "2. On or before a fixed or determinable future time specified therein; or
> "3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

This uniform law has now been adopted by all but two states of the Union (Georgia and Texas). The history of its drafting and enactment in the various states makes it clear that the purpose was to secure uniformity of legislation and decision throughout the United States, and the purpose is further manifest by a general proviso with reference to the applicability of the general law merchant to supplement the legislation, and no doubt to aid in its interpretation, as follows, viz.:

> "In any case not provided for in this act the rules of the law merchant shall govern." Utah Negotiable Instrument Law, § 196; Crawford's Ann. Negotiable Instrument Law, § 196, p. 8.

[**2, 3**] It is generally held that it is the duty of the courts in construing this law to have in mind the purpose of securing uniformity in the law of commercial paper. State Bank, etc., v. Bilstad, 162 Iowa, 433, 136 N. W. 204, 144 N. W. 363, 49 L. R. A. (N. S.) 132; Felt v. Bush, 41 Utah, 462, 126 Pac. 688; Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; Broderick v. McGrath, 81 Misc. Rep. 199, 142 N. Y. Supp. 497; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842. As the view of the Supreme Court of Utah on this rule of interpretation is of special interest, we quote from the case of Felt v. Bush, supra, as follows:

> "The question, therefore, it seems to us, has passed beyond the domain of judicial discussion. As we understand it, the negotiable instruments law was intended to give legislative sanction to the majority rule to which reference has been made and was conceived by its authors and adopted by the different state Legislatures for the express purpose of harmonizing the conflicting decisions which had been rendered on the subject of negotiable instruments and the rights of those interested therein whose rights were acquired before maturity. As we view it, therefore, it is our plain duty to follow the numerous decisions that have directly passed upon the negotiable instruments law, and have construed it in accordance with the majority rule. The question is one of business expediency, and not of logic or equity as applied to an individual case."

Before the enactment of this law the great weight of authority was that under the law merchant the clause accelerating the due date did not destroy its negotiability. Chicago Railway Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; Phelps v. Sargent, 69 Minn. 118, 71 N. W. 927; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Clark v. Skeen, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337; Harrison v. Hunter et al. (Tex. Civ. App.) 168 S. W. 1036; First Nat. Bank, etc., v. Garland, 160 Ill. App. 407; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Daniel on Neg. Instr. (6th Ed.) § 48; Smith v. Williamson, 8 Utah, 219, 30 Pac. 753. All the decisions based upon the uniform negotiable instrument law, so far as we are advised, hold that the clause in question does not destroy the negotiability of a promissory note. First Nat. Bank v. Barrett, 52 Mont. 359, 157 Pac. 951; Bright v. Offield, 81 Wash. 442, 143 Pac. 159; Mackintosh v. Gibbs, 79 N. J. Law, 40, 74 Atl. 708; Des Moines, etc., Bank v. Arthur, 163 Iowa, 205, 143 N. W. 556, Ann. Cas. 1916C, 498; State Bank v. Bilstad, supra. The reasoning by which the courts have reached the conclusion that such a note is negotiable is not in each case the same. By section 1553, supra (3082 of our Code), a note is negotiable if payable at a "determinable future time." A matter is determinable "that may be accurately found out, settled, or determined." Standard Dictionary. That is, "capable of being determined, definitely decided upon, decided upon or ended." Webster's New International Dictionary. A future determinable time could be one determinable at some time in the future, as well as one determinable at present, or in advance. By section 1556 (3085 of our Code) it is sought to make clearer what is meant by a "determinable future time." An instrument payable at a fixed period after sight is payable at a "determinable future time," the exact date of payment being ascertainable at the date of presentation, but not before. A note payable "on or before a fixed date" is payable at a "determinable future time." If the instrument expressly states that it is payable "on or before" a fixed date, it is payable at the date in question or, at the option of the payor, at any earlier date selected by him for payment. The exact due date is thus left to be determined at a future date by the option of the payor, if exercised before the fixed due date. Under the law merchant the option in such a case lies altogether with the payor, but the due date is no less "determinable" when the option lies with the payee instead of the payor, and if the option of the payee is limited to the case of a default in the payment of an installment of interest the date of maturity is not less determinable in the future, for it may be fixed by the payee at any reasonable time after such default. It should be observed that the statute does not say that only an instrument which uses the words "on or before" a fixed date is negotiable. It declares that an instrument which is in fact payable on or before a certain date is negotiable. For the reasons stated the note in question is payable at a determinable future time, to wit, at a fixed date or before that date at the payee's option in case of a default in the payment of interest. There seems no reason for supposing that in this attempt to secure uniform legislation and decision it was intended to change a well-settled rule of the law merchant, by which in nearly every state such a note was negotiable. Construed in the light of such rule, and under the plain language of the statute, the note is clearly negotiable.

Respondent calls attention to the fact that the Utah negotiable instrument law differs from that of California and some other states, in that the words "or of interest" contained in section 3083, subdivision 3, of our amended Civil Code, and section 2 of the uniform law (Crawford's Ann. Neg. Inst. Law, p. 13) are not included in the corresponding section (1554) of the Utah law. This section, however, defines when "the sum payable is a sum certain within the meaning of the act." The provision of the California law states that the sum is certain "although it is paid * * * by stated installments with a provision that upon default in payment of any installment or of interest, the whole shall become due." But the question here involved is with reference to certainty in the time of payment and turns upon the construction of subdivision 2 of section 3085, supra. Our attention is called to certain decisions by the courts of California upon the subject of the negotiability of promissory notes: National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Smiley v. Watson, 23 Cal. App. 409, 138 Pac. 367. It is suggested that in the interpretation of the uniform negotiable instrument law of Utah we should consider the same in the light of these decisions, on the theory that the Utah law is presumed to be the same as our own, except where shown to be to the contrary. That rule has no applicability here, for the reason that it was stipulated in the court below that the statute in question constituted the law in Utah. The decisions of the courts of this state, based upon its various Code provisions concerning negotiable instruments, and particularly upon sections 3088 and 3093, Civil Code, since repealed and replaced by the uniform negotiable instrument act, obviously can be of no assistance in ascertaining the law of Utah under the uniform act. Nor are we called upon to prophesy what the courts of Utah may do when the same question comes before them under the uniform negotiable instrument law. The question simply is: What interpretation do we place upon the language of the Utah statute in proof in this case? If there is any decision of the Supreme Court of Utah bearing upon the construction of the statute, such decision was not proved in the case, and, it may be added, is not now called to our attention. The note was negotiable under the law of Utah. The instruction to the contrary was erroneous.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LENNON, J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

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180 Cal. 17

HOLCOMB v. BREITKREUTZ. (L. A. 4698.)

(Supreme Court of California. Feb. 25, 1919.)

APPEAL AND ERROR 🔑1002—TRIAL—VERDICT UPON CONFLICTING EVIDENCE—CONCLUSIVENESS.

An appellate court will not interfere with a verdict based upon conflicting testimony.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Earl A. Holcomb against Otto Breitkreutz. Judgment for plaintiff and defendant appeals. Affirmed.

John Munro, of Los Angeles (Fay R. Robertson, of Los Angeles, of counsel), for appellant.

T. C. Gould and Frank Stewart, both of Los Angeles, for respondent.

WILBUR, J. Plaintiff recovered judgment against the defendant for $825 for assault and battery. Defendant appeals. Appellant's first point is thus stated:

> "While the defendant fully realizes that ordinarily appellate courts will not interfere with a judgment or verdict where the testimony in the case is conflicting, yet it would appear to appellant that the record in this case discloses that the preponderance of evidence was in his favor."

Counsel thus correctly states the rule that this court will not interfere with the verdict where the testimony is conflicting. The second point is that the verdict is excessive. Plaintiff claimed $5,000 punitive and $5,000 actual damages. The damages were not excessive. The appeal is frivolous.

Judgment is affirmed, with $100 damages to the plaintiff for a frivolous appeal.

We concur: LENNON, J.; MELVIN, J.

180 Cal. 103

SPENCER et al. v. CITY OF LOS ANGELES et al. (L. A. 4727.)

(Supreme Court of California. Feb. 28, 1919. Rehearing Denied March 27, 1919.)

1. Municipal Corporations 🔑523(2)—Assessments—Payment Under Compulsion—Recovery.

The general rule is that money paid on void assessments is not deemed to have been paid under compulsion, so as to allow recovery, where there is nothing to compel payment except mere threat by officer of a sale of property or a suit.

2. Municipal Corporations 🔑523(2)—Payment of Street Assessment—Duress.

Where property owners did not pay assessments for opening street in Los Angeles until after published notice of sale for delinquent assessments, but before sale, *held*, there was duress of property of payers within the rule that payments so made may be recovered, since deed to purchaser at sale would, under St. 1903, pp. 383, 384, §§ 25–29, be prima facie evidence of title.

3. Municipal Corporations 🔑523(4)—Assessments Paid Under Protest—Recovery.

Where invalidity of street opening assessments was due to latent defect, the property owners would, in any litigation with purchaser at sale for delinquent assessments, be compelled to establish facts showing defect, and in such case a threatened sale would imperil owners' property, so that they could pay assessments under protest and subsequently recover.

4. Trial 🔑395(5) — Finding — Ultimate Facts.

Finding that owners paid their respective assessments for opening a street "under protest, and did, at the time of said payment, then and there reserve to themselves and each of them the right to fully recover the same," was a sufficient finding of the ultimate fact that payments were accompanied by valid protest.

5. Municipal Corporations 🔑523(4)—Street Assessments—Payment—Protest—Sufficiency.

Pol. Code, § 3819, does not apply to special assessments made under street opening act of 1903, and since the act itself makes no provision therefor, the sufficiency of protest of property owners when they paid assessments must be determined by the rules of the common law under which oral protest is sufficient.

6. Municipal Corporations 🔑523(5)—Municipal Assessments — Payment — Recovery—Evidence—Admissibility.

Since payers when paying assessment for opening of street could make their protests, in parol, evidence of conversations on the subject between payers and collecting officers at time of respective payments was admissible.

7. Municipal Corporations 🔑523(4)—Payment of Assessment — Protest — Sufficiency.

The bringing of an action to test validity of street opening proceeding was express notice that plaintiffs therein claimed that assessments were illegal, and as to payers who were parties plaintiff and paid after notice of sale for delinquent assessments, it was unnecessary to specify grounds of protest when making payments.

8. Municipal Corporations 🔑523(4) — Assessments Voluntarily Paid—Recovery.

As to property owners who paid assessments for opening street before notice of sale of their property for delinquent assessments, there was no duress of property, and a protest was unavailing.

9. Municipal Corporations 🔑523(5)—Recovery of Assessments Paid Under Protest—Interest.

In action to recover money paid upon assessments for opening a street, interest should have been allowed against defendant city on payments made under protest only from the date the invalidity of the assessments was established by final judgment.

10. Municipal Corporations 🔑523(5)—Board of Public Works—Liability for Assessments Paid Under Protest.

Action would not lie against those who were members of board of public works of defendant city at the time assessments for opening street were paid under protest, where, at the time action was begun, the money collected had all been paid into city treasury and expended by city in satisfaction of damages awarded to persons whose lands were taken and damaged.

11. Municipal Corporations 🔑523(1)—Assessments Paid Under Protest—Recovery.

A city is liable for void assessments paid under protest, although before the action was begun the money collected upon the assessments had all been paid out to persons whose land was taken or damaged for the opening of the street.

12. Limitation of Actions 🔑28(1)—Municipal Assessments Paid Under Protest.

Action to recover money paid upon assessments for opening a street is not founded upon any instrument in writing, and Code Civ. Proc. § 339, subd. 1, barring action in two years, would apply.

13. Appeal and Error 🔑843(2)—Matters Not Necessary to Decision—Review.

Decision that payments of void assessments for opening a street were not made by two of the payers under duress makes it unnecessary to consider the effect of the statute of limitations upon that part of plaintiffs' claim based upon such payments.

14. Limitation of Actions 🔑66(3)—Cause of Action Against City—Accrual.

Where the charter of a city provides that demands must be presented to its council or some officer for approval or rejection, and that no payments can be made or suit be brought thereon until after such presentation and rejection, the cause of action does not accrue until presentation has taken place.

15. LIMITATION OF ACTIONS 🔑65(1)—CONDITIONS PRECEDENT.

When plaintiff's right of action depends upon some preliminary act which he has to perform, and the time within which such act must be performed is indefinite, a reasonable time will be allowed therefor, after which limitations will begin to run.

16. LIMITATION OF ACTIONS 🔑66(3)—ACTION TO RECOVER ASSESSMENTS PAID—ACCRUAL—PRESENTATION OF CLAIM TO CITY.

Where payments of municipal assessments were made only five days before beginning of the two-year period preceding action against defendant city to recover payments, action cannot be deemed barred under two-year statute (Code Civ. Proc. § 339, subd. 1), in view of city charter, providing for presentation and approval or rejection of claims against city.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Byron M. Spencer and others against the City of Los Angeles and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for appellants.

W. W. Hyams, F. E. Davis, and Davis & Hyams, all of Los Angeles, for respondents.

SHAW, J. In this action the plaintiffs seek to recover money paid upon assessments for the opening of a street in Los Angeles, under the street opening act of 1903 (St. 1903, p. 376). The court below gave judgment in favor of plaintiffs against all of the defendants. The appeal is from the judgment. The record also presents for review an order denying a motion for a new trial.

The ground of the action was that the assessments were invalid, and that the payments were made by compulsion and under protest. The proposition that the assessments in question were invalid was established by the decision of the District Court of Appeal in Walker et al. v. Los Angeles et al., 23 Cal. App. 634, 139 Pac. 89. The board of public works and the persons who were members thereof at that time were parties defendant to that action. The court there held that said assessment and all proceedings leading up to it were void because of the fact that there was a latent ambiguity in the description of the boundaries of the district in the ordinance of intention under which the proceedings were instituted, and that this ambiguity, when shown, made the description of the district uncertain and void. The defendants do not question the soundness of that decision. In the present action the plaintiffs claim as assignees of 54 of the property owners who, it is alleged, paid said assessment under protest, the amount paid being in the aggregate $46,599.32. The court below made findings in favor of the plaintiffs, covering the claims of 40 of the plaintiffs' assignors, amounting to $30,609.25.

The appellants present the following points as cause for reversal: (1) That the payments were not made under any duress of person or property, and were not accompanied by any valid or sufficient protest, and hence that they were voluntary payments which cannot be recovered. (2) That the court erred in allowing the plaintiffs interest accruing from the time of the making of the payments. (3) That the personal judgment against the members of the board of public works is not sustained by the findings or the evidence. (4) That the action was not begun until after the money paid in upon the assessments had been paid out by the city upon the damages allowed in the proceeding for the opening of the street, and that in such a case the money cannot be recovered from the city or its officers. (5) That with respect to some of the assignors of the plaintiffs the action is barred by the two-year statute of limitations. Some minor points regarding rulings upon the admission of evidence will be considered in connection with the question of voluntary payments. We will consider the points in the order above stated.

[1, 2] 1. The general rule is that money paid to an officer upon taxes or assessments which are alleged to be illegal and void are not deemed in law to have been paid under compulsion, so as to allow a recovery thereof, where there is nothing to induce or compel payment except the mere threat by the officer of a sale of property or a suit for the recovery thereof if payment is not made. There must be in addition some coercion or compulsion which amounts to a duress of the person or property of the payor. Phelan v. San Francisco, 120 Cal. 5, 52 Pac. 38; Maxwell v. San Luis Obispo County, 71 Cal. 466, 12 Pac. 484. In the present case, however, we think the facts show that there was such coercion and compulsion.

The conditions under which the payments were made were as follows: Under the charter of the city of Los Angeles, its board of public works exercised the powers conferred by the act of 1903, aforesaid, on the street superintendent. Stats. 1905, p 983. In pursuance of the ordinance above mentioned, the board made and filed an assessment for the expenses of the street opening, and published notice thereof. The assessment charged certain sums of money against lands of the plaintiffs' assignors. These assessments thereafter became delinquent, and on December 8, 1911, the board published a notice of the sale of the property for such delinquent assessments, stating therein that the property would be sold on December 27, 1911, unless the assessments thereon with penalties and costs were paid in the meantime. Prior to the day of sale the plaintiffs' assignors paid their respective assessments. The act of 1903 provides that if a delinquent assessment is not paid, the property assessed must be sold to any person who will take the least quantity of land and pay the assessment, penalty, and costs; that a certificate of sale must be issued to such purchaser, which vests in him the lien of the assessment; that after 12 months from the sale, if the purchaser has given proper notice of his application therefor, a deed of the property sold must be made to him; that at any time prior to the execution of such deed the property may be redeemed from such sale; and that such deed "shall be prima facie evidence of the truth of all matters recited therein, and of the legality of all proceedings prior to the execution thereof, and of title in the grantee." Stats. 1903, p. 383, §§ 25–29.

The rule regarding payments made under such circumstances is well established by our decisions. Gill v. Oakland, 124 Cal. 335, 57 Pac. 150, is a case in point. That was an action to recover money paid under protest upon a street opening assessment, made under the act of 1889 (Stats. 1889, p. 70), which in all essential particulars, so far as this question is concerned, was identical with the act of 1903. Concerning the claim that payment made after the giving of notice of sale and before the sale was to take place was voluntary, the court said (at page 341 of 124 Cal., at page 152 of 57 Pac.):

> "Under the rule stated in Pixley v. Huggins, 15 Cal. 128, many times approved by this court, the deed would cast a cloud upon plaintiff's title. It has been recently held here that where an officer is about to sell property under a void assessment he may be enjoined. Chase v. City Treasurer, 122 Cal. 540 [55 Pac. 414]. This remedy was open to plaintiff in the present case. But it was not the only remedy available to him. He also had the right to pay the assessment under protest, setting forth the grounds of its illegality, in order to prevent the sale and clouding the title of his property; and he could look for relief in an action at law, which this is. The facts which gave the remedy of injunction gave the remedy at law, and payment after protest, under the circumstances here disclosed, was payment under duress. Where the deed shows on its face that the tax or assessment was void, or the law under which it was levied was invalid, a payment has been held to be voluntary and not recoverable. Such were the facts in the cases cited by appellant. In the present case, however, plaintiff's rights would have been cut off if he had not paid the assessment or enjoined the sale."

The reason for the distinction made between this and the other cases where payment was held to be voluntary is that in those cases the deed upon the invalid sale would, when executed, show on its face its invalidity, so that when the grantee therein sought to establish his right under the deed, his very attempt to do so would defeat such right. In such a case it is well established that equity will not enjoin the making of the sale or the execution of the deed, and it has also been held that the threat of such sale and deed does not constitute sufficient duress of property to make the payment under protest involuntary within the doctrine that an involuntary payment may be recovered. In the present case the proceedings were not void on their face, and the deed, when executed, would have been prima facie evidence of the title of the grantee to the land purporting to be conveyed thereby.

[3] The defect in the description of the boundary was a latent defect. It did not appear on the face of the ordinance, but was made to appear in the case of Walker v. Los Angeles, supra, by extrinsic proof showing that the calls in the boundary lines were so uncertain that, when applied to the extrinsic facts, the point to which they would lead could not be ascertained. In any litigation by the property owner with a grantee under such sale, it would be necessary for such owner to establish these facts. For these reasons the case comes within the rule that his property is imperiled by the threatened sale, and that he may pay the assessment under protest and subsequently recover it in an action. In the cases of Williams v. Corcoran, 46 Cal. 553, Wills v. Austin, 53 Cal. 152, and Byrne v. Drain, 127 Cal. 663, 60 Pac. 433, cited by the appellant, the deed and the proceedings thereunder were invalid on their face, and consequently did not create any cloud upon the title to the land, or constitute duress of property sufficient to make such payment involuntary. Maskey v. Lackmann, 146 Cal. 780, 81 Pac. 115. They do not conflict with the doctrine stated in Gill v. Oakland, supra.

It is urged that the previous decisions on the subject favorable to the respondent were overruled in Crocker v. Scott, 149 Cal. 575, 87 Pac. 102. The point now under consideration was not involved in that case. It was a suit to enjoin a sale by the tax collector. The main question discussed was the discretionary power of courts of equity to enjoin the ordinary proceedings for the collection of taxes. It was said to be the rule that such injunction would not issue, unless it was necessary to protect the rights of the property owner, or unless it appeared that he had no adequate remedy at law, and therefore that "a court of equity will go no further than is necessary to protect the rights of the property owner, and will not to any greater extent impede the officers of the state in the performance of their duties." 149 Cal. 594, 87 Pac. 110. Upon this principle the court held that under the law then existing, under which the only thing done on the day of sale would be a formal entry of the sale to the state itself of all delinquent property on the roll, a sale redeemable at any time within five years, and thereafter until the state should receive a deed from the tax collector and should offer the property for resale, that neither the certificate of sale nor anything to be done prior to the execution of the deed, more than five years afterward, constituted prima facie evidence of the validity of the proceedings, and therefore that equity would not interpose to prevent the performance of the preliminary acts by the tax collector. Although not stated in the opinion, it might have been said as another reason for denying the injunction that the property owner would have a remedy at law under section 3819 of the Political Code by paying the alleged illegal tax and proceeding with the action there authorized to recover it from the county. This case is not in conflict with the rule that in cases not covered by section 3819, where the ultimate result of the threatened sale will be the execution of a deed prima facie valid, the party may prevent the sale by payment under protest, and that such payment will not be deemed voluntary, but may be recovered in an action for money paid.

[4] With respect to the protest, the finding is that the owners paid their respective assessments "under protest, and did, at the time of said payment, then and there reserve to themselves and each of them the right to fully recover the same." This is a sufficient finding of the ultimate fact. The evidence in support of this finding is claimed to be insufficient. It appears that the action of Walker et al. v. Los Angeles et al. was begun some time prior to December 4, 1911; that its object was to enjoin the city of Los Angeles and the board of public works from making any sale of the property of plaintiffs therein upon the assessment in question; that the amended complaint therein was served on the defendants on December 4, 1911; that on December 8, 1911, as above stated, the board of public works gave the necessary notice of sale, fixing the date of the sale as December 27, 1911; that almost all of the plaintiffs' assignors in this action were plaintiffs in the aforesaid action to enjoin the sale; that while this action was pending, the payments herein sued for, with two exceptions to be hereafter noticed, were made to the board of public works. The books of the board show that opposite the entries therein of the assessments against 23 of plaintiffs' assignors, there was indorsed in red ink at the time of payment thereof by the collecting officer the words, "paid under protest." Ten of the persons whose payments were not so marked testified on the trial that when they made the payments they orally stated to the collecting officer that they paid the same under protest. One or two of these do not appear to have used the word "protest," but merely objected that the tax was unjust, because their property was assessed in greater proportion than the property of some others within the district. As the case must be reversed for other reasons, it is unnecessary to determine here whether with respect to these two persons the protest was sufficient. There was no evidence that any of the persons paying under protest specified at that time, as grounds thereof, that the assessments were void because of the latent ambiguity in the description above referred to. As to those whose payments were marked as paid under protest on the collector's book there was no other evidence of the nature of the protest except the entry on said book. The complaint in Walker et al. v. Los Angeles et al., stated clearly the facts concerning the latent ambiguity in the description upon which the assessment was finally adjudged to be void. From the testimony of the witnesses concerning the conversations at the time of payment, and from the pendency of the Walker Case, and the allegations of the complaint therein, the court below might reasonably have inferred that the grounds upon which the parties claimed that the assessments were invalid, were fully understood, both by the protesting owners and by the collecting officers, as including those stated in said complaint; and that there was no necessity for further specification to make the reasons for the protest fully understood by such officers.

The appellant contends that the protests should have been in writing, and further, that, whether written or oral, the law requires that a protest shall specify the particulars in which the assessment is claimed to be illegal.

[5, 6] Section 3819 of the Political Code provides that the protest there authorized must be in writing, and must specify the grounds upon which the payor claims that the tax is void. But this section refers only to ordinary taxes for state and county purposes. It does not apply to special assessments made under the street opening act of 1903, nor to other special assessments, except where the act providing therefor makes the provisions of section 3819 applicable. Davis v. San Francisco, 115 Cal. 67, 46 Pac. 863; Easterbrook v. San Fran-

cisco, 44 Pac. 800[1]; Phelan v. San Francisco, 120 Cal. 4, 52 Pac. 38; Justice v. Robinson, 142 Cal. 199, 75 Pac. 776. The act of 1903 contains no provision on the subject. Consequently the sufficiency of the protests in question must be determined by the rules of the common law. Justice v. Robinson, supra. The common-law rule is that a writing is not essential to the validity or effect of any transaction or contract. Careful persons resorted to writings in order to preserve a more accurate memorial of the terms of the agreement or statement so as to facilitate the proof thereof. But this was a measure of convenience only, and the affair, when proven, was, at common law, as effectual when in parol as when it was in writing. It was competent, therefore, for the parties to make their protests in parol, and it necessarily follows that the court did not err in admitting the testimony of the conversations on the subject between the persons making the payments and the collecting officer at the times of the respective payments. It being a matter that could have been accomplished in parol, all the conversation and all the circumstances that would tend to show the understanding of the parties regarding the matter at the time the respective payments were made would be admissible.

[7] We think an analysis of our decisions shows that under the circumstances of this case it was not necessary that the grounds should be specified at the time of making the payment. The question was under discussion in Meek v. McClure, 49 Cal. 628, where the court said:

> "In most of the cases in which the effect of a protest is considered, the payment was made to a public officer; and the only purpose of the protest was to give the officer notice that the money was not legally due, and thus to enable the officer to protect himself against the consequences of an action to recover the money back from him. The officer is thereby put on inquiry as to whether the money is legally due; and if he finds that the demand is illegal, he may protect himself by refusing to receive the money; or, if he finds that it is of doubtful legality, he may take the proper steps to avoid, or protect himself against responsibility. If the officer has notice of the matter which renders the demand illegal another notice in the form of a protest would be useless; but if he has no knowledge of such matter, he ought not to be subjected to the costs and consequences of an action to recover the money from him—and that too, perhaps, after he has paid over the money in the usual course of official business—without notice from the party paying the money of the grounds upon which he claims that the demand is not legally due."

It is true that in that case the court further said that wherever a protest is essential it was "necessary to state the grounds upon which the party paying the money claims that the demand is illegal." But that was an action against the collecting officer alone, and there was nothing to show that he had actual knowledge of the defect which made the tax void and the statement last quoted obviously referred to that phase of the case. In Mason v. Johnson, 51 Cal. 612, the protest did not state the grounds upon which it was claimed the tax was void, but merely stated that it was unlawful. The officer was not authorized by law to collect the tax. The court held the protest to be sufficient, because the tax collector "was bound to take notice of the matter which rendered the tax illegal," it being a matter of law. So in Smith v. Farrelly, 52 Cal. 77, a tax was held to be illegal because it was made by a county assessor instead of a district assessor, and the tax collector of the county was not authorized to collect it because of the fact that he was elected as the county tax collector, and not as the district tax collector. The protest did not state either of these facts as grounds thereof. It was held that this was not necessary because the tax collector must know that he was not elected as the tax collector of the district, and that the assessment had not been made by the proper assessor; the court saying:

> "It is not necessary for the person paying taxes under protest to state facts of which the tax collector has notice."

Parenthetically, it may be remarked that the court in that case further decided that a tax paid after the delinquent list had come into the hands of the tax collector, and after the publication of the notice of the delinquent sale, was a payment under duress. Again, in De Fremery v. Austin, 53 Cal. 382, the court said on this subject:

> "The protest in this case does not specify any grounds of illegality of the taxes. It was not necessary for the plaintiffs to specify the illegality of the tax upon the solvent debts, or of the state tax upon the other property, for the tax collector is chargeable with notice of their illegality; but if they desired to recover back any portion of the tax on the ground that the levy for certain of the funds specified in the order of the board levying the city and county tax was illegal, they should have specified the grounds of the alleged illegality of the tax, for there is nothing in the case showing that the tax collector was chargeable with notice of the alleged illegality."

In each of these cases the action was against the collecting officer alone. The public corporation for which he acted was not sued. In the case at bar the action is against the city of Los Angeles. The members of the board of public works are also parties defendant, but, as will presently appear, they are not personally or officially liable in the action. The case may therefore be considered as if it were against the city alone. The action in the Walker Case was express notice to the city, and to all of its agencies empowered to act on the matter, that the plaintiffs therein claimed that these assessments were illegal and of the particular facts upon which such claim was based. It is obvious that no further information to the city was necessary. The rule established by the foregoing decisions is that even in cases where the collecting officer has not paid over the money and is therefore still subject to action, specifications of the grounds of protest are not necessary where such officer is chargeable with knowledge of the illegality of the tax, or is aware of the facts which make it illegal, and that in such cases a general statement that it is illegal is sufficient. We conclude, therefore, that the evidence was sufficient to support the finding, at least with respect to all the payors who were parties plaintiff in the Walker Case, and who paid after the notice of sale was given, and who paid under protest.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 112 Cal. 17.

[8] There were two of plaintiffs' assignors, Abbott and Straube, who paid their assessments before the notice of sale was given. As has already been shown, there was at that time no duress of property. There was only an apparent lien upon that property. At that time no proceeding to enforce the lien by a sale had been instituted. The protest was therefore unavailing. Brumagin v. Tillinghast, 18 Cal. 266, 79 Am. Dec. 176. The judgment, so far as these claims are concerned, was erroneous, because the payments were voluntary.

2. The judgment in this case exceeds the aggregate amount of the payments which were allowed to plaintiffs by about $9,000. The appellants claim that it is excessive to that extent. The excess is made up of interest accruing on the payments from December, 1911, to the date of judgment. It has become established by our decisions that in an action to recover taxes paid under protest under section 3819 of the Political Code no interest from the time of payment to the date of judgment can be allowed. Savings & L. Soc. v. San Francisco, 131 Cal. 356, 63 Pac. 665; Columbia Savings Bank v. Los Angeles, 137 Cal. 471, 70 Pac. 308; Miller v. Kern County, 150 Cal. 797, 90 Pac. 119. In the Columbia Savings Bank Case the court said that interest was not allowable for the reasons: First, that the statute did not provide for it; second, that the money could not be said to be due from the county "until its liability was fixed by the judgment of a court of competent jurisdiction"; and, third, that it was not a loan of money which could be presumed to be made upon interest.

[9] We think the same rule should apply to money paid under protest and governed by the common law, and that the proper rule applicable here is that interest should not have been charged against the city of Los Angeles until the invalidity of the assessments was established by the final judgment of the court against the city in the action of Walker and others v. Los Angeles aforesaid. That judgment established the invalidity of the assessment, and settled the question that the defendant city was withholding money from the plaintiffs without right. It brings the case within the provision of section 1915 of the Civil Code allowing interest for the "detention of money." It is true that, while the assignors of plaintiffs were parties to that action at the time the payments were made, they afterwards withdrew therefrom and dismissed the action so far as they were concerned, but it is at least a fair presumption that this withdrawal was made because of the fact that in the meantime they had preserved their rights to recover the money by making the protest accompanying the payment thereof, and under these circumstances we see no reason why they were not entitled to interest as soon as it was adjudged that the city had no right to exact payment, and that it was unjustly withholding the money from the plaintiffs. The court erred in so far as it allowed interest for a time antedating the final judgment in that action.

[10] 3. The judgment appealed from purports to run, not only against the city of Los Angeles, but also against the persons who at the time of the payments were members of the board of public works, and against the board of public works also. The board of public works is an agency of the city, it has no separate corporate existence, and so far as we are aware it is incapable of either suing or being sued, except perhaps in mandamus to compel the performance of its duty. Consequently the judgment, so far as the board is concerned, is unauthorized. With respect to the liability of the members thereof who were in office at the time the payments were made, it appears from the evidence that the money collected upon these assessments was all paid into the treasury of the city and paid out of the treasury in satisfaction of damages awarded to the persons whose lands were taken and damaged by the opening of the street, and that this all occurred before the beginning of the present action. It is settled by our decisions that an action will not lie against collecting officers or boards, such as the board of public works and its members, to recover money paid upon an illegal assessment, unless the money still remains in the hands of the board or its members at the time such action is begun. Hartford, etc., Co. v. Jordan, 168 Cal. 270, 142 Pac. 839; Craig v. Boone, 146 Cal. 718, 81 Pac. 22. It follows that the judgment against the members of the board is not sustained by the evidence.

[11] 4. As has just been said, there can be no recovery in cases like the present against one who is a mere collection officer and who before the action is begun has paid the money over to his principal in due course of law. The appellants contend that this rule applies to the city itself, and that it cannot be held liable because of the fact that before the action was begun the money collected upon these assessments had all been paid out upon the damages allowed to the persons whose land was taken or damaged for the opening of the street. Wherever a city or a county occupies a position similar to that of a collection agent who has paid the money collected over to his principal, this rule applies. The cases cited by the appellants are of this character. They are Elberg v. County of San Luis Obispo, 112 Cal. 316, 41 Pac. 475, 44 Pac. 572, Pacific, etc., Co. v. County of San Diego, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571, Easterbrook v. San Francisco, 44 Pac. 800,[2] and Davis v. San Francisco, 115 Cal. 67, 46 Pac. 863. In these cases it was held that where a collection officer of one public corporation, a county tax collector, for example, is also and ex officio empowered to collect taxes levied for another public corporation, such as a school district, which tax, when collected, belongs to and is to be paid over to such other corporation, a suit against the county for the recovery of the money paid to such collecting officer upon such a tax, upon the ground that the tax was illegal and void, cannot be maintained, unless it is begun before the money has been paid over to the other public corporation for which it was collected and to which it belonged. These decisions have no application here so far as the city of Los Angeles is concerned. The street opening district formed for the purposes of the assessment was not a public corporation, but was a mere area or taxing district which the proper authority had declared to be specially benefited by the proposed improvement. The city had the right of possession and control of the funds raised by the assessment. It had the power to raise funds for such street opening either by a proceeding for a special assessment, as here attempted, or by general taxation upon all the taxable property in the city. Section 2, subds. 13, 16, 18, and 19, City Charter (Stats. 1911, 2061). The money when raised belonged to the city. The protest made to the city preserved to the assessment payers the right to recover the same against the city, and it could not thereafter pay out the money in pursuance of the illegal assessment and thereby escape liability to the property owners. Upon receiving the money under a protest properly made it was the duty of the city to withhold the funds until the legality of the assessment was ascertained, and when that point was decided against the city it became its duty immediately to return the money to those from whom it had been received. This is clearly the effect of the decision of this court in Gill v. Oakland, supra, where the facts were in all essential particulars the same as those here existing. The only difference is that in that case the city had previously advanced money from its general fund for the opening of the street, and the assessment which was declared to be illegal was levied for the purpose of refunding the same to the city. Here the city, having used the money it had illegally collected to pay for the opening of the street, must be deemed to be in the same position as if it had paid out the same from its general fund. The difference in the two cases does not justify any different rule regarding the city's liability.

[12, 13] 5. Appellants claim that with respect to the payments made by Straube and Abbott, Lee and Parish, the action is barred by the two-year statute of limitations, as an action not founded upon an instrument in writing. Code Civ. Proc. § 339, subd. 1. There can be no question but that the action is not founded upon an instrument in writing, and therefore this statute applies. The action was begun on December 20, 1913. The payments of the above-named parties were all made more than two years before that time. Those of Straube and Abbott were made in November, 1911. As we have already decided that these two parties did not pay under duress or compulsion and could not recover, it is unnecessary to consider the effect of the statute of limitations upon that part of the plaintiff's claim. The payments of Lee and Parish were made on December 15, 1911, five days more than the two years prior to the beginning of the action.

[14-16] If the cause of action to recover the money accrued immediately upon such payment, these claims would be barred. But this is not the case. The city charter provides that claims against the city shall be paid only on demands as provided therein; that every claim must be first presented to and approved by the board authorized to incur the liability represented thereby, in this case the board of public works; that if such claim is approved it must then be presented to the city auditor to be audited by him, and that if he rejects it or approves it in part only it shall then go to the finance committee of the council; that it must then be considered by such committee and reported to the council for its action thereon; that the council may overrule or sustain the objection of the auditor, and shall thereupon return the same to the auditor with its action indorsed thereon; that no payment can be made from the city treasury or out of the

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[2] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 112 Cal. 17.

public funds of the city unless the demand therefor be so presented to and approved by every officer, board, or body, as required by the charter, all of which must appear on the face of the paper representing the demand; and finally, that no suit can be brought on any claim for money or damages against the city or any of its agencies or officers until a demand for the same has been presented in the manner above stated, and rejected, in whole, or in part. City Charter, §§ 216, 217, 219, 220, 222a, and 222g (Stats. 1911, p. 2152). It has been decided, and must now be considered as settled, that where the charter of a city provides that demands must be presented to its council or some officer of the city for approval or rejection, and that no payments can be made nor suit be brought thereon until after such presentation and rejection, that the cause of action does not accrue until such presentation has taken place. Whether failure of the city officers to act upon the claim will presently set in motion the right to begin a suit it is unnecessary to determine. At all events there must be a presentation and time given for action by the city authorities before the cause of action accrues. Farmers', etc., Bank v. Los Angeles, 151 Cal. 655, 91 Pac. 795; Sou. P. Co. v. Santa Cruz, 26 Cal. App. 26, 145 Pac. 736. The appellants resort to the doctrine laid down in a number of decisions where it was held that in cases where a demand is necessary to complete a cause of action, the party having the claim cannot delay the time when the statute of limitations begins to run by failing to make the demand. Williams v. Bergin, 116 Cal. 56, 47 Pac. 877, Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153, County of San Luis Obispo v. Gage, 139 Cal. 398, 73 Pac. 174, and other cases which we need not mention. In Williams v. Bergin this rule is laid down, and it is said that a party—

> "cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act, and that if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will begin to run after the lapse of such reasonable time. What is a reasonable time will depend upon the circumstances of each case. * * * The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action. The reason of the rule, however, ceases when the right of action is not under his control, but depends upon the act of another; and when the act upon which his right to maintain an action depends is an official act to be performed by a public officer in the line of his official duty, there is no presumption that any delay in its performance was unreasonable." 116 Cal. 61, 47 Pac. 878.

Under the rule thus stated the action upon these claims cannot be deemed to have been barred by the statute. The payments were made on December 15th, only five days before the beginning of the two-year period preceding the beginning of the action. It cannot reasonably be claimed that within that five-day period the parties could have secured action upon their claims by the several city officers and board who were required to act thereon before the claim could have been paid, or that the reasonable time within which to procure action of the city authorities did expire before the expiration of the said five days. See, also, Dennis v. Bint, 122 Cal. 45, 54 Pac. 378, 68 Am. St. Rep. 17. It appears from the record that demands were presented long before the expiration of the two years, and that they were duly rejected before this action was begun. The precise question was not before the court in San Luis Obispo County v. Gage, supra, and what is there said is not in conflict with the rule just stated. We are of the opinion that these demands were not barred by the statute of limitations.

Some of the questions we have treated would not be absolutely necessary to a determination of the case, but we have considered them because of the fact that the judgment must be reversed and a new trial may ensue in which the same questions may again arise. Although from what we have said it is apparent that the judgment against the city of Los Angeles was correct as to a part of the claim of the plaintiffs, yet the record does not present facts sufficient to enable us to determine with certainty how much should be recovered, and we therefore deem it better to reverse the entire judgment so that upon a new trial the facts may be more clearly established.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

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180 Cal. 83

CITY OF OAKLAND v. BUTEAU et al.

(S. F. 7743.)

(Supreme Court of California. Feb. 28, 1919. Rehearing Denied March 29, 1919.)

1. Navigable Waters ⚿44(3)—Boundary —Erosion and Accretion.

Where land is bordered by a running stream, the boundary is shifting, going landward with erosion, and waterward with accretion, a rule expressly declared in Civ. Code, § 1014, and judicially extended, as at common law, to cases where the land is bounded by tidal water.

2. Navigable Waters ⚿44(3) — "Ship Channel" as Boundary—Statute.

By Act May 4, 1852 (St. 1852, p. 180) fixing limit of grant of water front lands to town of Oakland as the line of "ship channel," the town took to the line of low tide, as affected by such gradual and imperceptible changes as might from time to time take place in the location of such line.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ship Channel.]

3. COURTS ⚷107 — EFFECT OF DECISION — DICTA.

Expressions in a judicial opinion must be read in the light of the particular question presented for decision and under consideration.

4. COURTS ⚷97(6) — DECISION OF FEDERAL COURT—CONSTRUCTION OF STATE STATUTE.

Supreme Court of state is not bound by decision of federal court in construction of a state statute, where it is at variance with the views expressed by the highest court of the state.

5. EJECTMENT ⚷86(4)—ACTION TO RECOVER LAND — BURDEN TO SHOW WRONGFUL POSSESSION.

In action by city to recover possession of lands lying below line of low tide, shifting statutory limit of grant to it, it having condemned defendants' lands above line of low tide, burden was on it to show that defendants were wrongfully in possession of land below line of low tide sought to be recovered.

6. EJECTMENT ⚷81 — ANSWER — CONTENTIONS.

In city's action to recover land lying below line of low tide, shifting statutory limit of grant to it, it having condemned land above such line, defendants' answer, setting up that true boundary was line of extreme low tide rather than of ordinary low tide, *held* not to have precluded them from contending that boundary was not tide line of date of statute of May 4, 1852 (St. 1852, p. 180), fixing limit of grant to city as "shipping channel," construed to mean line of low tide.

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the City of Oakland against Samuel H. Buteau and others, as trustees of the Samuel Merritt Hospital. From judgment for plaintiff, defendants appeal. Reversed.

Chapman & Trefethen, of Oakland, and Goodfellow, Eells, Moore & Orrick, S. A. Bailey, William B. Bosley, and Garret W. McEnerney, all of San Francisco, for appellants.

Paul C. Morf, City Atty., and John J. Earle, Deputy City Atty., both of Oakland, for respondent.

SLOSS, J. The defendants appeal from a judgment awarding the possession of real property to the plaintiff.

This action and a prior one entitled City of Oakland v. Wheeler et al., 34 Cal. App. 442, 168 Pac. 23, are companion cases. In each the city of Oakland, as plaintiff, proceeded against the same defendants, as trustees of the Merritt Hospital. The suits affect adjacent parts of a tract of land on the water front of Oakland. The property involved in the two actions, viewed as a unit, consists of a parcel bounded on the north by First street, on the east by Washington street extended southerly, on the west by the center line of Clay street extended southerly, and on the south by the north pierhead line of Oakland harbor, as established by the United States government. Washington and Clay streets are parallel, and First street runs at right angles to them. The pierhead line has the same general direction as First street, but is not exactly parallel thereto. At the intersection of the westerly line of Washington street projected, the pierhead line is about 510 feet southerly from First street. At its intersection with the center line of Clay street projected it is some 560 feet distant from First street. The distance between the westerly line of Washington street and the center line of Clay street is 340.25 feet. Part of the land involved is above the line of low tide and part of it below; the pierhead line established by the federal government lying some distance southerly from the low tide line.

Prior to the institution of either action the defendants were admittedly the owners of so much of the tract as lay above the line of low tide. They held as successors to the Oakland Water Front Company, which had acquired its title from Horace W. Carpentier, who, in turn, deraigned title from the city of Oakland. The history of the legislation. and the subsequent dealings of the city, affecting the water front lands, is fully set forth in the decision of this court in City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277, and we need not repeat it here. It will suffice to say that by an act of the Legislature of May 4, 1852 (Stats. 1852, p. 180), incorporating the town of Oakland, the Legislature granted to the town (the predecessor of the present city of Oakland) the lands lying within certain limits "between high tide and ship channel." The term "ship channel," used to mark one of the boundaries of the grant, has been the subject of much discussion in this court and elsewhere, and we shall have occasion to advert to it at a later stage of this opinion.

The earlier case to which we have referred (City of Oakland v. Wheeler) was a suit in eminent domain, by which the city of Oakland sought to condemn so much of the tract occupied by the the defendants as lay above the line of "ship channel." The judgment of condemnation was made December 21, 1911; the damages to be paid defendants being assessed at $211,315.06. A final order of condemnation was made February 10, 1912, and an order letting the municipality into possession on March 9, 1912.

Appeals from the judgment of condemnation and the two orders were taken, and were heard in the District Court of Appeal of the First Appellate District, where the judgment and orders were affirmed on August 23, 1917. City of Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23. A petition for transfer of the case to this court was denied.

The present action was begun on February 23, 1912, after the judgment and the final order of condemnation, and shortly prior to the order letting the city into possession of the condemned area. It is brought to recover possession of the land lying below the line of ship channel. The theory upon which the city went in the litigation was that by the condemnation proceedings it had acquired the right of possession of the land above ship channel theretofore owned by the defendants in fee, and that in the present action it was entitled to recover possession of the land below ship channel, held by the defendants and used by them for wharfing purposes. The claim was, and is, that the defendants and their predecessors had originally gone into occupancy of the land here involved as tenants of the city of Oakland under a lease which had expired before this suit was commenced. The appellants strongly attack the soundness of this claim, but the conclusions we have reached on other points will dispose of the appeal without the necessity of passing on the question just suggested.

[1] In the condemnation suit, as well as in the present action, the city took the position that the line marking the boundary of the property granted to the city of Oakland by the act of May 4, 1852, and consequently the southerly boundary of the land owned by the defendants as successors of Carpentier, to whom the city had conveyed, was the line of low tide, as that line existed on the 4th day of May, 1852, the date of the enactment of the granting statute. In the proceeding in eminent domain the property sought to be acquired was described, as bounded on the south by "the line of ordinary low tide of May 4, 1852," and this description was carried into the judgment and the final order of condemnation. In the present action the plaintiff sought to recover possession of a tract described as bounded on the north by "the line of ordinary low tide of May 4, 1852," and the judgment under review awards to the plaintiff recovery of the possession of a parcel of land so bounded. The boundary of the corporate limits of the town of Oakland and of the lands granted to the town by the state, as described by the act of 1852, is the line of "ship channel." Until the decision of this court in City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277, the meaning of the term "ship channel" had never been authoritatively declared. Both parties to that litigation contended for a construction which would extend the grant beyond the shore and over navigable water. The assumption on all hands was that the Legislature, in using the words "ship channel," meant "the three fathom line or the four fathom line in the bay." 118 Cal. 177, 50 Pac. 283. Such interpretation was definitely rejected by this court, which declared that the term "ship channel," as used in the act of 1852, meant the line of low tide. To this extent both parties to the present appeal are agreed. But, as we have already observed, the city contends that the boundary is the line of low tide as it existed at the date of the passage of the act, while the appellants maintain that the boundary described in the act is the line of low tide as such line may appear from time to time. In other words, the appellants contend for the application of the rule that a boundary marked by a water line is a shifting boundary, going landward with erosion and waterward with accretion. This is unquestioned law where the land is bordered by a running stream. Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; Missouri v. Nebraska, 196 U. S. 23, 35, 25 Sup. Ct. 155, 49 L. Ed. 372; Tappendorff v. Downing, 76 Cal. 169, 18 Pac. 247; Fillmore v. Jennings, 78 Cal. 634, 21 Pac. 536; 9 C. J. 195. Express statutory declaration to this effect is found in section 1014 of our Civil Code. But at common law the rule was the same where the land was bounded by tidal water (Scratton v. Brown, 4 B. & C. 485), and in a recent case this court has declared this to be the law of our state, expressly declining to accede to the claim that section 1014 of the Civil Code limits the application of the rule to lands bordering on flowing streams. Strand Improvement Co. v. Long Beach, 173 Cal. 765, 161 Pac. 975.

[2, 3] It would seem, therefore, that the true interpretation of the term "ship channel," as used in the act of May 4, 1852, is the line of low tide, as affected by such gradual and imperceptible changes as may from time to time take place in the location of that line. The city's claim that the boundary is an unchanging one, fixed by the line as it existed on May 4, 1852, finds its source of inspiration in an expression used by Chief Justice Beatty in his opinion in Oakland v. Oakland Water Front Co., supra, at page 180 of 118 Cal. at page 284 of 50 Pac. In the course of his elaborate and learned discussion the late Chief Justice said:

> "My conclusion is that the line of low tide as it existed on the 4th of May, 1852, was the western boundary of the town of Oakland intended by the original act of incorporation."

Too much weight is not to be attributed to this reference to a specific date. The argument based upon it affords a very apt illustration of the wisdom of the settled rule that expressions in a judicial opinion must be read in the light of the particular question presented for decision and under consideration. In the argument of the Oakland Water Front Case no contention on the point now under discussion had been made by either party. As we have already said, both sides were contending for a deep-water line. It was this issue which the Chief Justice was meeting, and he met it by declaring that "ship channel" meant the line of low tide, rather than a three or four fathom line. The reference to the line as it existed on a given date was, in a sense, inadvertent or accidental. But, beyond all this, the opinion of Chief Justice Beatty did not receive the assent of a majority of the court. Two justices only concurred in it, while two others filed separate concurring opinions, in which they stated merely that they agreed that the land was limited by the line of low tide. The remaining members of the court dissented, and expressed no view on the question of the boundary of the legislative grant. The concurrence of four members of the court is necessary to a decision in bank, and the only thing decided with reference to the point under discussion was, therefore, that the boundary of the town of Oakland, and of the grant to the town, was the line of low tide. Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 682, 140 Pac. 591, 948. The judgment was reversed, and upon further proceedings a new judgment was entered in which the lands granted by the act of 1852 were described as bounded by the line of ordinary low tide. This judgment, which was subsequently affirmed by this court (Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251), did not fix the line as of May 4, 1852, or any other date. Whether or not the second judgment, which was introduced in evidence at the trial of this section, is available to the appellants as an adjudication of the true limits of the grant under which they claim is not the point here. We refer to it simply to show that the case of Oakland v. Oakland Water Front Co. does not contain a judicial determination in favor of the respondent's contention that the boundary is the low tide line as of May 4, 1852.

As further support for its construction of the legislative grant, respondent relies upon the decision of the United States Circuit Court of Appeals in Western Pacific Railway Co. v. Southern Pacific Co., 151 Fed. 376, 80 C. C. A. 606. It is true that in that case the court expressed the view that "the grant made by the state to the town of Oakland in 1852 was intended to have fixed and permanent boundaries," and reached the conclusion, apparently, that to give effect to this intention it was necessary to hold that the land was bounded by the low tide line as of the date of the act. The question was one of the interpretation of an act of the state Legislature, a matter in which the federal court was concededly bound by the construction placed upon the act by the highest court of the state. If the Circuit Court of Appeals was influenced in any degree by the belief that this court had decided on the first appeal in the Oakland Water Front Case that the line was that of May 4, 1852, its view of the former decision is not in accord with what we have here said. Another ground for the interpretation placed on the grant by the learned federal court was its conclusion that section 1014 of the Civil Code covers "the whole subject of the right to alluvion, and confines it to that * * * which is formed on the banks of rivers or streams." Since the decision of the Western Pacific Case, however, this court, as noted above, has held in Strand Improvement Co. v. Long Beach, supra, that the Code section is not to be given this effect. In that case we expressly declined to accept the construction placed upon the Code section by the Circuit Court of Appeals.

[4] To the suggestion that a boundary shifting with the location of the tide line would be incapable of definite ascertainment, we respond that in our judgment such a line is more readily susceptible of location on the ground than a line not marked by permanent monuments, and to be determined by conditions as they existed many years ago. To fix the latter line, resort must be had to oral testimony which is, in its nature, uncertain, and may be difficult or impossible to obtain. At any rate, the question being one of the construction of a statute of this state, we cannot be bound by the decision of a federal court, however great our respect for that court, when such decision is at variance with the views expressed by the highest court of this state.

Nor was anything decided in City of Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23, which precludes us from now holding that the true line is the line of low tide as it may exist from time to time. In its opinion in that case, the District Court of Appeal quoted the language of Chief Justice Beatty to which we have referred. But the question under discussion was simply whether the complaint and the judgment contained a sufficient description of the property sought to be condemned. The property was described as bounded by the line of ordinary low tide of May 4, 1852, and the court was not called upon to decide whether this land marked the limits of the legislative grant. The city had the right to condemn as much or as little land as it chose. Having undertaken to condemn to the low tide line of May 4, 1852, the only question was whether that line was clearly ascertainable. The holding of the court was that, as a matter of pleading, the description was not insufficient, and that by the evidence in the case the line of May 4, 1852, had been located and identified. Any expression of opinion on the limits of the legislative grant, if there was such expression, was entirely unnecessary to the decision.

[5] Concluding, then, that the southerly limit of the lands formerly owned in fee by the defendants was the low-tide line as it might exist from time to time, it is apparent that the plaintiff has not established its right to the possession of the land here involved. It did not on the trial undertake to show where, with reference to the present low-tide line, the line of 1852 lay. The burden was upon it to show that the defendants were wrongfully in possession of the land sought to be recovered. If the low-tide line at the time of the condemnation suit was south of the low-tide line of 1852, the plaintiff was, by this judgment, awarded possession of an intervening strip belonging to the defendants. It was not for the latter, resisting this action for possession, to show affirmatively that they were entitled to some of the land claimed. It was for the plaintiff, asserting its right to show that the present low-tide line was located at or north of the northerly boundary of the property described in this complaint, and that it therefore was entitled to the possession of all of such land. But, going beyond the mere question of failure of proof, the record makes it apparent that the affirmance of this judgment would work a real and substantial injustice to the defendants. The area of land included between First street on the north and a stone wall on the south was 162,947 square feet. This stone wall lies northerly, that is to say, above, the line claimed by the defendants to be the low-tide line as of the time of the condemnation proceeding. The jury in that proceeding returned, in addition to its general verdict, a special finding that the land bounded on the south by the low-tide line of May 4, 1852, included 80,961 square feet, and this verdict was carried into the judgment by way of recital. If, as matter of law and fact, the defendants really owned the rest of the parcel north of the stone wall, they still retained, after the condemnation suit, the ownership of an area of 81,986 square feet, and the effect of the present judgment clearly is to take this land from them without compensation, if in fact the low-tide line of 1911 was southerly of the stone wall. The same result, in a different degree, would follow if the low-tide line of 1911 lay anywhere southerly of a line drawn to include, between itself and First street, the 80,961 square feet which the jury found to be covered by the description in the condemnation complaint. Before the plaintiff can prevail in this action, it must either establish that the land condemned by it includes all of the land above the low-tide line as it existed at the date of the institution of the condemnation suit, or it must acquire by condemnation or purchase the land between the low-tide line of May 4, 1852, and the low-tide line of the date of such acquisition.

[6] These views make it unnecessary to consider a number of points argued by counsel. We may say that we do not agree with the respondent's contention that the pleadings of the defendants were such as to preclude them from contending that the boundary was not the tide line of May 4, 1852. In their answer they set up that the true boundary was the line of extreme low tide, rather than ordinary low tide. But there was nothing in the pleading which binds them to the position that either line is to be fixed as of its location at the date of the passage of the act of 1852.

Whether or not the respondent would be entitled to the benefit of any changes in the low-tide line produced by artificial structures is a question suggested in the briefs, but not argued to any extent. We do not find it necessary to decide it here, and mention it merely to avoid the implication that a view either way is involved in what we have said.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LENNON, J.; LAWLOR, J.

180 Cal. 38

MILLER & LUX, Inc., et al. v. JAMES et al. (Sac. 2686.)

(Supreme Court of California. Feb. 26, 1919.)

1. Judgment 🔑590(5)—Res Adjudicata—Issues Withdrawn by Consent.

The rule of res adjudicata is to prevent vexatious litigation, and to require the parties to rest upon one decision in their controversy, unless they have expressly agreed to withdraw an issue from the court, in which case the parties are not entitled to invoke the rule requiring submission of the whole controversy.

2. Judgment 🔑586(1) — Res Adjudicata —Water Rights—Appropriations as Distinct Causes of Action.

Where two separate and distinct appropriations of water are made at separate and distinct times, although from the same stream, the rights are so far distinct that they may be litigated separately.

3. Judgment 🔑590(5) — Res Adjudicata —Withdrawal of Issues by Stipulation.

In an action to determine rights to appropriate water, a stipulation that the court need make no finding as to any appropriation other than a stipulated number of feet, *held* a withdrawal of the issue of other appropriations from the consideration of the court, the decision of which was therefore not an adjudication on the issue so withdrawn.

4. LIMITATIONS OF ACTIONS 🔑130(4)—INTERRUPTION—BRINGING SUIT.

Where riparian owners allowed others, with whom they were litigating, to appropriate water in litigation, and by stipulation removed from the consideration of the court the relative rights of the parties to that water, and stipulated that such rights might be determined in another action, subject to the claim that the first action was res adjudicata, the rights of the parties in a subsequent case, so far as the statute of limitations is concerned, must be determined as though the first suit had not been brought, and such first suit does not constitute an interruption of the rights of the parties to prevent the running of the statute.

5. EMINENT DOMAIN 🔑284 — REMEDY OF OWNER—RIGHT OF PURCHASER.

The right to sue for compensation for the taking of water from a stream for a public use is in the owner of the water right taken, and does not pass by the mere grant of the land.

6. EMINENT DOMAIN 🔑288(1) — APPROPRIATION FOR PUBLIC USE—RIGHT TO COMPENSATION—LACHES.

Where the five-year period of limitations has been allowed to elapse without any affirmative action by the riparian owner, who claims that his water has been appropriated for public use, he is guilty of laches, and cannot assert his right to compensation for the appropriation.

7. WATERS AND WATER COURSES 🔑39 — RIPARIAN LANDS—LOCATION.

Land adjoining riparian land does not, by becoming united therewith in ownership, itself become riparian, although accessible to, susceptible of irrigation thereby, and situated within the watershed of the stream.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Miller & Lux, Incorporated, and another, against Jefferson G. James, San Joaquin Valley Farm Lands Company, and others. Judgment for plaintiffs, and the two named defendants appeal. Affirmed.

O'Brien & Spalding and James M. O'Brien, all of Los Angeles, for appellants.

Edward F. Treadwell, of San Francisco, and Frank H. Short and W. A. Sutherland, both of Fresno, for respondents.

WILBUR, J. The defendants appeal upon the judgment roll alone from a judgment whereby plaintiffs were adjudged entitled to a continuous flow of water from the San Joaquin river of 1,360 feet per second, diverted through plaintiffs' main and outside canals, and superior to the riparian or other rights of the defendants. The same parties plaintiffs and defendants, or their predecessors, were plaintiffs and defendants, respectively, in prior litigation over their relative water rights in and to water flowing in the San Joaquin river, wherein it was adjudged that the respondents were entitled to a flow of 760 cubic feet per second. The principal point involved on this appeal is whether or not the previous decision precludes the adjudication of a greater right than 760 cubic feet a second in this litigation. The question turns, in part, upon a stipulation made by the parties in the previous case, which stipulation was incorporated into and made a part of the decision therein, and which decision and judgment are incorporated into and made a part of the decision in this case. To an understanding of the situation it is necessary to state some of the facts in relation to the litigation between the parties. In the previous litigation the plaintiffs were the appellants, and in this litigation defendants are the appellants, and to avoid confusion on this appeal we will use the terms "plaintiffs" and "defendants" instead of "appellants" and "respondents."

In 1899 plaintiffs brought the action in Fresno county, final judgment in which is relied upon by the defendants as a conclusive adjudication of the rights of the parties in this action. This case is referred to throughout the briefs as the Fresno case and will be so referred to here. In the Fresno case plaintiff sought to enjoin the defendants from diverting water through a canal known as the Enterprise canal. In 1904 plaintiffs brought this action in Merced county to enjoin the defendants from pumping water from Fresno slough. In both actions plaintiffs alleged their right to divert more than 1,360 cubic feet a second from the flow of the San Joaquin river, and claimed that right by adverse possession and its devotion to a public use. In the Fresno case the plaintiffs alleged that they had diverted 800 cubic feet of water a second through its main canal, which was about 72 miles long, and a continuous use of that water from 1871. They also alleged an appropriation in 1896 of 350 cubic feet of water a second, and the use thereof through a canal known as the "outside canal," which was over 30 miles long. All active litigation between the parties was conducted in the Fresno case until that case, after several appeals and trials, resulted in a final judgment entered in June, 1915, pursuant to the directions of this court, contained in Miller & Lux v. Enterprise Canal Co., 169 Cal. 415, 147 Pac. 567; Id., 169 Cal. 447, 147 Pac. 579. After that decision, this case, the Merced county case, filed in 1904, was brought on for trial. In both cases the defendants not only denied plaintiffs' title, but also set up their own rights as upper riparian owners. It was contended by plaintiffs in these suits that the lands of the defendants were not riparian to the San Joaquin river, for the reason that they were situated along the Fresno slough. But while these cases were pending, this court in Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, decided that the lands of the defendants along the Fresno slough were riparian to the San Joaquin river. The history of the Fresno case and the nature of the rights involved and the result of the appeals therein are stated in the opinion finally handed down. Miller & Lux v. Enterprise Canal Co., 169 Cal. 415, 147 Pac. 567.

The Fresno county case having been once tried and a new trial granted, on November 3, 1909, for the purposes of that trial the stipulation was entered into between the parties with relation thereto which now requires our consideration.

It will be observed that plaintiffs claim two separate and distinct rights by separate and distinct appropriations—one in 1871 and one in 1896; that whatever rights could be gained by prescription had fully ripened with relation to the appropriation of 1871, and as to that of 1896 had not ripened at the beginning of the Fresno suit (1899), but had ripened at the time of the beginning of the Merced suit (1904). Notwithstanding the fact that plaintiffs claimed water at two different points of diversion and under separate appropriations, we may assume, without deciding, that the judgment in the Fresno case, fixing the amount of water to which the plaintiff was entitled, would be a final and conclusive adjudication in all subsequent litigation between the parties, including the Merced county case, as contended by the defendants, in the absence of a stipulation; and that if the plaintiff failed to offer proof concerning the alleged appropriation of 1896 through the outside canal, and to establish its claim to the water so appropriated, the court must have found that there was no such appropriation.

We will now consider the terms and effect of the stipulation on the point in question, without quoting more of its language than seems necessary for that purpose. It was expressly stipulated that no evidence should be offered for the purpose of proving an appropriation or diversion by plaintiffs greater or less than 760 feet. From this stipulation it followed, if the plaintiffs were entitled to the use of any water from the stream, the quantity was 760 feet, no more and no less. To obviate that conclusion, however, it was further stipulated that the court need make no finding as to any appropriation of water by said Canal Company other than as to 760 feet. The stipulation, then, is further amplified with relation to the effect of the decision in the case as follows:

> "But this provision shall not be construed as aiding the plaintiff in any future action or proceeding in establishing rights in the water of the San Joaquin river greater than 760 feet." "The plaintiff San Joaquin & Kings River Canal Company, however, hereby preserving the right to claim, prove, and establish in any proper action or proceeding authorized by law, other than the above-entitled action, the appropriation and diversion and right to an additional quantity of water made by said plaintiff since the commencement of this action or during said period of five years next preceding the commencement of this action."

It is further provided:

> "But the findings as to the appropriation (1896) alleged in the complaint from said outside canal shall not be deemed to be in favor of one party or the other, but shall be deemed as withdrawn."

On applying the statement to the facts as above indicated, the canal company thus reserved the right to prove in the then pending Merced case, among other things, the appropriation of 1896, as was subsequently done, resulting in the judgment for an additional 600 feet of water, from which the defendant is appealing. In making the above quotations from the stipulation we have omitted certain provisions, no doubt inserted at the instance of the defendants, and designed to preserve their right to assert that the Fresno judgment was res adjudicata as to the quantity of water to which plaintiffs were entitled. We will now consider such stipulations.

After providing that no finding need be made as to any appropriation of water other than the 760 feet, and that this should not be construed to aid the plaintiff in any future action to establish rights in the waters of the San Joaquin river greater than 760 feet, the following clause was added, viz.:

> "Nor shall the defendants be deemed to have waived their right to plead in any such action or proceeding that the judgment made and entered in this action is a final adjudication of all the rights of said plaintiffs in and to the waters of said river."

It will be observed that this added clause is not an agreement that the decision shall be a final adjudication of all the rights of the plaintiffs in and to the waters of the river. If it had that meaning, it, of course, would foreclose the plaintiffs in this case. The agreement is that the defendants may claim in any other suit, and therefore in this suit, that the decision was a final adjudication of all the rights, just as they have done and are now doing. It was the same sort of reservation as the preliminary stipulation which authorized the defendant to attack the entire title of the plaintiff to the 760 feet of water, in which attack upon the first hearing before this court they were substantially successful. 47 Cal. Dec. 1. After the above-quoted provision wherein the plaintiffs reserved the right in other litigation to establish the right to additional water, the following proviso was added, viz.:

> "Provided, however, that nothing herein shall be construed as a waiver by defendants of their claim that plaintiffs cannot hereafter in any other way establish any appropriation other than the appropriation established in this action."

Defendants are now, in the instant case, as it was stipulated they might, raising that exact question before this court. Nor is it contended that they have waived the right to make that claim. Of course, the stipulation does not mean that the claim referred to is valid. If so, there would be no room for argument and no necessity for so extended a stipulation. The provision in the stipulation that no findings need be made with reference to the outside canal, "but shall be deemed as withdrawn," is also modified by the following clause, "subject to defendants' claim that plaintiff was and is obliged to include such water and its claim thereto in this action and unless so included, its rights thereto are waived." This means nothing more nor less than that, notwithstanding the defendants' consent that this issue be withdrawn, the right is still reserved to plead res adjudicata in any subsequent action. Each of the parties having reserved certain rights more or less contradictory, the question may be perhaps best approached by considering what was actually accomplished by the stipulation. It was definitely and specifically agreed that there should be no finding of the court upon the issue as to the appropriation of 1896 for the outside canal. This, in effect, withdrew from the court all consideration of that appropriation, and the additional statement that it "should be deemed withdrawn" added no force to the stipulation. In the absence of this stipulation, the failure of the court to find upon that material issue would have resulted in a mistrial of the action and required a new trial thereof. It was because of this stipulation and only because of this stipulation, that a decision was proper wherein no findings were made with relation to this express allegation of the complaint. The case then resolves itself into the simple proposition of one whereby the parties by mutual consent have withdrawn from the consideration of the court an important portion of the matter before the court for litigation. The effect of this withdrawal was to narrow the issues in the case to those relating to the nature and character of the use of the 760 feet of water, and the rights of the parties with relation thereto, and the rights of the defendants growing out of the situation of their land, etc. That which the parties stipulated to thus accomplish was in fact accomplished by the decree. The court made no finding upon that issue, and in lieu thereof, and for the purpose of justifying such failure, incorporated in its finding as a part thereof the stipulation in question.

[1] The rule of res adjudicata is to prevent vexatious litigation and to require the parties to rest upon one decision in their controversy; but, where they expressly agreed to withdraw an issue from the court, the reason for the rule ceases. The issue is not in fact adjudged, and the parties themselves having consented to that method of trial are not entitled to invoke the rule which requires parties to submit their whole case to the court. If they consent to adjudicate their differences piecemeal, there is no reason that the court should extend the rules of law to prevent that which they had expressly agreed might be done.

[2] It is argued here that the rights of the plaintiff to the two different appropriations of water were as distinct as though they were two separate and distinct parcels of land, in which case, of course, it would be conceded that separate actions might be brought as to each. While the illustration may not be exactly apt, as we are dealing with a body of water flowing in a single stream, the rights are so far distinct that there is no good reason for holding that the parties could not, if they desired, litigate them separately. If it is true that where an issue is withdrawn by mutual consent from the consideration of a court in the trial of a case that the decision is not res adjudicata as to that issue between the parties because of that consent, then the provisions in the stipulation wherein the defendants reserved the right to claim that the decision is res adjudicata do not have the effect of re-establishing the case as one in which the plaintiff has either failed to allege, or, having alleged, has failed to prove, some issue which under the principles of res adjudicata should have been submitted to the court for its decision in that case. If the consent gave a right to withdraw an issue, and if a withdrawal by consent ipso facto defeats a claim that the issue is res adjudicata, the reservation of a right to claim that the fact is otherwise amounts to nothing. But there are other baffling provisions in the stipulation bearing upon the question, for it is finally provided therein as follows, viz.:

> "It being the true intent and meaning of this stipulation that the rights of said plaintiff in any action or proceeding shall be no greater and no less than if this stipulation had not been made, and shall exist as though the judgment in this action was entered upon evidence taken at the trial and not upon the stipulation."

If the first clause of this sentence is given full force and effect, without a consideration of other provisions, we ought not to consider the stipulation at all in determining the rights of the parties in this action; for it is provided that the rights in this action shall be "no greater and no less than if the stipulation had not been made," and, of course, if they are neither greater nor less because of the stipulation, it is a false quantity in determining the relative water rights of the parties. The next clause provides that the rights of the plaintiff "shall exist as though the judgment in this action was entered upon evidence taken at the trial and not upon the stipulation." It was difficult, if not impossible, to formulate a judgment in the Fresno case which could, in fairness to the parties, give effect to this stipulation. If the trial court found the fact to be that the plaintiff was entitled to 760 cubic feet of water a second, this would necessarily be a finding, as defendant now claims it to be, that the plaintiff was entitled to no more than 760 feet of water. It would not leave the question open, but would close by an implied finding the very issue which counsel had agreed should not be determined by the court. It was, therefore, only by incorporating the stipulation into the findings that the trial court was able to make it clear that the issues with relation to waters of the outside canal, and waters appropriated within five years of the commencement of the action, were not determined. And so, of necessity, the decision shows on its face that the issue was not determined, and the reason why it was not determined, and, the stipulation being a part of the decision, it is impossible to construe the effect of the decision without considering the effect of the stipulation. We cannot, therefore, construe the judgment and the findings as though the judgment had been entered "upon evidence taken at the trial and not upon stipulation."

[3] Taken as a whole, therefore, the stipulation was in fact a withdrawal of an issue from the consideration of the court. The reservations and provisos in favor of the parties neither add to nor detract from this fundamental fact, and, the issue having thus been withdrawn by consent, the decision of the court cannot be held to be an adjudication upon the very issue so withdrawn. In view of this conclusion it will be unnecessary to consider the various lines of argument by which it is sought to show that the rights of the plaintiff either have or have not accrued since the beginning of the Fresno suit, and the interpretation of those cases in which it has been held, pro and con, that rights accruing subsequent to the filing of a complaint, or to a defendant after the filing of the answer, need not be set up in a pending suit, for in any case the decision does not prevent the litigation in the instant case of the issues withdrawn from the first case.

A few important questions are presented by defendants which have not yet been considered, involving the nature and character of plaintiffs' right to the use of water, and various corollary propositions depending thereon. These will now be considered. The defendants claim that the decision in Miller & Lux v. Enterprise Canal Co., 169 Cal. 415, 147 Pac. 567, adjudging the plaintiffs entitled to 760 cubic feet of water a second, was based upon the fact that the water had been appropriated by plaintiffs and dedicated to a public use. The plaintiffs contend, however, that their title was held to be prescriptive. Upon the theory of a right by reason of a public use, defendants claim that the circumstances concerning the appropriation and use of the 600 cubic feet of water in the instant case are precisely the same as in the case of the 760 feet. That being so, it is claimed that the right of the plaintiffs to the 600 cubic feet of water appropriated in 1896 must have accrued, if at all, before the filing of the Fresno suit, and the argument that the Fresno decision is res adjudicata on the question of title is based in part upon this proposition. Defendants also claim that if the right herein adjudged to the plaintiffs to the 600 cubic feet of water arises from a public use and a dedication of such water to such public use by the defendants, the plaintiffs ought not to secure from a court of equity an injunction against them without first paying adequate compensation for the property so taken for a public use, upon the principle that he who seeks equity must do equity. To these contentions the plaintiffs reply that the adjudication in the Fresno case was not based upon a dedication to public use, but upon prescription; that the right to 600 cubic feet of water involved in the instant case is also prescriptive, and consequently did not accrue until 1901, and that, therefore, the right to the 600 feet was acquired after the commencement of the Fresno case. To this defendants reply that the Fresno suit was brought only three years after the appropriation, and constituted an interruption of the adverse use; that there was therefore no period of five years of uninterrupted use before the Merced case was begun; and that, on plaintiffs' own theory of a prescriptive title, they cannot recover.

We will first consider the question as to whether the Fresno case is res adjudicata upon the question of title by dedication to a public use as distinguished from a prescriptive title. In determining that question we must look to the findings and judgment of the trial court as finally entered. The reasoning by which this court supported the decision of the trial court and directed a modification of the judgment is only material under the doctrine of stare decisis, and is of no more binding effect than any other decision of the Supreme Court. San Pedro, Los Angeles & Salt Lake R. R. Co. v. Los Angeles, 56 Cal. Dec. 213; San Pedro, Los Angeles & Salt Lake R. R. Co. v. Los Angeles, decided Feb. 25, 1919, 179 Pac. 393. The first decision rendered upon the appeal (47 Cal. Dec. 1) was vacated by the order granting a rehearing, and is not reported in the California Reports.

While it is true that the order granting such rehearing limited the argument to the question of the effect of the public user, the order, nevertheless, vacated the previous opinion and judgment and set the whole matter at large. The limitation of the argument to one point meant no more than the court was satisfied that the argument and the briefs upon the other points fully covered them. In the opinion of the court upon rehearing, the first opinion, so far as it was adhered to by the court, was incorporated therein. The opinion is mainly directed to a consideration of those cases in which the establishment of a public use was, under the circumstances, adjudged to be so far a dedication of a private right to a public use that the court would not interfere with that public use, and left the persons whose property was thus taken for public use to seek relief by way of compensation in a proper action. It was found from an examination of these cases that in every instance there had been some form of invasion of the property holder's right. In applying the cases the court, therefore, turned to a consideration of whether or not there had been such an invasion of the rights of the defendants as would come within the rule of those cases, and upon such examination considered that, under the facts as shown, the defendants' rights had been invaded in two ways: First, by damming the water so that the same backed up into Fresno slough along the lands of the defendants; and, second, by taking out so large a volume of water so near the lands of the defendants that the flow of water to the riparian lands of the defendants was directly affected, and held that from the moment of the first appropriation and diversion there had been such an interference with the rights of the defendants that they could have brought an action to prevent such interference. Two results followed from this fact: First, that the case came clearly within those decisions declaring that courts would not interfere by injunctive process with the use of property by the public that had been allowed to accrue by the owner whose rights are alleged to have been invaded; and, second, that the use had at all times been adverse to defendants. The court held that the finding of the trial court that there was no interference with the defendants' riparian rights was, under all the facts, not a correct finding, but that other findings also made by the court so far negatived that fact that a new trial was not necessary. The order of the court directing a modification of the judgment was therefore predicated upon two lines of reasoning, either of which was sufficient to support the conclusion. In the instant case, however, if the Fresno case was an interruption of the quiet and peaceable possession essential to the ripening of a prescriptive right to the 600 feet of water, the decision of the trial court that these plaintiffs held by prescriptive title could not be maintained, and we would then be compelled to inquire whether or not the facts found by the court as to the public use was alone a sufficient basis for the judgment in favor of plaintiffs. We are, however, at this point again met by the fact that the question as to the rights of the parties to the 600 cubic feet of water was by stipulation eliminated from the Fresno suit; that it was, in effect, agreed that the rights of the parties in and to that water could be adjudicated in the Merced suit. While the defendants were very careful to preserve their rights to plead res adjudicata in the Merced case, although ineffectively, as we have held, no provision whatever is made by which the plea of the statute of limitations would be preserved in the Merced case to the same effect as it would have applied in the Fresno case. Under such circumstances we do not see how it can be successfully claimed that the Fresno case was such an interference with plaintiffs' rights, by reason of the affirmative answer of defendants therein, as would prevent the statute of limitations from running. If, as is claimed by defendants, the right to 600 cubic feet of water was involved in the Fresno case, the defendants were in a position to insist that the rights thereto be tried in that case and thus preserve to themselves the benefit of the fact that the five-year period had not elapsed at the time of the beginning of the suit with relation to the appropriation of 1896.

[4] It must be held, where parties to litigation of this character allow the plaintiffs to continue in the occupation and enjoyment of the right to water claimed by them, and by a stipulation remove from the consideration of the court the relative rights of the parties to that water, and stipulate that the rights thereto may be determined in another action, subject to the claim that the first action is res adjudicata with relation thereto, that the rights of the parties in and to the water must be determined, in a subsequent case, so far as the statute of limitations is concerned, by the same rules that would have obtained had the first suit not been brought. The parties, in effect, treated the right to the 760 cubic feet of water and the 600 cubic feet of water as two distinct rights, as they were in fact. Under the circumstances, the first case cannot be considered such an interruption of the rights of the parties as to prevent the running of the statute of limitations, and therefore, the finding of the court that the five-year prescriptive period had run was correct. A consideration of the numerous decisions cited by both parties with relation to the effect of a pending action on the rights of the parties, in the subsequent action, to rely upon the statute of limitations, is therefore unnecessary. That being true, we are in the same position with reference to public use and adverse use in the decision of this case as in the decision of the Fresno case, and

upon the authority of that case the judgment in favor of the plaintiffs, fixing their right to 600 cubic feet of water, must be affirmed.

The next point is as to the right of defendants to compensation for property taken for a public use. Defendants in 1915 filed a cross-complaint, claiming compensation amounting to $1,825,000 for the 760 cubic feet of water, and $912,000 for the 600 cubic feet, on the ground that private property could not be taken for a public use without just compensation; and cite Newport v. Temescal, 149 Cal. 539, 87 Pac. 372, 6 L. R. A. (N. S.) 1098, and other cases. The cross-complaint was stricken out and the court declined to consider the issues raised thereby. The question presented here is whether or not the decision of the trial court in striking out the cross-complaint was erroneous. Passing the question of the sufficiency of the cross-complaint as an original plea for the recovery of the value of the water right so alleged to be appropriated and dedicated to public use, and assuming that the issue was sufficiently raised in the trial court to present the question whether or not compensation could therein be adjudged to the defendants for the value of the water right so taken as a condition to enjoining the defendants from interfering with that right, we are met at the outset by the fact that the party owning the riparian lands claimed by the defendants at the time of the appropriation of 1871 or 1896 is not, nor are his heirs or representatives, parties hereto. The defendants are the grantees of the riparian lands deprived of water by the appropriations of 1871 and 1896.

[5] The right to sue for compensation for such use by the public, assuming that it was a public use rather than an adverse use, was in the owner of the water right at the time it was taken for public use. There is no stipulation nor pleading showing that that right to compensation was ever transferred to the defendants. This is a sufficient answer to the contention of the defendants in that behalf. It is, moreover, conceded that at the time of the filing of the cross-complaint in 1915 the right to sue for such compensation had long since expired under our statute of limitations. But defendants predicate their claim to compensation here upon the theory that, notwithstanding such bar, a court of equity will not grant relief to the plaintiffs until the plaintiffs have done equity, which they claim requires the payment of just compensation for such use.

[6] Where the five-year period has been allowed to elapse without any affirmative action by the riparian owner who claims that his water has been appropriated for public use, he is guilty of laches, and should not be permitted to assert his right to compensation after the lapse of that period, as against the public or the appropriator for a public use. Otherwise it would result that five years' adverse use of water would give a perfect title to a private person as against the owner thereof without any compensation, while the public, under similar circumstances, could be compelled after a lapse of five years to pay compensation therefor as a condition of receiving equitable relief. We therefore conclude that whether the right of plaintiffs is prescriptive or an appropriation for a public use, that the action of the court in striking out the cross-complaint was proper.

[7] Defendants urge that the trial court should have found that they owned 29,000 acres of riparian lands instead of 19,500 acres. This claim is based upon their contention, to quote from their brief, that "land adjoining riparian land may, by becoming united therewith in ownership, become itself riparian if accessible to, susceptible of irrigation thereby, and situate within the watershed of the stream." Our decisions are to the contrary, and there is nothing in the point urged. Lux v. Haggin, 69 Cal. 255, 424, 4 Pac. 919, 10 Pac. 674; Boehmer v. Big Rock C. & I. Dist., 117 Cal. 19, 26, 48 Pac. 908; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 331, 88 Pac. 978, 11 L. R. A. (N. S.) 1062.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LENNON, J.

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180 Cal. 7

KERN COUNTY UNION HIGH SCHOOL DIST. v. McDONALD et al. (L. A. 5858.)

(Supreme Court of California. Feb. 25, 1919. Rehearing Denied March 27, 1919.)

1. Eminent Domain ⊂⊃191(2)—Condemnation Proceedings—Sufficiency of Complaint—Resolution of Board.

In school district's action to condemn land for gymnasium, complaint, alleging in effect that the taking was sought pursuant to Code Civ. Proc. §§ 1237–1264, sufficiently stated "the right of plaintiff" as required of complainants in eminent domain proceedings by section 1244; an allegation of adoption of resolution by board being unnecessary.

2. Eminent Domain ⊂⊃191(2)—Complaint—Sufficiency.

Code Civ. Proc. § 1244, requiring complaint in eminent domain proceedings to state "the right of plaintiff," has reference only to a statement of the legal right or authority to exercise power of eminent domain.

3. Eminent Domain ⊂⊃8—Authority of School District.

School board had power to condemn land for gymnasium prior to the taking effect of St. 1917, p. 1176, such power having existed under Code Civ. Proc. § 1238, Pol. Code, § 1610, subd.

5, added by St. 1917, p. 739, and sections 1668, 1741, 1750, and St. 1909, p. 908.

4. Eminent Domain 🔑169—Condemnation of Land—Resolution of School Board—Preamble.

School board's power to condemn land for certain purpose was not restricted to its power specified in preamble of resolution authorizing such condemnation, since preamble was unnecessary to efficacy of resolution, and in absence of statutory requirement; statement in resolution of statutory authority for condemnation being unnecessary.

5. Eminent Domain 🔑169—Condemnation—Resolution of School Board—Preamble.

It was unnecessary to efficacy of resolution of school board, authorizing condemnation of land for certain purpose, that it should have a preamble.

6. Eminent Domain 🔑169—Resolution of School Board—Statement of Statutory Authority.

School board's resolution, authorizing condemnation of land for certain purpose, is not required, in absence of statutory requirement, to state statutory authority for the condemnation.

7. Eminent Domain 🔑169—Resolution—Legal Authority for Proceedings.

School board's resolution, directing the condemnation of land for gymnasium, will be construed as having been passed in exercise of right of eminent domain under Code Civ. Proc. §§ 1237–1264, though resolution based right to construct gymnasium upon St. 1917, p. 1176, which had not taken effect at time resolution was entered into, since resolution will be construed to have been passed pursuant to power warranting passage.

8. Constitutional Law 🔑70(1)—Condemnation of Property—Public Uses—Legislative Power.

Power to determine what uses are public is vested in Legislature.

9. Eminent Domain 🔑56—Public Use—Determination of Necessity of Taking.

Immediate future needs are ordinarily an essential factor in determining whether there is a present necessity for a taking in condemnation for the purpose of a particular public use.

10. Eminent Domain 🔑194—Amendment to Complaint—New Cause of Action—Condemnation Proceedings.

In view of Code Civ. Proc. § 1262, amended complaint, in school district's action for condemnation of land, differing from original complaint only in not alleging school board's resolution, and in seeking condemnation of the entire 100 feet of the tract of land instead of only 80 feet, did not state new cause of action; resolution not being basic element of cause of action and the demand for additional 20 feet not causing surprise or detriment.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Kern County Union High School District against Ronald McDonald and others. From judgment and final order of condemnation, defendants appeal. Affirmed.

Emmons & Johnstone and Rowen Irwin, all of Bakersfield, for appellants.

W. W. Kaye and Erwin W. Owen, both of Bakersfield, for respondent.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., amici curiæ.

LENNON, J. In the action, the corporation plaintiff sought and secured, by the exercise of the right of eminent domain, a judgment condemning certain real property belonging to the defendants in the city of Bakersfield. The appeal is from the judgment and final order of condemnation. The complaint was filed June 2, 1917, and, among other things, alleges:

> "That the public interest and necessity require the construction by the said Kern County High School District of a gymnasium or athletic building, and also the acquisition by the said district as a site upon which the said building may be erected, of that certain tract of land hereinafter described; that the board of trustees of the said plaintiff on the 24th day of May, 1917, duly passed and adopted by a unanimous vote of the board of trustees a resolution, directing proceedings to be taken under title 7, part 3, of the Code of Civil Procedure of the state of California, to condemn said tract of land for the public use set forth."

Issue having been joined by the answer of the defendants denying all of the allegations of the complaint, the case was tried with a jury, which found and fixed the value of the property to be condemned at the sum of $5,500. Thereupon the trial court made its findings of fact in substantial accord with the allegations of the complaint, all of which are sufficiently supported by evidence which in turn supports the judgment, and which, therefore, must be affirmed, unless it be held as a matter of law, as is contended for by appellants, that the plaintiff was precluded from proceeding, or rather, was not authorized under any existing law to proceed to condemn the property in suit for the purpose pleaded. The contention of appellants in this behalf is perhaps more precisely stated in the language of appellants' closing brief, wherein it is said that—

> "Appellants claim a reversal * * * upon the ground that the right to condemn the real property involved was based upon a law which, at the time the action was commenced and at the time of trial, had not yet gone into effect."

This contention is rested upon the fact adduced in evidence at the trial of the case that, on May 24, 1917, the plaintiff's board of trustees adopted a resolution which, in a "stately preamble beginning with the emphatic 'Whereas,'" reminiscent of "the style of the early-day legislation," declared that:

> "* * * By an act of the Legislature of the state of California adopted at a recent session thereof it is provided that all students of the high schools shall be required to take at least two hours' physical training per week under a competent physical director," and that "the Kern County High School is not provided with an adequate building for the giving of such training."

This resolution then proceeded in the usual and ordinary form to evidence the determination of the said board of trustees that the public interest and necessity required the construction of a gymnasium or athletic building as an adjunct of the Kern County High School, and, after appropriately resolving to proceed with the erection of such a building and declaring that the public interest and necessity required for that purpose the acquisition of the land therein specifically described, concluded with the resolve that said board forthwith take proceedings, under title 7, part 3, of the Code of Civil Procedure, for the acquisition of said land.

It was an admitted fact in the case that "the act of the Legislature" referred to in the preamble of the resolution was the act of the Legislature of this state, approved May 26, 1917, and which became effective July 27, 1917, wherein it was made the duty of the high school board of every high school district in the state to "prescribe suitable courses of physical education for the pupils thereof" (Stats. 1917, p. 1176), and it was the uncontroverted fact that the preliminary proceedings of the plaintiff purporting to authorize and require the commencement of the action of condemnation and the action itself were commenced and concluded prior to the taking effect of that act.

[1, 2] It was not essential to the sufficiency of the cause of action pleaded that the complaint should contain an allegation that the plaintiff was empowered by a valid or any resolution of its board of trustees to proceed in condemnation. Section 1244 of the Code of Civil Procedure, which prescribes the essentials of a complaint in eminent domain proceedings, does not require a statement of the adoption of such a resolution, and therefore it was not necessary to allege that fact. Central Pacific R. R. Co. v. Feldman, 152 Cal. 308, 92 Pac. 849. The requirement of that Code section (subdivision 3), that the complaint "must contain * * * a statement of the right of the plaintiff," has reference only to a statement of the legal right or authority of the plaintiff to exercise the power of eminent domain, and, as against a general demurrer, the complaint before us sufficiently complied with the mandate of the statute by alleging, in effect, that the taking was sought pursuant to the provisions of title 7, part 3, of the Code of Civil Procedure. Lake Shore, etc., R. R. Co. v. Baltimore, etc., R. R. Co., 149 Ill. 272, 285, 37 N. E. 91.

[3-7] The resolution in question not being essential to the statement of plaintiff's cause of action, it would seem to follow that proof of its passage was not necessary to the maintenance of plaintiff's cause (Central Pacific R. R. Co. v. Feldman, supra), but, however that may be, we are satisfied that the source of plaintiff's power to proceed in condemnation for the purpose stated in the complaint did not begin with and end in the act referred to in the resolution; nor was such power, as granted elsewhere in the then existing law, in any wise restricted or restrained by the verbiage of the preamble of the resolution. The latter proposition is so because it was wholly unnecessary to the efficacy of the resolution that it should have a preamble, or, having it, that the resolution should, in the absence of a statutory requirement, either in its preamble or elsewhere within its context, contain a recital of the statutory authority permitting, and the necessity prompting, the proposed condemnation. Church v. Higgins, 4 Robt. 1; Bohle v. Stannard, 7 Mo. App. 51; McQuillin, Mun. Ord. § 539, p. 846; Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564. Assuming the resolution in question to be a jurisdictional prerequisite to the plaintiff's proceeding in condemnation, still it should be construed, if necessary, as declaring and directing the exercise of the right of eminent domain primarily pursuant to the provisions of title 7, part 3, of the Code of Civil Procedure; and this may and should be done in keeping with "the established rule, * * * aptly stated in an early Maryland case" (McQuillin, Mun. Ord. § 139, p. 222), where it is said that—

> "It is not essential to the validity of an ordinance executing powers conferred by the Legislature that it should state or indicate the power in execution of which the ordinance is passed. If it state no particular power as its basis, judicial courtesy requires that we should regard it as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and prerequisites show that it has been adopted." Methodist, etc., Church v. Baltimore, 6 Gill [Md.] 391, 48 Am. Dec. 540.

By like reasoning, in the case of Delamater v. Chicago, 158 Ill. 575, 42 N. E. 444, an ordinance creating a special assessment was sustained as having been passed in pursuance of an enabling act, despite the fact of a recital of the ordinance that the authority for its adoption was dependent upon a statute which had been repealed; and within the reasoning of the rule stated in Methodist, etc., Church v. Baltimore, supra, it was held, in the case of Baltimore v. Ulman, 79 Md.

469, 30 Atl. 43, that a misrecital in an ordinance relative to the source of power under which it was enacted would not suffice to limit the source of the power to that specified if the power in fact existed elsewhere. Of course, in this discussion of the scope and effect of the preamble to a resolution, as well as the requirements of the resolution itself, we are not forgetful of the distinction which ordinarily obtains between an ordinance and a resolution, and while the rule relied upon to construe the resolution in question here has more particular application to, or, rather, has been more particularly applied to, ordinances, still we apprehend that, despite the distinction, the rule should be and is the same with reference to resolutions.

This, then, brings us to a consideration of the text of title 2, part 3, Code of Civil Procedure, and we find embodied therein section 1238 of that Code as it existed and was in operation at and before the commencement of the action and the preliminary proceedings in condemnation in question here, which authorizes a school district to exercise the right of eminent domain for the purpose of acquiring "public buildings and grounds for the use * * * of any * * * school district." This Code section, as we read it in conjunction with various other sections and provisions of our Code and statute law relative to and regulating the public school system of the state, all of which were also in full force and effect at all of the times involved in this action, clearly empowered the plaintiff, if not expressly, then by necessary implication, to proceed to condemn the land in suit for the purpose prescribed in the resolution and alleged in the complaint. Section 1750 of the Political Code provides that—

> "Every high school course of study may include training in athletics, * * * for which credit may be given as a part of said high school work, and instruction shall be given at such times and in such manner as such high school board shall determine."

Section 1668 of the Political Code commands that—

> "Attention must be given to such physical exercises for the pupils as may be conducive to health and vigor of body as well as mind."

Subdivision 5 of section 1610 of the Political Code (Stats. 1917, p. 739), formerly subdivision 21 of section 1617 of the same Code, provides that boards of school trustees and city boards of education shall have power and it shall be their duty "to give diligent care to the health and physical development of pupils," and by virtue of the provisions of section 1741 of the Political Code the powers and duties of school boards now found in said subdivision 5 of section 1610 of that Code and primarily existing in subdivision 21 of section 1617 were at all of the times herein involved applicable to high school district boards. In addition to all of this there was in force and effect at and prior to the commencement of the action and the institution of the preliminary proceedings included therein, a statute entitled "An act to provide for health and development supervision in the public schools," etc. (Stats. 1909, p. 908), which authorized school boards throughout the state to establish health and development supervision in the public schools of the state which should "secure the correction of developmental and acquired defects of both pupils and teachers which interfere with health, growth and efficiency," and (subdivision 2) "to adjust school life and activities to health and growth needs and to development processes. * * *"

[8] It is settled law that the power to determine what uses are public is vested in the Legislature, and clearly the public character of the use sought to be secured in the present case is embodied within the several laws hereinbefore enumerated. While it is true that no express mention is made in any of the Code sections or statutes previously mentioned and outlined concerning the necessity for and construction of a gymnasium and athletic building as an adjunct for the physical development and training of the pupils of the public schools, still the necessity for such a building and its consequent construction is inherently embodied in the underlying principles which permeate and prompted the enactment of those several laws, and the power to put these principles into actual operation by the creation and employment of such agencies as would ordinarily and naturally be required for the accomplishment of the desired results follows by necessary implication. The plaintiff, having thus been duly invested by existing law with the right to provide the agencies necessary to the accomplishment of the legislative design, rightly resorted to the exercise of the power of eminent domain in the furtherance of that design, and it was not essential to the exercise of that power that the plaintiff should have previously prescribed as a part of the high school curriculum a course of instruction in athletics. Granting, for the sake of discussion, that under the terms of section 1750 of the Political Code the institution of a course of instruction in athletics was a matter of discretion with the plaintiff, and that the exercise of such discretion, to be effective, was required to be evidenced by formally including such a course in the "high school course of study," still it cannot be said that a present necessity for the use in suit within the meaning of the law of eminent domain did not exist at the time of the commencement of the action. In this behalf it will be noted that the act of May 26, 1917 (Stats. 1917, p. 1177),

became effective on July 27, 1917, just 1 month and 25 days subsequent to the institution of the action, and required the plaintiff at the taking effect thereof to "prescribe suitable courses of physical education," and the requirement when in operation was mandatory. S. F. v. Hyatt, 163 Cal. 346, 353, 125 Pac. 751.

[9] Clearly under existing laws the plaintiff was empowered in its discretion to provide suitable courses of physical education, and therefore could have exercised such discretion in anticipation of the mandatory requirements of the new law, but doubtless deferred doing so until such time as it could be assured that it would have the appurtenances at hand necessary to the inauguration and effective operation of such a course; and it may be fairly assumed that the act in question was the incentive for the proceedings in condemnation in anticipation of the future and added needs of the school district which were certain to come into being with the operation of the mandatory requirements of the new law Immediate future needs are ordinarily an essential factor in the determination of the question of whether or not there is a present necessity for a taking in condemnation for the purposes of a particular public use. Central Pac. R. R. Co. v. Feldman, supra. And this is so, because of the obvious fact "that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement, and * * * the mere fact that land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party, is not necessarily a defense to a proceeding to condemn it." Matter of Staten Island, etc., 103 N. Y. 251, 8 N. E. 548.

[10] But one other point remains to be discussed, and that involves the right of the plaintiff to amend its complaint, which was done on the day when the action came on for trial. The amended complaint differed from the original in the particulars only that it did not plead the previous passage of a resolution by its board of trustees, and in that a cause of action was stated for the condemnation of the entire 100 feet of land belonging to the defendants, instead of only 80 feet thereof as originally prayed for. It is now insisted that the amendment was in no wise materially related to the cause of action originally pleaded, but constituted the statement of a supplemental and entirely new cause of action. This contention, like the primary contention of the appellants, rests, in effect, upon the erroneous assumption that the resolution of the plaintiff's board of trustees, authorizing and directing the institution of proceedings for the condemnation of only a part of defendants' land, created and conclusively controlled the plaintiff's cause of action in the first instance, and that, as a consequence, a second resolution of plaintiff's board of trustees, not pleaded, but received in evidence, and which called for the condemnation of all of the defendants' land, likewise created a new and distinct right in plaintiff to exercise the power of eminent domain, and therefore it is argued that the amendment of the complaint was the statement of a new and distinctly different cause of action. As previously pointed out, the allegation of a preceding resolution of plaintiff's board of trustees, authorizing and directing the institution of condemnation proceedings was not essential to a statement of plaintiff's cause of action. Obviously, therefore, neither resolution operated to create and then control the plaintiff's cause of action stated either in the first or second instance. The resolutions referred to not being a basic element of the plaintiff's cause of action, we are satisfied that the amendment in question did not plead a new and distinct cause of action, and that, under the circumstances which prompted the amendment, the trial court had no recourse but to allow it. The rules of pleading and practice pertaining to civil actions generally are in this state applicable to proceedings in eminent domain, "and constitute the rules of pleading and practice therein (Code Civ. Proc. § 1262), and it has been held in other jurisdictions, where the same or a similar rule prevails, that—

> "Amendments are recognized and allowed in condemnation proceedings as in civil actions * * * to alter the allegations of the petitions as to * * * the quantity of land desired by lessening or increasing the quantity." Standard Ency. of Proc., pp. 296, 297.

An instance of the application of the rule in this behalf is to be found in the case of Newton v. Alabama, etc., Ry. Co., 99 Ala. 468, 13 South. 259, in which the situation, in so far as the pleadings were concerned, was identical with that presented here. There the petition as originally filed sought the condemnation of a strip of land 80 feet in width as a right of way running through the entire premises involved in the condemnation proceedings. Subsequently, the petition was amended to the extent of enlarging the right of way sought to be condemned from 80 feet to 100 feet in width, and in passing upon the merits of a motion made in the court below to set aside the judgment upon the ground that it was void for the reason that the amendment "changed the subject-matter of the suit," it was held in effect, by the court of last resort, that a new and a different cause of action was not pleaded by the amendment to the original petition, and that under the "liberal system of amendments" prevailing in that jurisdiction the lower court had authority to permit the amendment. In the case before us the record shows that the amendment to the complaint was sought and permitted because of the fact that on the day the case was called for trial one of the defendants, Lester McDonald, sought and secured permission, without objection, to file his separate answer which, in effect, averred that the whole tract of land owned by the defendants is of the approximate dimensions of 100 by 344 feet fronting upon a certain street in the city of Bakersfield, and that a judgment in favor of plaintiff as prayed for in the original complaint for the value of 80 feet in width fronting on said street would leave the remaining portion of defendants' land only of the approximate width of 20 feet, and therefore comparatively worthless. It will thus be seen that the effect of this answer, if it were supported by evidence, would be to require the plaintiff to pay practically the value of the entire 100 feet of land belonging to the defendants, while under the pleading and prayer of the original complaint it could acquire only 80 feet thereof. Manifestly, such a result would be unjust, and clearly the exigencies of the situation warranted the plaintiff in seeking, and justified the trial court in permitting, the amendment, and particularly is this so in view of the fact that the defendants do not claim, and under the circumstances narrated could not claim, that they were caused any surprise or detriment by the amendment in question.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; SLOSS, J.; SHAW, J.

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180 Cal. 92

SHEAN v. COOK et al. (S. F. 7688.)

(Supreme Court of California. Feb. 28, 1919.)

1. Corporations 🔑243(2) — Stockholder's Liability—"Stockholder."

A "stockholder," within Const. art. 12, § 3, and Civ. Code, § 322, defining stockholder's liability, is one who owns stock, the term being so defined by Civ. Code, § 298, which was in effect at the time of the adoption of Const. art. 12, § 3, and the Legislature, in providing in Civ. Code, § 322, that the term "applies not only to such persons as appear by the books of the corporation to be such," etc., having had in mind section 324, relating to transfer of stock upon books and effect of books as evidence of ownership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Stockholder.]

2. Corporations 🔑243(2) — Stockholder's Liability — Record Stockholder — Indorsement of Stock.

A wife who refused to accept stock transferred to her on the books of the corporation by her husband, without her consent, did not by signing indorsement on back of certificate, to make possible transfer of stock back to husband on the corporate books, so recognize ownership as to be liable to creditors of corporation, under Const. art. 12, § 3, and Civ. Code, § 322, upon husband's failure to transfer stock from her name; such indorsement having been in nature of quitclaim.

3. Corporations 🔑243(10) — Stockholder's Liability—Estoppel.

Wife who refused to accept stock tendered her by husband and transferred to her on corporate books was not estopped to deny ownership of stock in action to enforce stockholder's liability, under Const. art. 12, § 3, and Civ. Code, § 322, upon husband's failure to have stock transferred from her name on books, where creditors did not know at time credit was extended that she was shown by books to be a stockholder.

4. Corporations 🔑243(2) — Stockholder's Liability—"Stockholder."

Wife who refused to accept stock tendered her by husband and transferred to her on corporate books, and who indorsed certificate to make possible transfer from her name on books of corporation, was not a stockholder within Const. art. 12, § 3, and Civ. Code, § 322, defining stockholder's liability, upon subsequent extension of credit to corporation, though she remained stockholder of record because of husband's failure to make transfer upon books.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frank Shean against Violet M. Cook, as administratrix with the will annexed of the estate of Carrie M. Cook, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Pillsbury, Madison & Sutro and A. E. Roth, all of San Francisco, for appellant.

Bert Schlesinger and S. C. Wright, both of San Francisco, for respondents.

Heller, Powers & Ehrman, of San Francisco, amici curiæ, for San Francisco Stock and Bond Exchange.

WILBUR, J. This action was brought by plaintiff to recover from Carrie M. Cook upon her stockholder's liability for indebtedness incurred by the Morton L. Cook Company, a corporation, in which it was alleged she owned 49,095 shares of the total capital stock of 50,000 shares. Morton L. Cook, her husband and guardian, was joined as defendant. The court found that Carrie M. Cook was not a stockholder in the corporation, and rendered judgment in favor of defendants. Plaintiff appeals. Mrs. Cook has since died, and the administratrix of her estate with the will annexed has been substituted. The main question presented by the appeal is as to the sufficiency of the evidence to support the finding of the court that Mrs. Cook was not a stockholder in the corporation. In determining that question we must consider the evidence from the view most favorable to the conclusion of the court. The corporation was organized March 6, 1903. Morton L. Cook was the owner of 49,095 shares. On the 28th of October, 1908, he caused a new certificate for these shares to be issued to Carrie M. Cook. Mr. Cook took this certificate to his wife, telling her that they had decided to make her the principal stockholder of the Morton L. Cook Company. She immediately repudiated the transaction and refused to accept the stock or to have anything to do with the matter. Two or three days later her husband told her that, if she was not going to have anything to do with the corporation, she should sign an indorsement that he had written upon the back of the stock as follows: "October 28, 1908. I hereby assign any and all int. I may have to this stock to Morton L. Cook." She thereupon signed said indorsement. Mr. Cook, who was during this whole period president of the corporation, took the stock to Mr. Alderson, who was the secretary, and said: "Mr. Alderson, that is all off; just let that matter remain in abeyance; I will take it up again at a later date." The stock certificate ever since October, 1908, has remained in the custody of Morton L. Cook in his safe deposit box in San Francisco. Mrs. Cook never had anything to do with the corporation or with said stock other than as stated. The corporation was actively engaged in business, and the indebtedness upon which plaintiff sued was incurred by the corporation between the 1st day of January, 1912, and the 1st day of February, 1914. Before that time Mrs. Cook, on December 10, 1910, had been declared an incompetent, and her husband had been appointed her guardian. She was under this guardianship up to the time of her death. It is obvious that there never was any contract or agreement between Mrs. Cook and the corporation that she should become a stockholder. Upon being tendered the stock, she refused the same, and returned it to the president of the corporation, who had presented it to her, and for the purpose of perfecting her repudiation and permitting the ownership of the stock to appear upon the books in conformity with the real fact she indorsed the same, so that such stock might be transferred on the books of the corporation in the usual and proper manner. Morton L. Cook was at all times the owner of the stock. Appellant's contention is that, as Mrs. Cook was shown by the books of the corporation to be a stockholder, and by reason of the presentation to her of the stock certificate and her indorsement thereof must have known that fact, she was liable for her proportionate share of the indebtedness of the corporation during such period as the stock continued to appear upon the books of the corporation in her name. This contention is based upon the following provision contained in section 322 of the Civil Code relating to stockholders' liability:

> "The term stockholder, as used in this section, applies not only to such person as appears upon the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another. * * *"

The statutory liability of stockholders is declared by our Constitution (article 12, § 3):

> "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association."

At the time this constitutional amendment was adopted, the Civil Code, in accordance with the general law concerning the subject, declared:

> "The owners of shares in a corporation which has a capital stock are called stockholders." Civ. Code, § 298, enacted 1871.

[1] The term "stockholder," therefore, as used in the Constitution, must be construed in the light of this definition, and the liability, therefore, attaches to the owner of the stock. Section 322 of the Civil Code uses the exact language with reference to stockholders' liability as that contained in the Constitution, excepting that the words "of joint-stock association" and the words "or association" are omitted in the statutory declaration of liability. The remaining provisions of section 322 are obviously and necessarily for the purpose of carrying out the constitutional and statutory liability thus declared. Under the constitutional declaration of liability, carried into section 322, that liability is predicated upon ownership of the stock. Western Pacific Ry. Co. v. Godfrey, 166 Cal. 346, 136 Pac. 284, Ann. Cas. 1915B, 825. It is evident that the Legislature in its declaration that "the term stockholder * * * applies not only to such persons as appear by the books of the corporation to be such," etc., had in mind the provisions of section 324, Civil Code, relating to transfers of stock upon the books of the corporation, and the effect of such books as evidence of ownership. The term "stockholder" had already been defined (Civ. Code, § 298), and it was neither necessary nor desirable to again define the term. By the terms of section 324, Civil Code, it is provided that title to the stock may be transferred "by indorsement * * * and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so en-

tered upon the books of the corporation." In considering whether the fact that the name of Mrs. Cook appeared upon the books of the corporation as a stockholder made her liable under the statute to plaintiff, it will be necessary to consider some of the previous decisions of this court upon the subject. In Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248, and Shattuck & Desmond, etc., Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348, the court had under consideration the statutory liability of a stockholder in a nonbanking corporation, where the books of the corporation showed the defendant to be a stockholder at the time the indebtedness sued upon was incurred. Gillelen was a pledgee of the stock, but by mistake, which he endeavored to correct, the stock was issued to him personally, and he was shown by the books of the corporation to be a stockholder. In the latter case it was said, with reference to section 322, Civil Code:

> "* * * The only rational construction of the section, that the language 'such persons as appear by the books,' etc., must be limited to persons who knowingly or voluntarily permit their names to appear as stockholders."

In both cases it was held that a construction of the section which would lead to the result that "would necessarily preclude one from showing that, while upon the face of the corporate books he appeared to be a stockholder, yet in fact he was not, that he had never owned or subscribed for any stock or authorized the issuance of any to him by the corporation, * * * cannot seriously be considered."

In Welch v. Gillelen, supra, it was held that the relation of the stockholder to the corporation was one of contract; that one could not become a stockholder, and liable to the creditors of the corporation, because of entries in the stock book of the corporation made without his consent. See, also, People's Home Sav. Bank v. Stadtmuller, 150 Cal. 108, 88 Pac. 280; Geary St., etc., R. R. Co. v. Bradbury Estate Co., 175 Pac. 457. In Shattuck & Desmond, etc., Co. v. Gillelen, supra, concerning appellant's contention that the stockholders were liable, it was said:

> "The decisions relied on by the appellant in that case [Welch v. Gillelen, supra] were shown to be cases where the party asserting that he was not a stockholder had either knowingly and voluntarily assumed that position upon the books of the corporation, or, if he had not originally done so, had by his subsequent conduct estopped himself from denying the relationship."

The case of Hurlburt v. Arthur, 140 Cal. 106, 73 Pac. 734, 98 Am. St. Rep. 17, involved the statutory liability of stockholders in a banking corporation under sections 321 and 322 of the Civil Code. The question of an unauthorized issuance or transfer of stock was not involved or considered. While the construction of sections 321 and 322, Civil Code, are there considered, the effect of the opinion must be determined in the light of the point under discussion, namely, the liability of stockholders in a banking corporation. In such case the stock books and public notice of transfers are by statute declared to be conclusive evidence of the ownership of stock. Civ. Code, § 321. It was therefore held that, where the holder of stock as pledgee had the stock transferred to him in his own name and was shown on the books as owner thereof, and not as a pledgee, he was liable as a stockholder to creditors. The same rule also holds good in other corporations. Welch v. Gillelen, supra; Shattuck & Desmond, etc., Co. v. Gillelen, supra; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. In Baines v. Babcock, supra, the defendant, who was shown by the books of the corporation to be the owner of stock, offered to prove that he was the real owner of only 425 shares issued to him by the corporation, and that the others standing in his name on its books were owned by other parties, and that they were issued to him as matter of convenience to enable him to negotiate a loan for such owners. The evidence was excluded because of the rule which was there stated to be well settled:

> "That one to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner; and this whether he was in fact a pledgee, agent, or trustee for the real owner."

As was suggested in Hurlburt v. Arthur, supra, the construction placed upon the sections of the National Banking Act by the federal courts is of assistance in construing sections 321 and 322 of the Civil Code. Section 5151 of the U. S. Revised Statutes provides:

> "Shareholders of every national banking association shall be individually responsible," etc.

Section 5210 of the U. S. Revised Statutes (U. S. Comp. St. § 9773), like section 321 of our Civil Code, requires the keeping of a list of stockholders for the inspection of shareholders and creditors, but it does not provide that such lists shall be "conclusive evidence as to who are stockholders," as does section 321, Civil Code. The general tenor of the decisions of the federal courts is very well set forth in Williams v. Vreeland, 244 Fed. 346, 156 C. C. A. 632, Circuit Court of Appeals, Third District. In that case the facts were very similar to the instant case. There the wife indorsed a dividend check, which, however, was issued in her husband's name, and also signed a power of attorney upon the back of the stock authorizing its transfer. She did not know that the stock had been issued in her name, and her signature to the power of attorney for the transfer of the stock was procured without her seeing the face of the certificates or knowing what they were. Her husband placed the certificates before her, face down, and said, "Mary, will you sign these papers for me?" She said, "What are they?" He replied, "They are some bank stock; I have made a mistake." The court states the rule to be applied in testing the question of liability, to the creditors of the corporation, of the wife under the circumstances as follows:

> "The test of liability, therefore, seems to be the fact of being a record shareholder, knowledge of that fact, and some act in approval or ratification of it. Along this line the cases have been tried."

The court cited with approval the decision of the Court of Appeals of New York in Glenn v. Garth, 133 N. Y. 38, 30 N. E. 651, 31 N. E. 346, and quoted therefrom a part of the opinion pertinent here, as follows:

> "It [a ratification] implies a conscious and intended approval of the act done. It rests upon the actual and existing purpose to make such approval. Hence the courts say that it must occur with full knowledge of all the facts. * * * Where the shareholder consciously accepts that relation, he ought to bear its burdens as well as enjoy its benefits, and it is easy to imply a promise to perform that duty. But where he does not accept the relation, where it was put upon him by another without authority and against his will, where, instead of accepting its benefits, he repudiates them at serious loss, where his mind and that of the company never met in any contractual relation, where it was not his duty to pay, and he explicitly refused to take what was offered, all foundation for an implied promise is gone. The facts do not admit of it, for the law does not raise a fiction to accomplish a wrong. And thus again we come to the proposition that the real truth must be ascertained, and when ascertained must control. And that real truth is that the defendants repudiated and did not ratify the unauthorized act of McKim. The whole force of a ratification lies in conscious and intended assent with full knowledge of the facts. If there is no such intent and no such volition, but a contrary intent and an opposite purpose, there is no ratification. The absence of any such intent and the presence of a different one is clearly disclosed by the facts."

[2, 3] The United States Circuit Court of Appeals sustained the finding of the trial court that Mrs. Vreeland was not liable as a stockholder of the bank to the creditors of the corporation. In the instant case Mrs. Cook refused to accept the stock offered her, and her indorsement is not the usual power of attorney consistent with an assumption of ownership of the stock, but is more in the nature of a quitclaim. There is no element of estoppel in the case. The creditors did not know at the time credit was extended that Mrs. Cook was shown by the books of the corporation to be a stockholder.

Appellant relies upon the case of Abbott v. Jack, 136 Cal. 510, 69 Pac. 257. In that case, at the request of the husband, a certificate for 330 shares of stock had been issued to Mrs. Jack as owner, March 14, 1896, and the same stood in her name on the books of the corporation until July 17, 1899, when it was surrendered and canceled, "and her acceptance of the stock is shown by her written assignment of it to R. E. Jack, her husband, of date March 16, 1896." It was there held:

> "From this it appears that she became a stockholder of the corporation on or before March 16, 1896, and that she continued to appear as such on the books of the company until the cancellation of the certificate, July 17, 1899. She therefore continued to be a stockholder as the term is defined in section 322 of the Civil Code, and under the provisions of that section (no facts being found to exonerate her) she continued to be liable, along with her husband. Civ. Code, §§ 322, 324; Duke v. Huntington, 130 Cal. 274 [62 Pac. 510]; Baines v. Babcock, 95 Cal. 593 [27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158]; Moore v. Boyd, 74 Cal. 174 [15 Pac. 670]; O'Connor v. Witherby, 111 Cal. 528 [44 Pac. 227]."

The holding of the court would thus seem to be that the issuance of the certificate, coupled with the indorsement and the fact that her name appeared upon the books of the corporation, ipso facto created Mrs. Jack a stockholder, and the finding of the court to the contrary was erroneous. The court added:

> "R. E. Jack indeed testified that on notifying her of the issue of the stock she refused to receive it; and he further testified that he told her, if she would not receive it, she must assign to him. * * * On a new trial the question of her liability as affected by the facts testified to by R. E. Jack, or otherwise appearing, can be considered; and as it is clear that there is a liability on her or her husband, or on both, the plaintiff, if he be so advised, should be permitted to amend his complaint by charging the latter with such liability."

The reversal of the trial court in that case seems to be based rather upon the condition of the record than upon the substantive rights of the parties. It is said:

> "But there is no finding as to these or other facts tending to exonerate her, and their effect cannot, on the record as presented, be considered."

The necessary implication from the decision is that, if the court had found the fact to be that the wife had refused to receive the stock and had assigned it to her husband for the purpose of making effective her repudiation, she should not be held as a stockholder. In view of the construction placed upon the record in that case, the decision cannot be said to be an authority for the plaintiff in this case, but rather, on the whole, either leaves open the question as to the effect of the repudiation by the wife of the transaction, or decides that question in favor of the nonliability of the wife. In the case of Abbott v. Jack, the fact that section 321 of the Civil Code makes the books conclusive evidence of the liability of the stockholder is apparently not relied upon by the court. In so far, however, as this case can be considered an authority for the proposition that the stock books of the corporation are conclusive as to the liability of stockholders in a nonbanking corporation, the case has been overruled by the subsequent cases of Welch v. Gillelen, supra, and Shattuck & Desmond, etc., Co. v. Gillelen, supra. See, also, Western Pac. Ry. Co. v. Godfrey, supra.

[4] In addition to the facts heretofore stated, it may be said that M. L. Cook, the husband, while acting as guardian, reported to the court sitting in probate, on several occasions, that the stock in question belonged to his wife and was a part of her estate. These declarations, however, merely went to the question of his credibility, and the court having based its decision upon the truth of his statement concerning the original transaction, if we hold his statement sufficient to support the finding that she was not a stockholder, as we must do upon the authorities above quoted, the judgment must be affirmed.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

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180 Cal. 101

RIVERSIDE COUNTY v. BRINSMEAD.
(L. A. 4826.)

(Supreme Court of California. Feb. 28, 1919.)

1. Agriculture ⚷11 — Destruction of Fruit Pests—Service of Notice on Occupant of Premises.

The notice required by Pol. Code, § 2322a, for the abatement of nuisance created by fruit pests in orchards may properly be served upon the occupant of the property, the former owner who had conveyed to his mother, the present owner, she then living in a foreign country.

2. Agriculture ⚷15 — Destruction of Fruit Pests—Owner's Liability for Expenses.

In an action by a county against the owner of an orchard to recover for fumigating it to destroy fruit pests under Pol. Code, § 2322a et seq., that the inspector only inspected one-eighth of the trees did not justify an assumption that the remaining trees were not infected, and that no recovery should be had thereon, in view of testimony that the orchard was generally infected.

Department 2.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by the County of Riverside against Elizabeth Brinsmead. Judgment for plaintiff, and defendant appeals. Affirmed.

H. A. Massey and Peyton H. Moore, both of Los Angeles, for appellant.

Lyman Evans, of Riverside, for respondent.

WILBUR, J. [1] Plaintiff recovered judgment against the defendant for the costs of fumigating her orchard, amounting to $871.45. Defendant appeals from the judgment. The lien is based upon the provisions of section 2322 of the Political Code, et seq. Appellant claims that the notice required by section 2322a was not served upon the proper party. Plaintiff alleged and the court found that the notice was served "upon the person in charge and in possession of said premises and orchard for the defendant as his agent." It is claimed that the evidence was insufficient to justify this finding. The proof showed that the notice was served upon Reginald Brinsmead, who was living in a residence upon the property in question. The owner of the property was living in England. C. White Mortimer, living in Los Angeles, had charge of the property, and a Mr. J. A. Thompson cultivated and cared for the property. Mr. Brinsmead, upon whom the notice was served, had lived upon the property for years while he was the owner thereof, and remained in the same house after transferring the property to the defendant, his mother. No one else lived upon the property or was in visible possession thereof. The defendant claims that the decision in San Bernardino v. Stewart, 173 Cal. 236, 159 Pac. 717, controls. In that case, however, the owner was living on the property, and was there at the time the notice was served. Here the owner was living in England, and no one was on the property at the time of the service other than the party served. The evidence sustained the finding of the court.

[2] Appellant further claims that, because the inspector only inspected one-eighth of the trees, it must be assumed that the other trees were not infected, and that no recovery should be had thereon. This point hardly merits consideration, particularly in view of the testimony that the orchard was generally infected.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

180 Cal. 71

HERTWECK et al. v. FEARON et al.
(S. F. 8087.)

(Supreme Court of California. Feb. 27, 1919.)

1. Judgment ⚷752—Lien—Creation.

Judgment lien is purely creature of statute; no such lien having existed at common law.

2. Judgment ⚷772—Lien—Creation—Time.

Judgment does not become lien on property subsequently acquired by judgment debtor, as of the time it was docketed, but lien attaches, under Code Civ. Proc. § 671, at time of acquisition of property.

3. Judgment ⚷784—Lien—Priority.

Upon acquisition of land by one against whom there are undocketed judgments, the liens of such judgments, under Code Civ. Proc. § 671, are equal without regard to order of time in which docketed, having become liens at same time by single act of acquisition of property.

4. Judgment ⚷784—Lien—Priority—Execution.

Where judgment liens are equal, the judgment debtor who first has execution issued and levied upon the land thereby obtains a lien superior to that of the other judgments upon which executions have subsequently issued, the owners of which may redeem from sale upon first execution.

In Bank.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Edward Hertweck and another against Joseph Fearon and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wm. H. H. Hart, of San Francisco, for appellants.

G. L. Aynesworth and S. L. Strother, both of Fresno, for respondents.

ANGELLOTTI, C. J. This is an action to enjoin the sale of certain land in Fresno county under a writ of execution issued upon a judgment of the superior court of Fresno county in favor of defendant Fearon against one Rauer for $513.25. The plaintiffs were the purchasers of said land at a sale thereof under execution issued upon a judgment of the superior court of Fresno county in favor of one Webb against said Rauer for $15.90, and, the time for redemption from said sale having expired, they had received the sheriff's deed to said land before any levy was made on the land under the Fearon judgment execution. Plaintiffs had judgment herein, and defendants appeal therefrom.

The Fearon judgment was the prior judgment. It was given and docketed against Rauer on March 13, 1912. The Webb judgment was given and docketed against Rauer on June 10, 1912. Rauer had no interest in the land here involved prior to October 22, 1912, on which date he became the owner thereof. This, it will be observed, was some months after the recovery and docketing of both judgments. Thereafter a writ of execution under the Webb judgment was issued and levied upon the land, and a sale had, and, no redemption having been had, the plaintiffs received their sheriff's deed January 20, 1914. Thereafter, viz. on May 10, 1915, the writ of execution was issued on the Fearon judgment and levied on the land.

The principal question presented is whether as to this after-acquired land the lien of the prior judgment, given by section 671, Code of Civil Procedure, was the prior and paramount lien. If it was, of course the sale of the land under the junior judgment execution was made subject to the prior judgment lien, and such prior lien could be enforced by execution, levy, and sale without regard to the sale, under the junior judgment. But if it was not the prior lien as to this land, it seems manifest to us that the purchasers at the sale acquired the land free of the lien.

[1-3] It being true, as was said in Boggs v. Dunn, 160 Cal. 283, 116 Pac. 743, that "the lien of a judgment is purely the creature of the statute, no such lien having existed at common law," the question presented must be determined by ascertaining the meaning of section 671, Code of Civil Procedure, the statutory provision covering this matter. That section, after providing for the docketing of the judgment by the clerk, is as follows:

> "And from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The lien continues for five years," unless enforcement of the judgment be stayed on appeal by a sufficient undertaking, in which event it ceases.

This section is in all material respects substantially the same as it was when originally enacted in 1851 as section 204 of the old Practice Act, the only changes being the substitution of the word "becomes" for "shall become" as it originally was and the substitution of the word "ceases" for the word "expires." Of course, under this provision both judgments became liens upon this property acquired by the judgment debtor after their docketing. Manifestly, however, neither judgment could become a lien upon such property until it became the property of the judgment debtor. It was the single act of acquisition of the property by the judgment debtor that caused both docketed judgments to become liens thereon, and in the very nature of things there could be no priority in point of time between them in so far as the creation and inception of the liens are concerned. The two liens on this property were simultaneously created, and, unless there can be found in section 671, Code of Civil Procedure, an intention to make the liens of docketed judgments on after-acquired property of the judgment debtor rank according to the order of the respective docketings, it cannot be held that one has any priority over another. We can see no such intention expressed in our statute. The claim is that this intention is to be found in the words "and from the time the judgment is docketed it becomes a lien," etc., but certainly if such was the intent as to after-acquired property it was a very poor way in which to express it. We have already noted that the docketed judgment cannot "become a lien" on after-acquired property of the judgment debtor until the property is actually acquired by him. If it had been intended to provide for any priority as between judgment liens on after-acquired property, actually created at the same moment, based on the dates of docketing of the judgments, it would have been a simple matter to make that intention clear in apt words. Provisions in all substantial respects similar to those of section 671, Code of Civil Procedure, have been considered by the courts of many other states, and the overwhelming weight of authority is to the effect that under such provisions there is no priority as between such liens on after-acquired property as are here involved—that they become liens at the some instant upon the after-acquired property, viz., at the instant there is a title to attach to, and do not relate back to the original judgment, and that neither has any priority over the other. See particularly In re Hazard's Estate, 73 Hun, 22, 25 N. Y. Supp. 928, affirmed on opinion of Supreme Court, 141 N. Y. 586, 36 N. E. 739; Moore v. Jordan, 117 N. C. 86, 23 S. E. 259, 42 L. R. A. 209, note; 53 Am. St. Rep. 579, note; Kisterton v. Tate, 94 Iowa, 665; Ware v. Purdy, 95 Iowa, 667, 64 N. W. 648; 2 Freeman on Judgments, § 368; 1 Black on Judgments, § 460; 5 Ruling Case Law, § 262, p. 802; 23 Cyc. 1381. Mr. Freeman says that "this construction seems to be of undisputed correctness, and to be adopted wherever the question has arisen, except in Oregon." Freeman on Judgments, § 368. The Oregon case referred to is that of Creighton v. Leeds, 9 Or. 215, and the statute there involved was similar to our own. The question was there learnedly and exhaustively considered, but we find ourselves unable to assent to the conclusion reached therein. We are of the opinion that the words "and from the time the judgment is docketed," etc., on which so much reliance is placed, can reasonably be taken as meaning in the connection in which they are used no more with regard to after-acquired property than that from such time the judgment becomes a lien at the instant there is a title to attach to. It follows from what we have said that the judgment liens here involved were equal, neither party having priority over the other.

[4] The necessary consequence of this conclusion, it appears to us, is that the purchaser at the sale under the execution issued on the Webb judgment took a title free of all claim based on the Fearon judgment lien. The situation in this regard was well expressed in Elston v. Castor, 101 Ind. 426, 51 Am. Rep. 754, where the court said:

> "The result of all these authorities * * * is that where there are different judgments, which are equally liens upon the lands of the judgment debtor, the judgment creditor who first has issued and levied an execution thereby obtains a lien which is superior to that of the other judgments upon which executions have been subsequently issued. * * * The result of this is that the first execution so far subordinates the lien of the other judgments that the owners of them may redeem from the sale upon the first execution, under the statute which provides that junior judgment creditors may redeem. * * * This does not conflict with the rulings that a judgment lien which is superior by seniority cannot be overthrown by a junior judgment lien. There the preference is completed by the seniority. Here there is no seniority, and the preference is brought about by the superior diligence in following up the steps of the law, and, in a sense, appropriating the property by the levy of an execution."

See, also, Freeman on Judgments, § 374.

No question as to any possible right of Fearon to share with Webb in the proceeds of the sale upon the execution on the Webb judgment is material in this action, and therefore any such question need not be here discussed.

Plaintiffs, being by virtue of their purchase and deed the owners of this land free of all claims based on the Fearon judgment, were entitled to the relief sought by them.

The judgment is affirmed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.; SLOSS, J.; MELVIN, J; LAWLOR, J.

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180 Cal. 63

NEIDLEIN v. SOUTHERN PAC. CO.
(Sac. 2596.)

(Supreme Court of California. Feb. 27, 1919. Rehearing Denied March 27, 1919.)

1. MASTER AND SERVANT ⚷278(18)—INJURIES TO SERVANT.

In action for death of switch tender in freight yard at night by being crushed between cars, evidence *held* insufficient to show that either foreman of switching crew or any of crew had reason to believe any special care was essential to the switch tender's protection, or that he was in, or likely to be in, a position of danger.

2. MASTER AND SERVANT 🔑278(18) — INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In action for death of switch tender, crushed between cars in freight yard, evidence *held* sufficient to justify conclusion there was no negligent omission of railroad with relation to switch tender.

3. APPEAL AND ERROR 🔑1050(1) — HARMLESS ERROR—EVIDENCE.

In action for death of switch tender, crushed between cars in freight yard, testimony of car inspector as to rule or practice as to employés in yard looking out for themselves *held* not prejudicial.

4. MASTER AND SERVANT 🔑270(16)—INJURIES TO SERVANT—EVIDENCE.

In action for death of switch tender between cars in freight yard, evidence as to usual practice in moving of cars and making up trains was admissible as illustrative of known knowledge of deceased, in considering administratrix's claim as to special negligence through knowledge of foreman of dangerous situation, also in considering question of contributory negligence, available in dimunition of damages.

Wilbur, J., dissenting.

In Bank.

Appeal from Superior Court, Sacramento County; J. E. Prewett, Judge.

Action by Catherine Neidlein, as administratrix of the estate of Francis J. Neidlein, deceased, against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Theodore A. Bell and Arthur L. Shannon, both of San Francisco, and Shinn & Hart, of Sacramento, for appellant.

Devlin & Devlin, of Sacramento, for respondent.

ANGELLOTTI, C. J. Francis J. Neidlein, a switch tender in the employ of defendant, was killed while working in defendant's freight yard at Sacramento by being crushed between two cars. He left surviving him as his sole heir at law his mother, Catherine Neidlein. She was appointed administratrix of his estate, and upon the theory that at the time of the accident the deceased was engaged as the employé of defendant in interstate commerce, a matter not disputed, brought this action as such administratrix, alleging negligence on the part of defendant proximately causing the death. At the trial, the case for the plaintiff being closed, a motion for a nonsuit was made upon various grounds, including among others a want of a showing of negligence on the part of defendant or any of its officers, agents, or employés. The motion was granted, and judgment given for defendant. This is an appeal by plaintiff from such judgment.

Concededly the rights of the parties are to be determined under the act of Congress approved April 22, 1908, commonly known as the federal Employers' Liability Law. 35 Stat. L. 65, c. 149 (U. S. Comp. St. §§ 8657–8665). The act involved allows a recovery in such cases for the damage occasioned by the injury or death of an employé "resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." No defect or insufficiency of equipment of any kind was here alleged or relied upon, the sole negligence alleged being that while the deceased was upon one of the railroad tracks engaged in the discharge of his duties, the track then being in total darkness, the agents and employés of defendant other than deceased, in the switching and moving of cars in the yard "negligently caused to be kicked, and to be moved along and over said track No. 2, at the point where the deceased then was, * * * a detached, unattended, unguarded and unlighted tank car, without giving any notice or warning of any kind or character to the deceased of such movement of such tank car," which car struck deceased and crushed him between the end thereof and the end of another car standing on said track.

The accident occurred about 7 o'clock of the evening of December 2, 1913. At that time it was dark. The yard had no light therein except such as came from the lanterns carried by the employés, the light from the switch engine and the lights on the various switch targets. It was the private property of defendant, and no street or way traversed it. Located therein were the two main line tracks of defendant, and to the south of these five other tracks for the switching of cars and the making up of trains, all of which lay parallel, and are numbered from north to south on the diagram in evidence as tracks 2, 3, 4, 5, and 6, and the track known as the "lead" to the south of the others, into which all these switch tracks ran, the "lead" itself finally running at its westerly end into the west-bound main line track. In this yard something was moving nearly all night. Deceased had been for some time engaged therein in the capacity of switch tender, his duties being, under the direction of the assistant yardmaster, to keep the main line switches lined up so as to permit the safe passage of main line trains, and also apparently to supervise the use by the switching crew and other crews of the tracks used for making up trains and switching cars, as well as of the "lead." It is not questioned that he was thoroughly acquainted with the conditions in the yard and the manner of doing the work therein. At the time of the accident daily train No. 223, due to leave at 7:40 p. m., had been partially made up on track 2, consisting at that time of some seven or eight cars, without engine attached. Some other cars were to be attached at the westerly end, as to which deceased had full knowledge. These cars, with several others, were then attached to the switch engine. One William Bowles was the foreman of the switching crew, and he told deceased that he had two cars for train 223, and others to be sent down the lead track. Deceased told him that he had an engine on track 6 to be sent back along track 3, and Bowles told him in substance that he would take his cars up the west-bound main line so as to leave the switch tracks clear, and there wait until the tracks were cleared for his work. Accordingly Bowles took his engine and cars up to the main track, and, leaving them and the remainder of the crew there, walked back to observe the work being done until he could proceed further with his own duties. Deceased, carrying his lantern, went to the switch of track 6, apparently opened it, and then went back along track 6 and spoke to the engineer of the train on that track, and apparently found him to be not ready to move. He then went again to the switch of track 6 and closed it, and then, walking back northerly across the tracks to somewhere between tracks 4 and 3, swung his lantern around his head, giving a signal which Bowles called a "highball" or "back up sign," calling out at the same time substantially: "Go ahead, Billy, with your work; he ain't ready." Bowles testified that in the giving of this signal the lantern of deceased was extinguished. This was the last that Bowles saw of deceased till after the accident. Bowles then gave his own engineer a "back up signal," and they backed down and kicked one car down the lead, and then lined the switch for track 2, and kicked one of the cars for train 223 down that track. Another car was kicked down the lead, and another about to be kicked down track 2 for train 223 when Bowles was notified of the accident. It appears that after deceased gave his signal to Bowles and his light was extinguished, he had walked over track 3 to track 2 and the cars thereon, had gone up to the westerly end of those cars, and half crossing this track had stopped at the center of the track at the coupling of the most westerly car and facing easterly, away from the work that was then going on in the yard, rested his lantern on the coupling, and attempted to light it. He was here seen thus engaged by one Ensbury, a foreman of car inspectors, who, looking over the cars on track 2, and crossing the track to see that the cutting lever of the end car was in proper shape and then to go down the other side of the cars, saw him there. He asked deceased to lift his lantern so that he could try the lever, which deceased did, and he tried it. He said to deceased, "You are in a hell of a place, kid," to which deceased did not respond. He then walked down the other side of the cars a very short distance when he heard the impact of the car kicked down track 2 against the partially made up train standing thereon, and a cry from deceased. Apparently when the kicked-in car came in contact with the cars on track 2, deceased was still in the position in which Ensbury had left him, and was so injured by being crushed between the two cars that he died very shortly thereafter. The car was kicked in on track 2 very gently, traveling with very little noise only a mile or two an hour, and only a car length or so after being cut off from the engine, there being only about two car lengths in the clear on track 2 west of the westerly end of the partially made up train. There was no light on the car so kicked in, and no attendant. The work was being done in accord with the usual custom and practice obtaining in the yard.

[1] So far as we can see, after a most thorough consideration of the evidence, there was absolutely nothing to indicate that either Bowles or any of the switching crew had the slightest reason to believe or even suspect that any special care in the matter of the work was essential to the protection of deceased, or that he was at any time in or likely to be in a position of danger with relation to the work that the crew was about to do. That Bowles knew that the light of the lantern carried by deceased had been extinguished has no significance in this connection. Bowles, of course, knew that deceased was somewhere in the yard without a light in his hands, and we may assume that he knew that some time after having given him the signal to proceed with his work deceased would cross track 2 on his way northerly to get back to the main line tracks and his switchman's shanty on the northerly side thereof. But he also knew that deceased was thoroughly familiar with the location of the tracks in the yard and with the manner of doing the work of switching and making up trains therein, and that he knew that part of the work that was about to be proceeded with in accord with his own signal and direction was the completion of the making up of the train on track 2, and he was entirely justified in relying on the presumption that deceased, who had no further duty to perform with reference to that work, would take all reasonable precautions to insure his own safety by keeping out of the way of the cars about to be moved. See Casey v. Boston & M. R. R. Co., 121 N. E. (Mass.) 403; Aerkfetz v. Humphreys, 145 U.

S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. While there is testimony to the effect generally that it was "dark" in the yard, there is nothing substantial enough to justify the inference that if deceased had observed he would not have been able to detect the actual approach of the car in ample time to have avoided it. There was nothing in the circumstances to even suggest to Bowles that there could be any danger to deceased in his proceeding with his work in the ordinary way. The possibility that deceased would stand on track 2 with his back to the work, or even attempt to cross the track where he did without any attempt whatever to ascertain whether a car was approaching, would not reasonably occur to him. Upon this point the evidence appears to us to be such that there could not be any reasonable difference of opinion.

[2] Nor can we see that there is any reasonable basis in the evidence for a conclusion that there was any negligent omission on the part of the company with relation to deceased. Learned counsel for appellant devotes himself almost entirely to a discussion of the claim that in view of the fact that the lantern of deceased had been extinguished Bowles was negligent in not taking unusual and special precautions to avoid any possible injury to him. We are entirely at a loss to see in the evidence any fair warrant for an inference that with relation to the class of employés to which deceased belonged, switch tenders, etc., in railroad yards, there was any negligence on the part of the company in the usual manner of the doing of the work in this yard, which manner apparently was followed in this case. So far as we can see, the cars were so moved that, to use the language of Aerkfetz v. Humphreys et al., supra, "any ordinary attention on the part of the" employé "to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to" avoid them. With relation to such employés the very nature of the business is such that the obligation of the employer must necessarily be measured in the light of the obligation of the employé to use at least ordinary care to avoid injury in his dangerous work. That is to say, the employer is "not bound to assume that any employé, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars." Aerkfetz v. Humphreys et al., supra. Wherein defendant may reasonably be said to have failed in the duties to such employés with relation to this yard and the manner of doing work therein, we are unable to perceive from the evidence. See Aerkfetz v. Humphreys et al., supra; Crowe v. N. Y. C. & H. R. Co., 70 Hun, 37, 23 N. Y. Supp. 1100; Connelley v. Penn. R. Co., 228 Fed. 322, 142 C. C. A. 614; Travis v. Kansas City So. Ry., 121 La. 886, 46 South. 909. The point specially made in the brief of learned counsel is that the company had not made any rule "as to what should be done in the event that a switch tender or switchman's light should become extinguished." The record is not clear as to whether or not this is true, but assuming it to be so we cannot see how in so far as the protection of switchmen or switch tenders is concerned any rule could reasonably have been considered necessary.

It seems to us very clear that the sole cause of the deplorable accident was the negligence of the deceased, and that in no respect was there any negligence on the part of any officer, agent, or employé of defendant contributing thereto. It follows that the learned judge of the trial court properly granted the motion for nonsuit.

[3] Complaint is made that the car inspector, Ensbury, was improperly allowed to testify as to a rule or practice as to employés in the yard looking out for themselves. The substance of his testimony was that, according to his understanding of the custom in the yard, everybody was supposed to use care to avoid being injured. We are at a loss to see anything of a prejudicial nature in the evidence.

[4] Evidence as to the usual practice and custom in the moving of cars and making up trains in the yards was undoubtedly admissible, not, as was suggested by counsel for plaintiff in his objection and expressly recognized by the trial judge, that a negligent course of conduct would be any the less negligent simply because long continued without mishap, but as illustrative of the known knowledge of deceased in considering the claim of plaintiff as to any special negligence on the part of Bowles arising from knowledge of a dangerous situation on the part of deceased, and also in considering questions of contributory negligence which was available to defendant in diminution of damages.

The judgment is affirmed.

We concur: SLOSS, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

WILBUR, J. I dissent. It does not seem to me that it can be said that as a matter of law the defendant was guilty of no negligence, and, unless it can be so said as a matter of law, the question of negligence should have been submitted to the jury, who were charged with the responsibility of determining what constitutes ordinary care. No one would doubt that to kick an unlighted car across a public highway when it was so dark that the car could not be readily seen, the car moving so slowly and so silently that it could not be heard, would constitute negligence. Whether or not the moving of a car under similar conditions in a yard where workmen had a right to be and were expected to be, in view of the deadly results of a collision with such a moving car, seems to me to be a question to be determined by the jury by applying the standard of ordinary prudence. While it is true that the engineer had a right to rely upon the deceased taking reasonable precautions to insure his own safety, that did not justify him or the defendants in omitting that degree of care required by ordinary prudence. Scott v. San Bernardino, etc., 152 Cal. 604, 93 Pac. 677.

I think the judgment of nonsuit should be reversed.

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180 Cal. 76

CLARKE v. NEW AMSTERDAM CASUALTY CO. (S. F. 7984.)

(Supreme Court of California. Feb. 28, 1919. Rehearing Denied March 27, 1919.)

1. INSURANCE 🔑466—ACCIDENT INSURANCE—CAUSE OF DEATH—DISEASE.

Under an insurance policy covering death from bodily injuries, which independently of all other causes are effected solely and exclusively by accidental means, if disease plays a part in the death of insured after an accident, it is essential to recovery on the policy that such disease was due to the accident.

2. INSURANCE 🔑466—ACCIDENT INSURANCE—CAUSE OF DEATH—DISEASE.

Under an insurance policy covering death by accidental means exclusively, if the death of the insured was in part caused by heart disease, which was not in fact caused by the accident, there could be no recovery.

3. INSURANCE 🔑665(5)—ACCIDENT INSURANCE—CAUSE OF DEATH—EVIDENCE.

In an action under an insurance policy covering death by accidental means exclusively, where it appeared that insured was struck by an automobile resulting in concussion of the brain, and consequently developed appendicitis and heart disease, evidence *held* to sustain a finding that the proximate cause of death was concussion of the brain.

4. APPEAL AND ERROR 🔑1001(1)—REVIEW—FINDINGS OF FACT.

A verdict will not be disturbed on appeal, where there is sufficient evidence to support it.

5. INSURANCE 🔑146(3)—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY.

If doubt arises in respect to the application, exceptions to, or limitations to liability, the construction of the contract most favorable to insured should be adopted.

6. TRIAL 🔑296(9)—INSTRUCTIONS—CURE OF ERROR.

In an action on an accident policy, an instruction that the jury might, in case of doubt as to the application, exceptions to, or limitations to liability in the contract, accept the construction most favorable to plaintiff was not erroneous, as directing a verdict for plaintiff if they should be in doubt regarding what decision to render; the court elsewhere charging that plaintiff must establish her case by the preponderance of the evidence.

7. INSURANCE 🔑669(11)—ACCIDENT INSURANCE—ACTIONS ON POLICY—INSTRUCTIONS.

In an action on an accident insurance policy, instructions that if the jury found "or believed" certain facts as to the proximate cause of death, a verdict for plaintiff would be justified were not misleading.

8. INSURANCE 🔑669(11)—ACCIDENT INSURANCE.

In an action on an accident insurance policy, where the accident was followed by heart disease, which was the immediate, but not the proximate, cause of death, an instruction that the diseased condition must have existed at the time of the accident, when considered in connection with other instructions, *held* not misleading.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Mary B. Clarke against the New Amsterdam Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, and B. A. Herrington and H. G. Hill, both of San Jose (Redman & Alexander, of San Francisco, of counsel), for appellant.

Gavin McNab and Nat Schmulowitz, both of San Francisco, and Holland, Rutledge & Lashly, of St. Louis, Mo., amici curiæ.

H. A. Blanchard, of San Jose, for respondent.

MELVIN, J. Defendant appeals from a judgment in favor of plaintiff after a trial by jury. Plaintiff, who is the widow of James T. Clarke, deceased, sued as beneficiary named in an accident policy issued to her husband.

The policy in question provided for the payment to plaintiff of $7,500 for "loss of life * * * from bodily injuries, * * * which independently of all other causes are effected solely and exclusively by accidental means. * * * Nor shall the company be liable for any loss caused or contributed to by illness or disease."

Mr. Clarke was struck by an automobile while he was crossing a street in San Jose, was knocked to the pavement, and suffered a severe concussion of the brain. The date of the accident was December 10, 1914. Mr. Clarke was confined to his bed, either in the hospital or at home, for a little more than a week. After that he was up for a few hours each day, and later was able to go into his garden and even to take walks of several blocks. On the Sunday before he died he complained of a pain in his side, and on the following Wednesday, January 13, 1915, an operation was performed upon him, and the appendix was removed. It was one of those not infrequent cases in which nature had walled off and localized the pus, and there was no apparently serious general infection. On January 16, 1915, Mr. Clarke died, the immediate cause of his death being acute myocarditis, a disease of the heart. Prior to the accident he had been a man of robust health, and had exhibited no symptoms either of heart disease or of appendicitis. Immediately after the accident Dr. Van Dalsem examined him, using a stethoscope, but found no indication of heart trouble, but just before the operation a slight heart murmur became evident. This indicated a leak of the tricuspid valve. The autopsy revealed a heart of more than normal size. The valves were thickened and covered with a calcareous deposit, which, according to the experts, would account for the murmur noticed just before the operation.

There was testimony to the effect that Mr. Clarke was struck across the stomach by the fender of the automobile, and was thrown so that his head struck the pavement. There was upon his head when he was first examined by Dr. Van Dalsem a contusion 2½ or 3 inches in diameter. There was a concussion of the brain which caused unconsciousness for five or six hours, and for several days thereafter he was so disturbed mentally that he was unable to understand his surroundings or his condition.

[1, 2] The court instructed the jury that if disease plays a part in the death of an assured person after an accident, it is essential to recovery that such disease was due to the accident. New Amsterdam Casualty Co. v. Shields, 155 Fed. 54, 85 C. C. A. 122. The jurors were also given the following instructions:

> "Under the terms of this policy plaintiff cannot recover for the death of James T. Clarke, unless that death was caused by accidental means, and solely and exclusively by such means, independently of other causes. * * * If you shall find that the death was caused in part by the heart disease, and that this heart disease was not in fact caused by this accident, your verdict must be for the defendant. * * * If you shall be in doubt whether this accident caused either appendicitis or the heart disease, your verdict must be for the defendant."

These instructions substantially stated the rule governing such cases, and therefore the problem before us is whether or not there is substantial evidence to support the verdict in view of the court's charge.

It appears from abundant and uncontradicted testimony that Mr. Clarke was a man of extraordinary health and bodily vigor for a man of his years. Just before the operation a slight leak of the tricuspid valve was discovered, but, according to the testimony of his physician, the heart was then functionally normal and was propelling the blood throughout the body. The autopsy revealed no abnormal condition of the lungs or liver indicative of any chronic heart condition. Dr. Van Dalsem testified, regarding the myocarditis, as follows:

> "In my opinion this acute myocarditis was due to the appendicial abscess, aided by the lowered resistance caused by the concussion of the brain. That is the way of poisons gathered up from the appendicial abscess and carried through the heart."

[3] Regarding the infection resulting in the appendicitis, one of the physicians, Dr. Blanchard, testified that in his opinion the accident so lowered Mr. Clarke's vitality and put him in such a physical condition, with reference to resistance, that he became a prey to the malady to which otherwise he would have been immune; that the appendix would not have been infected from the bacilli in the larger intestine had it not been for the accident. There was other evidence regarding these matters, but the above synopsis sufficiently illustrates the theory of respondent and the substantial support to that theory upon which the jury was justified, in our opinion, in reaching the conclusion that the concussion of the brain, due to the accident, was the proximate cause of Mr. Clarke's death.

Great stress is laid by defendant's counsel upon the fact that at the post mortem examination the heart showed lime deposits. One of the defendant's expert witnesses, a physician, testified that "the lime deposits in the heart were due to arteriosclerosis, which is frequently due to old age." But there was no showing that this condition was pathological, or that it was even unusual in a man of the age of the assured. Naturally, a man of 60 or more would have less power to resist evil consequences resulting from an accident than a younger person would possess, but an insurer, accepting as premiums the money of a client of advanced years, may not complain of that fact. It has been held that the existence of unknown conditions tending to shorten the life of the assured does not nullify a policy. Stanyan v. Security Mutual Life Insurance Co., 91 Vt. 83, 99 Atl. 417, L. R. A. 1917C, 350; Freeman v. Mercantile Mutual Accident Association, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. It may be conceded that morbid conditions induced by bodily injury may be more readily caused and more deadly in result when the victim is an aged person than in the case of a healthy youth, but that concession would not excuse the insurer of the maturer individual. If the accidental injury produces morbid change in the exercise of vital functions, which in turn results in death, the injury and not the morbid change is held to be the cause of death. Ward v. Ætna Life Insurance Co., 82 Neb. 499, 118 N. W. 70; New Amsterdam Casualty Co. v. Shields, 155 Fed. 54, 85 C. C. A. 122; Ludwig v. Preferred Accident Insurance Co. of New York, 113 Minn. 510, 130 N. W. 5.

[4] The cause of death is a question for the jury, and where, as here, there is sufficient testimony in the record to support the conclusion reached by the jury, the verdict and judgment based thereon will not be disturbed. Hanley v. Fidelity & Casualty Co., 180 Iowa, 805, 161 N. W. 114; Hatfield v. Iowa State Traveling Men's Association, 180 Iowa, 39, 161 N. W. 123; Semmons v. National Travelers' Benefit Association, 180 Iowa, 666, 163 N. W. 338.

Defendant's counsel cite many authorities, of which Maryland Casualty Co. v. Morrow, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. (N. S.) 1213, is typical. In that case the jurors were told, in effect, that although death might have resulted from two concurring causes—one being the injury and the other being pre-existing diabetes—the plaintiff would nevertheless be entitled to recover. This was very properly held to be error. But in the present case the theory of the plaintiff, supported by testimony which the jurors were entitled to accept, was that no heart disease existed before the accident, and that both the appendicitis and the myocarditis were results of the injury itself. In Bellows v. Travelers' Insurance Co. (Mo.) 203 S. W. 978, the court was considering the case of a man who had been severely beaten about the head and body by robbers. He recovered from the external wounds, but the internal results progressed from stage to stage until, according to certain testimony, death resulted from them. The immediate cause of death was nephritis (inflammation of the kidneys) occurring nine months after the accident, but the court held that from the evidence the jurors were justified in deciding that death resulted directly and independently of all other causes from the injury.

Where real and substantial evidence in a case supports a verdict the judgment will not be set aside on the ground that it was not justified by the proofs. Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243.

[5] The instructions were unusually full and fair, and it would serve no good purpose to review all of those to which appellant's counsel call our attention. Some of them, however, require notice. The twenty-eighth instruction was as follows:

> "When a doubt arises in respect to the application, exceptions to, or limitations to liability, you will adopt the construction most favorable to the plaintiff."

It is not contended that the rule announced is not a correct one for the guidance of a court, nor could such contention well be sustained, because this court, and, generally speaking, all American courts, have declared in favor of that principle of construction of contracts which are at all doubtful in the matter of the exact meaning of the language employed. 1 Corpus Juris. 415; Bayley v. Employers' Liability Assurance Corporation, 125 Cal. 345, 58 Pac. 7.

[6] But appellant's counsel complain that by giving this instruction, applicable, if at all, to issues of construction to be determined alone by the court, the jurors must have understood the court to say that, if they were in doubt regarding what decision to render in the case, they should find a verdict for the plaintiff. We cannot see that jurors would be so misled, nor can we agree with counsel for appellant regarding the alleged harmful result of the giving of this instruction. Elsewhere in the charge the jury had been told by the court that "plaintiff must establish her case by a preponderance of the evidence." We may not assume that the jurors disregarded this rule, nor that they were misled by the statement of a canon of construction of insurance contracts, which is, undoubtedly, one recognized by the courts.

[7] The twenty-sixth instruction began with the words, "If you find from all the facts and circumstances," and these words are followed by a recital of the details of the accident, the contusion and the shock to his nerves, which Mr. Clarke experienced. Then occur the words, "and if you find *or believe*" (the italics are ours), followed by a recital of respondent's theory of the proximate cause of death, which they were told, if believed by them, would justify a verdict for plaintiff. Appellant's counsel insist that this instruction is prejudicially erroneous, citing in that behalf Fries v. American Lead Pencil Co., 141 Cal. 610, 75 Pac. 164. That authority does not sustain the contention. It is true that in the Fries Case an instruction was condemned which began with the words, "If in this case you believe from the evidence," etc., but the error lay not in the use of the word "believe," but in the statement to the jurors that they could award such damages as they might "feel" the child entitled to receive. This gave the jurors, as the court held, a right to allow "play to their emotions of sympathy for the injured child." It is clear that the instruction there held erroneous is not at all similar to the one here criticized.

[8] It is further asserted that the court committed radical error by instructing the jury that in order to defeat the claim the diseased condition of the heart or appendix "must have existed in the body of James T. Clarke at the time of the accident." This statement, wrenched from its context, would of course be an erroneous one, but it occurs in the course of a long instruction to the effect that if the diseased condition existing at the time of the operation or autopsy

was "not concurrent with the injury, or existing prior thereto," and was "a natural result of the injury, and that the resulting death was solely due to the bodily injuries, and not to any independent cause," the verdict must be for the plaintiff. The part of the instruction to which objection is made was followed by this sentence:

> "If you believe from the evidence that the acute suppurative appendicitis and the valvular heart disease, with hypertrophy of the heart, was brought about by the weakened condition of the body of James T. Clarke, as the result of said injuries, and not from some condition existing at the time or prior to the injury on December 10, 1914, then your verdict must be in favor of the plaintiff and against the defendant."

The instruction was proper by reason of the conflicting claims of the litigants as to the existence or nonexistence of disease prior to the accident. Undoubtedly, death from any independent cause, whether existing prior to or supervening at a time subsequent to the accident, would defeat the claim of plaintiff, but the instruction was dealing with one phase of the problem, namely, the existence or nonexistence of disease prior to the accident. Nevertheless, the jurors were told that death from "any independent cause" would prevent recovery. Therefore we are of the opinion that the jurors were not misled by the instruction. An instruction somewhat similar was approved in New Amsterdam Casualty Co. v. Shields, supra.

No other alleged errors in the giving or refusing of instructions require further comment than that we are of the opinion that the very exhaustive charge was fair and free from substantial error.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; LAWLOR, J.

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180 Cal. 52

CITY OF LONG BEACH v. LISENBY, Mayor, et al. (L. A. No. 5795.)

(Supreme Court of California. Feb. 26, 1919.)

1. MUNICIPAL CORPORATIONS 🔑864(7)—ISSUANCE OF REFUNDING BONDS — CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 18, prohibiting cities from incurring liability exceeding annual income without the assent of two-thirds of the voters, does not prohibit city from issuing a refunding bond to pay a judgment against it for personal injuries, regardless of whether its liabilities exceed its annual income.

2. MUNICIPAL CORPORATIONS 🔑913 — ISSUE OF BONDS—"FUND"—"REFUND."

St. 1897, p. 75, § 1, as amended by St. 1901, p. 274, authorizing cities other than those of the first class to fund or refund certain indebtedness, permits a municipality to issue a refunding bond to cover a warrant given in payment of a judgment for personal injuries; to "fund" an outstanding debt being to convert the indebtedness into a more permanent form, with an extended time of payment, and with interest which is regular and which may also be reduced, and to "refund" being to replace that which has once been funded by a new fund.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fund; Refund.]

3. MUNICIPAL CORPORATIONS 🔑907 — PAYMENT OF JUDGMENTS—STATUTES—REPEAL.

St. 1897, p. 75, § 1, as amended by St. 1901, p. 274, providing for refunding bonds was not repealed, either expressly or by implication, by St. 1901, p. 794, providing for a tax levy to pay judgments; the two acts being complementary.

4. MUNICIPAL CORPORATIONS 🔑913 — ISSUE OF BONDS—PAYMENT OF LIABILITIES ARISING EX DELICTO.

A city may issue refunding bonds to provide for the payment of a judgment against it for personal injuries, payable out of funds derived from general taxation, notwithstanding that the liability arose from the exercise of the proprietary as distinguished from the governmental functions of the city.

In Bank.

Mandamus proceedings by the City of Long Beach, a municipal corporation, against W. T. Lisenby, Mayor, and another, to compel them to execute a refunding bond. Writ of mandate issued.

Wheaton A. Gray, Waldo M. York, Harry M. Irwin, and Geo. L. Hoodenpyl, all of Los Angeles, and D. L. Bathurst, of Long Beach, for petitioner.

Eugene C. Tincher, of Long Beach, for defendants.

K. A. Miller, Barstow, Rohe & Jeffers, Nathan Newby, and T. E. Gibbon, all of Los Angeles, T. A. Williams, of Richmond, Va., W. C. Shelton, Harry A. Hollzer, Slosson & Mitchell, W. A. Alderson, all of Los Angeles, and Beverly L. Hodghead, of San Francisco, amici curiæ, for petitioner.

T. A. Sherwood, of Long Beach, and James E. Kelby and Parke Godwin, both of Los Angeles, amici curiæ, for defendants.

PER CURIAM. This is a proceeding in which the petitioner seeks a writ of mandate requiring the defendants, as its officials charged with a duty so to do, to execute a certain bond for the sum of $563.23, issued under the provisions of a certain ordinance of the petitioner authorizing the issuance of such bond for the purpose of funding and thereby providing for the eventual payment of an outstanding indebtedness in the form of a judgment against the petitioner, evidenced by a warrant issued to the judgment creditor for said sum. The facts of the case are undisputed and may be briefly stated as follows:

The city of Long Beach is a municipal corporation operating under a charter duly adopted by its people and approved by the Legislature in the year 1915. Prior to said time, and acting under the permission of an act of the Legislature adopted in the year 1903 (Stats. 1903, p. 412), authorizing municipalities to issue bonds and incur indebtedness for the purpose of constructing and maintaining public assembly or convention halls, the city of Long Beach had proceeded to erect and conduct an auditorium for the purposes of public assemblage. When such auditorium was about to be used for such a purpose, and while a large number of people were assembled in front thereof, the approach to the building collapsed, and many persons were killed or injured. Actions were brought against said city for damages resulting from the death or injury of these people, based upon the alleged negligence of the said municipality in the construction of said building, some of which resulted in judgments in favor of the several plaintiffs therein. One of these cases affirmed upon appeal to this court was that of Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, and upon the affirmance of this judgment other judgments based upon the authority thereof were obtained against said city. In all, these judgments aggregated the sum of over $370,000, a sum much in excess of the income and revenue of said city provided for any single year. M. A. Poll was one of those persons in whose favor one of said judgments had been entered, and, said judgment not having been satisfied, he applied to and received from said city a warrant for the payment of the sum of $563.23, the amount of said judgment, dated March 13, 1918. Thereafter, and on March 15, 1918, the governing body of said city, who are termed the commissioners thereof, by a two-thirds vote of its members, adopted an ordinance entitled "An ordinance providing for the issuance of a bond in the sum of $563.23 to refund outstanding indebtedness of the city of Long Beach in the sum of $563.23, evidenced by a warrant of said city. It is the bond which was to be issued pursuant to this ordinance which the defendants herein as mayor and treasurer of said city refused to sign, and it is their signature of the same which it is the purpose of the writ sought herein to compel. The act of the Legislature under the terms of which the petitioner seeks to justify attempted issuance of the bond in question by a two-thirds vote of the governing body of said city is the act of 1897 (Stats. 1897, p. 75), which reads in part as follows:

> "Section 1. The common council, board of trustees, or other governing body of any incorporated city or town other than cities of the first class, in this state, having an outstanding indebtedness, evidenced by bonds or warrants thereof, is empowered, by a two-thirds vote of its number, to fund or refund the same and issue bonds of such city or town therefor in sums of not less than one hundred dollars nor more than one thousand dollars each, and having not more than forty years to run, and bearing a rate of interest not exceeding six per cent. per annum, payable semiannually."

It may be here noted that the foregoing section of the act of 1897 was amended in 1901 (St. 1901, p. 274) in an important particular to be hereinafter discussed.

The first contention of the defendants herein in opposition to the issuance of said writ is that the payment of said indebtedness in the manner provided by the terms of the statute above quoted or of any amendment thereto is inhibited by the provisions of section 18 of article 11 of the state Constitution, reading as follows:

> "No city * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

It being conceded that the indebtedness or liability evidenced by said warrant is part of a total indebtedness or liability arising from a common cause which exceeded in the year of its creation the income or revenue of said city provided for such year, the first question presented for our consideration is that of the scope, application, and effect of the provisions of the state Constitution last above quoted. The purpose for which the foregoing section of the state Constitution was adopted is somewhat outlined in the debates of the constitutional convention of 1879, to which our attention has been directed, from which it appears that the framers of this particular section of the Constitution stated its object to be to put an end to "the practice prevalent both in California and in Eastern states, a practice that has grown rapidly of late years, of extravagance and expenditure in engaging in improvements of various kinds which has resulted in an enormous increase of municipal indebtedness." A yet more definite expression of the purpose of this provision of the Constitution is to be found in the decision of this court in the case of San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, wherein it is stated:

> "The system previously prevailing in some of the municipalities of the state, by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruit-

ful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted."

The subject was further considered in the case of McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191, and Arthur v. City of Petaluma, 175 Cal. 216, 165 Pac. 698, wherein the language of the foregoing case was expressly referred to and approved.

Having thus determined the general scope and purpose of the constitutional provision under review, we may next consider the limitations imposed upon its application by our previous decisions. In the case of Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128, this court decided that the payment of the salary of a public officer (in that case the treasurer of the city and county of San Francisco), whose office has been created and salary fixed by the Legislature of the state, is not within the prohibition of section 18 of article 11 of the Constitution. In so deciding, this court, after quoting the foregoing language of the Constitution, said:

"It is quite apparent, however, that this clause of the Constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred—that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used. The clear intent expressed in the said clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. But the stated salary of a public officer fixed by statute is a matter over which the municipality has no control, and with respect to which it has no discretion; and the payment of his salary is a liability established by the Legislature at the date of the creation of the office. It, therefore, is not an indebtedness or liability incurred by the municipality within the meaning of said clause of the Constitution."

The reasoning of the foregoing decision, as well as that of the other cases above cited dealing generally with the scope and purposes of this constitutional provision, would clearly seem to confine the application of said provision to those forms of indebtedness and liability which may have been created by the voluntary action of the officials in charge of the affairs of such city and to have no application to cases of indebtedness or liability imposed by law or arising out of tort. As to the latter class of liabilities to which the indebtedness existing in the instant case belongs, viz. that arising out of tort, there is no direct adjudication in this state. The Constitutions and statutes of several of the other states of our Union contain similar provisions to that embraced in the foregoing clause of our own Constitution, and in construing these it has been uniformly held by the courts of these states that said limitations do not apply to liabilities arising out of torts. Conner v. City of Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; City of Bloomington v. Peurdue, 99 Ill. 329; Rice v. City of Des Moines, 40 Iowa, 638; City of Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263; Ft. Dodge, etc., Co. v. City, etc., 115 Iowa, 568, 89 N. W. 7; Lorence v. Bean, 18 Wash. 36, 50 Pac. 582; People, etc., v. May, 9 Colo. 404, 12 Pac. 838; O'Bryan v. Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800; Little v. Portland, 26 Or. 235, 37 Pac. 911.

[1] In McQuillin on Municipal Corporations it is stated to be the well-settled rule that such provisions in the Constitutions and statutes of the various states apply only to indebtedness which arises ex contractu, and have no application to involuntary liabilities arising ex delicto. We are therefore constrained to hold that the section of the Constitution above quoted may not be relied upon to defeat the asserted right of the city of Long Beach to provide for the payment of its indebtedness of which the judgment sought to be funded through this proceeding forms a part, without regard to the state of its revenues for the year in which such liability arose, and without a vote of the people of said city.

The question still remains, however, whether the provisions of the act of 1897 above quoted, or of the later amendment thereto, furnish the proper legal authority for the attempted action of the governing body of said city in its endeavor to provide a means for the ultimate payment of said indebtedness. This leads us to a closer consideration of the terms of the act of 1897 and of the amendment thereto adopted in the year 1901. The act of 1897 in its original form was one of a series of similar acts authorizing the funding or refunding of the outstanding indebtedness of municipalities by the issuance of bonds. The first of these acts was passed in the year 1880, and had reference only to the indebtedness of municipalities outstanding on and prior to January 1, 1880, which might be funded in the form of bonds by a two-thirds vote of the members of the governing body. The next enactment touching the subject was the act of 1883 applicable to all cities and towns of the state except cities of the first class. This act provided for the funding or refunding of the outstanding indebtedness of such cities or towns, evidenced by bonds or warrants thereof by a four-fifths vote of the members of the governing body thereof. The next act was that of 1893, which amended the act of 1883, adding the important requirement that the question of the issuance of the funding or refunding bonds should be submitted to a vote of the electors. The act of 1895 again amended the act of 1883 by omitting the word "warrants" and also the requirement of its immediate predecessor for submitting the matter of the issuance of such bonds to the vote of the electors, but limiting the outstanding indebtedness which might be funded or refunded to the principal of the bonds. Then came the act of 1897, which went back as to its language to the form substantially of the act of 1883. Had the legislation of the state been permitted to remain in the form into which it was crystallized in the act of 1897, it cannot be fairly disputed that it was the intention of the Legislature to enable towns and cities to fund or refund every form of their indebtedness by the issuance of bonds therefor through a vote of two-thirds of their governing body. This, of course, they could not do as to such of their contractual obligations as would come within the inhibition of section 18 of article 11 of the state Constitution; but as to such forms of indebtedness as arose by operation of law, such as official salaries fixed by state law and the like, or as had arisen ex delicto and been put in the form of judgments and evidenced by either bonds or warrants, there would seem to be no constitutional objection to the method provided in said act of 1897 for funding or refunding these latter forms of indebtedness. This view of the scope of these several successive acts is further enforced by the meaning to be given to the use of the phrase "fund or refund" found in each of them. To "fund" an outstanding debt of a municipal corporation which is payable presently or at short periods is to convert such indebtedness into a more permanent form with an extended time of payment and with interest which is regular and which may also be reduced. The usual method of "funding" such a debt is by the issuance of bonds. People v. Carpenter, 31 App. Div. 603, 52 N. Y. Supp. 781; Ketchum v. City of Buffalo, 14 N. Y. 356; Webster's New International Dict., subject "fund"; Bouvier's Law Dict., subject "fund." To "refund" is to replace that which has once been funded by a new fund. Webster's New International Dict., subject "refund."

Applying these definitions to these several statutes, it would seem that the term "fund" should be given application to those forms of municipal indebtedness referred to therein as evidenced by "warrants," and the term "refund" to those forms of such indebtedness as had already once or oftener been funded by being put into the form of bonds. Our attention has, however, been called to the fact that two important changes were made in the law relating to the indebtedness of municipalities by the Legislature in the year 1901. The first of these consisted in an amendment to the act of 1897, by which the words "or by judgment or judgments recovered against it upon bonds or warrants originally issued by such town or city" were inserted in said act, making the portion of said act important to this inquiry read as follows:

> "Section 1. The common council, board of trustees, or other governing body of any incorporated city or town other than cities of the first class in this state, having an outstanding indebtedness, evidenced by bonds or warrants thereof, or by judgment or judgments recovered against it upon bonds or warrants originally issued by such town or city, is empowered, by a two-thirds vote of its number, to fund or refund the said indebtedness and issue bonds of such city or town therefor in sums of not less than one hundred dollars nor more than one thousand dollars each, and having not more than forty years to run, and bearing a rate of interest not exceeding six per cent. per annum, payable semiannually." St. 1901, p. 274.

[2] It is the contention of the respondents herein that as to the above-quoted amendment inserted in the act of 1897, this amendment is to be construed as a limitation upon the powers of the governing bodies of such towns or cities as are embraced in the act confining the issuance of bonds for the funding or refunding of judgments to such judgments only as had been recovered against the town or city upon bonds or warrants previously issued by such town or city; and hence that the judgment in the instant case, not being of that character, was not susceptible of being funded under the terms of the amended act. We cannot adopt this contention. We think the purpose of the amendment to this act made in 1901 was to enlarge rather than to limit its application, and was to so enlarge it as to render it applicable to cases wherein the holders of warrants or bonds against such municipalities who had put these into the form of judgments might also have these judgments funded or refunded in the same manner as they might have had funded or refunded the indebtedness in its original form. Any other construction would leave the term "warrants" without meaning or place in the act. It is to be noted in this connection that the matter of funding or refunding so much of the indebtedness of a municipality as may come within the scope of these acts is a matter which is reposed in the discretion of the governing body of the municipality, and is not a right to such action which holders of the warrants, bonds, or judgments evidencing such indebtedness can either invoke or compel. It rests entirely with the governing body of the town or city to determine whether or not an outstanding indebtedness which is presently due or is soon to become due, or which is bearing a high rate of interest, shall be converted into long-term bonds at reduced interest, payable as to both principal and interest in annual or periodical installments. It may not be denied that in many instances of outstanding municipal obligations, possibly even in the instant case, this would be both the desirable and pruden-

tial course to pursue. The statute of 1897, as amended in 1901, in our view permits municipalities of the kind covered by its terms to fund or refund their outstanding indebtedness, evidenced by their issued warrants or bonds or by judgments obtained thereon when such indebtedness is not of the sort inhibited by the state Constitution, and that they may do so by the action of two-thirds of their governing body as provided in said amended act; and that the indebtedness due the creditor of the petitioners in the instant case, evidenced as it is by a duly issued warrant, may be thus funded; and that the petition herein having by the due and regular action of its governing body adopted an ordinance to that effect it is now entitled to have its ministerial officers, the respondents herein, perform the ministerial act of affixing their official signatures to the bond to be issued pursuant to said ordinance.

[3] In reaching this conclusion we are not unmindful of the second contention of the respondents herein that the act of 1897, as amended in 1901 by the act making such amendment approved March 12, 1901, was repealed by the act entitled "An act to provide for the payment of judgments against counties, cities, cities and counties, and towns," approved March 23, 1901. Stats. 1901, p. 794. This later act does not purport expressly to repeal any former enactment touching the indebtedness of municipalities. It provides in substance that it shall be the duty of the county clerk to file with the auditor and furnish to the governing bodies of the local municipality affected by the act a list of such existing final judgments against each as are of record in his office 15 days before the day on which the tax levy must by law be made. It is then made the duty of the governing body of the municipality affected by such judgment having authority to levy taxes upon its taxable property to include in the tax levy a rate or sum sufficient to pay such judgment or such aliquot portion thereof as during a series of like successive levies covering a period of not to exceed 10 years would eventually pay the whole of such judgment. This act does not purport to expressly repeal the former act, nor do we think it does so by implication. It is to be noted that the former act excepts from its operation cities of the first class, and that it has no reference of the indebtedness of counties, while the second is general in its application to counties, cities and counties, and cities and towns of every class. The chief distinction between these two acts, however, is this: The former act and all of its predecessors touching the same subject are, as we have seen, acts purporting to provide a means by which cities and towns excepting those of the first class may through the discretionary action of their governing bodies elect to fund or refund their outstanding indebtedness in the form of long-term bonds. This method of gradually relieving such municipalities of a burden of debt presently due cannot be compelled by the creditor, but rests entirely in the voluntary action of two-thirds of the membership of the governing body. The later act, on the other hand, is compulsory in its nature. It imposes upon the official body invested with the power to levy taxes the duty of making a special tax levy to pay judgments against the municipality, the performance of which duty the judgment creditor could compel by an appropriate writ. These two provisions for the payment of outstanding judgments against the municipalities respectively affected thereby are thus not inconsistent or in conflict with each other, the former providing a means by which the municipality may in its discretion adopt a method for funding or refunding such portion of its indebtedness as may thus be paid; the latter prescribing a means by which the creditor may compel the payment of his judgment by an enforced levy of taxes. These acts are thus in effect complementary in providing a twofold means by which municipalities may elect, or if they do not do so, may be compelled to pay such of their debts as are payable out of revenues other than those of the year in which the obligation was incurred.

[4] As to the respondents' contention that the indebtedness which it is herein sought to have funded in the form of bonds payable by general taxation was in its inception a liability arising out of the exercise of the proprietary as distinguished from the governmental functions of the municipality, and hence cannot be made payable out of funds derived from general taxation, we do not deem the point deserving of extended consideration. It has long been the settled policy in this state to permit municipalities to issue bonds for the purpose of creating and carrying on public activities which are proprietary in character, such bonds being made payable out of funds derived from general taxation. No distinction can be drawn between obligations thus created and payable and obligations in the nature of liabilities arising ex delicto out of the operation of the public properties thus called into being. In the instant case the creditor has secured a general judgment against the petitioner herein payable generally out of whatever funds or property of the city may be available and upon which a warrant has been duly issued, also payable out of the general funds of the municipality. We are satisfied that the statute of 1897, as amended in 1901, is available for the purpose of providing a means for the funding and eventual payment of this indebtedness, and hence that the petitioner is entitled to the issuance of a writ of mandate,

commanding the respondent, its officials, to sign and issue the bond in question. Let the writ issue accordingly.

ANGELLOTTI, C. J., RICHARDS, Judge pro tem., and SHAW, MELVIN, SLOSS, WILBUR, and LENNON, JJ., concur.

180 Cal. 32

ZARZANA v. NEVE DRUG CO. et al.

(Sac. 2717.)

(Supreme Court of California. Feb. 26, 1919.)

1. Negligence ⚷136(30) — Contributory Negligence—Imputed Negligence—Question of Fact.

In an infant's suit in his own right for personal injuries when run into by a motorcycle, the question of imputed negligence of plaintiff's parents, if properly a part of the case, was one of fact, and not of law.

2. Negligence ⚷95(1) — Negligence of Parent—Imputation to Child.

The rule of imputed negligence as applied to actions by children in their own right no longer prevails in California, if it ever did prevail.

3. Municipal Corporations ⚷705(1)—Motor Vehicles—Use of Streets—Care.

Apart from Motor Vehicle Act, § 22(b), the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself.

4. Municipal Corporations ⚷706(5)—Injuries from Motorcycle — Negligence — Sufficiency of Evidence.

In a child's action for injuries when struck by a motorcycle, evidence that the driver was going at 15 miles an hour on a slippery street crowded with traffic, a speed sufficient on sudden stoppage to throw him over the handlebars, *held* sufficient to sustain finding of his negligence.

Department 2.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Salvadore Zarzana by Albert Zarzana, his guardian ad litem, against the Neve Drug Company and Albert Holthaus. From judgment for plaintiff, defendants appeal. Affirmed.

Downey, Pullen & Downey, of Sacramento, for appellants.

Fred J. Harris, of Sacramento, for respondent.

LENNON, J. In this action plaintiff sued in his own right for the sum of $5,000, and recovered judgment in the sum of $350, with costs of suit, as damages for personal injuries, the result of being struck by a motorcycle ridden and driven by the defendant Albert Holthaus, who at the time was in the employ of the defendant Neve Drug Company. Issue was joined as to the negligence of the defendants, and as a special defense the answer of both defendants pleaded that—

> "The injuries occurring to * * * plaintiff were proximately caused by the negligence of the parents of * * * plaintiff in allowing * * * plaintiff, a boy of five years of age, to be upon the highway where said accident occurred unaccompanied and unprotected, except by an older brother of * * * plaintiff, who was then and there of tender age, and not a fit and proper person to accompany * * * plaintiff across said highway."

The action was tried by the court below without a jury, and the appeal is from the judgment upon a record which shows the facts of plaintiff's case, in so far as they appertain to the time, cause, and character of the accident, to be substantially as follows: The accident occurred between the hours of 5 and 6 o'clock p. m. on January 24, 1916, at the intersection of two streets in the residential district of the city of Sacramento, which streets at the time of the accident, as was usual at that hour of the day, were crowded with the traffic of pedestrians, street cars, motor vehicles, and other conveyances. The injuries complained of consisted generally of bodily bruises and lacerations and fractures of the bones of plaintiff's left leg. The plaintiff, a boy of five years of age, in company with his brother, two years older, was on his way from his home on an errand to nearby relatives. The boys had arrived at the northeast intersection of the streets in question as the defendant Holthaus was approaching on a motorcycle traveling, as he testified when called as a witness for plaintiff, at a speed of 15 miles an hour, and at a time when the asphalt paved streets were wet and slippery. When approaching the intersection of said streets, and when 30 feet distant therefrom, the defendant Holthaus saw the plaintiff and his brother standing on the edge of the sidewalk. While Holthaus was approaching, the plaintiff and his brother, the latter holding plaintiff's hand, started to cross the street, and when within about 8 feet of the boys, Holthaus applied the brake of the motorcycle, with the result that the machine skidded upon the wet and slippery pavement and collided with the plaintiff with great force and caused the injuries complained of. The sudden stoppage of the machine, resulting from the application of the brake precipitated Holthaus over the handlebars and onto the ground. The testimony is in conflict as to whether or not Holthaus, at any time after he saw the plaintiff and his brother standing on the corner, sounded the horn of his machine. The evidence is also in conflict as to whether it was daylight or dark at the time of the accident, but the fact that the motorcycle was without a light at the time of the accident is undisputed. Upon the conclusion of the plaintiff's case as thus outlined the defendants interposed a motion for a nonsuit upon the ground that the plaintiff's evidence did not show negligence on the part of Holthaus, and did show as a matter of law "imputed negligence" on the part of the mother of plaintiff in allowing him to be exposed to the hazards of the street without adequate protection. The trial court found that Holthaus was guilty of negligence which was the proximate cause of the injury, and that the parents of the plaintiff were not guilty of "imputed" or any negligence. The correctness of the trial court's ruling upon the motion for a nonsuit and the claimed insufficiency of the evidence to support the trial court's finding of negligence are the only points involved on the appeal.

[1, 2] The contention that the trial court was compelled, as a matter of law, upon the decision of the motion for a nonsuit, to deduce from plaintiff's proofs the existence of imputed contributory negligence on the part of plaintiff's parents sufficient to defeat plaintiff's action, is based upon the assumption that the doctrine of imputed negligence is a firmly fixed feature of the law of negligence in California, and has been adopted in this state to the extreme extent that, when such a defense is relied upon, as was done here, the question of whether or not there was such negligence is wholly and exclusively a question of law; and, with this assumption as a basis, it is argued that, even though the action was not by the parents in their own behalf, but was by the plaintiff alone in his own right for personal injuries to him, the court below should have invoked and applied the doctrine of imputed negligence to the facts of plaintiff's case, and then have determined as a matter of law whether the claim of contributory negligence on the part of the parents was well or ill founded. This contention is attempted to be supported by the citation of the following cases: Schierhold v. North Beach, etc., Ry. Co., 40 Cal. 447; Meeks v. Southern Pacific R. R. Co., 52 Cal. 602; McQuilken v. Central Pacific Ry. Co., 64 Cal. 463, 2 Pac. 46; Higgins v. Deeney, 78 Cal. 578, 21 Pac. 428; Daly v. Hinz, 113 Cal. 366, 45 Pac. 693; Fox v. Oakland, etc., Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216. Our perusal of these cases has not satisfied us that the doctrine of a parent's "imputed negligence" in the care and control of the activities of its child is firmly fixed as a part and parcel of the substantive law of this state, in so far as it concerns the adjudication of cases of an infant suing in his own right for compensation for personal injuries to him. All but two of the cases cited do no more, primarily and directly, than decide that the solution of the question of whether or not "imputed negligence" as a contributing cause of an infant's injury is one of fact or of law is dependent, as is commonly the case, upon a consideration of the evidentiary circumstances preceding and attending the infliction of the injury and that when such circumstances, even though the evidence be nonconflicting, may, as oftentimes happens, readily and rightfully respond to one of two distinctly different deductions, the question of negligence, imputed or otherwise, is always a question of fact. Applying, as doubtless the trial court did, these fundamental and familiar principles of the general rules of evidence pertaining to the law of negligence to the facts of the case, it correctly concluded that the question presented, assuming it to be properly a part of the case, was one of fact, and not of law. Meeks v. S. P. R. R. Co., supra; Daly v. Hinz, supra. But was the question properly a part of the case? Doubtless, where the parent is suing in his own right, the doctrine of imputed negligence applies (Neff v. Cameron, 213 Mo. 350, 111 S. W. 1139, 18 L. R. A. [N. S.] 320, 127 Am. St. Rep. 606), but in this behalf it will be noted that only in two of the cases relied upon to support the contention made here (Meeks v. S. P. R. R. Co., supra; Daly v. Hinz, supra) does it appear that the injured infant was a plaintiff suing in his own right, and while the doctrine in question was in those cases dealt with, still it was not definitely and distinctly invoked and applied as a decisive factor in either case, nor was its soundness, in so far as its applicability to the instant cases was concerned, challenged or considered in either case, and therefore we are of the opinion that it cannot be held that the tacit recognition of the doctrine in those two cases warrants the conclusion that the doctrine, unrestricted, was ever the carefully considered and finally accepted law of this state; and we have but little difficulty and less hesitation in here and now refusing to recognize the doctrine as having any application to cases of the character under consideration here when we stop to consider that the doctrine found no sanction in the common law, was originally conceived in the sin of a far-fetched fiction, and wormed its way into the law of a few jurisdictions through the medium of a dictum declared in the case of Hartfield v. Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, and thereafter blindly followed despite the fact that it has never, so far as we are aware, been decisively accepted by any court of last resort where its soundness was squarely challenged, and, when challenged, it has been judicially anathematized by the "overwhelming weight of authority as well as of argument" as an obsolete and exploded legal heresy which was ever contrary to humanitarian and common sense conceptions of the justice of rules which should be employed in the adjudication of the relative and immediate rights and wrongs of individuals (Neff v. City of Cameron, supra; Robinson v. Cone, 22 Vt. 213,

54 Am. Dec. 67; Berry v. Lake Erie, etc., Co. [C. C.] 70 Fed. 682; Chicago, etc., Co. v. Kowalski, 92 Fed. 312, 34 C. C. A. 1; Wymore v. Mahaska County, 78 Iowa, 398, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449; Flaherty v. Butte, etc., Ry. Co., 40 Mont. 454, 107 Pac. 416, 135 Am. St. Rep. 630; Shearman & Redfield, Cont. Neg. §§ 75, 78). Commenting on Hartfield v. Roper, supra, the parent case in the United States on the doctrine of imputed negligence, and referring to the approval of the doctrine by the English courts, Beach on Contributory Negligence (3d Ed.) § 127, has this to say:

> "The rule of imputed negligence, as applied to persons non sui juris, is an anomaly. The English law on this point presents an extraordinary illustration. On the one hand, it is held that the negligence of the person having charge of a child is the negligence of the child, and imputable to it, when the child comes into a court of justice and asks damages for an injury negligently inflicted upon it by the defendant. But, per contra, when a donkey is carelessly run down in the highway, where he is negligently exposed, the defendant is liable, and though oysters are negligently placed in a river bed, it is an injury redressible at law in damages for a vessel negligently to disturb them. It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years in such jurisdictions as enforce the English or the New York rule in this respect."

The rule first enunciated in Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67, to the effect that the negligent exercise of a parent's care and control of a child is not to be imputed to the child as a defense to an action by the child itself for personal injuries, is abundantly approved by the rulings and reasoning to be found in twenty and more jurisdictions throughout the United States (Shearman & Redfield on Cont. Neg. supra), and "in at least three states where the doctrine of Hartfield v. Roper, supra, was once followed, Indiana, Minnesota, and Illinois, it is now repudiated." Neff v. City of Cameron, supra. Following in the wake of the preponderating weight of authority, we may well and wisely, although somewhat tardily, declare that the rule of imputed negligence as applied to actions by children in their own right no longer prevails, if it ever did prevail, in this jurisdiction.

[3, 4] The evidence sufficiently supports the finding of negligence on the part of the defendant Holthaus. In this behalf it will be noted that at the time of the accident there was in force and effect the Motor Vehicle Act of 1915 (St. 1915, p. 397), which provided that—

> "Every person operating or driving a motor or other vehicle on the public highways of this state shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property." Section 22(b).

Aside from the mandate of the statute, the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there. Motor vehicles have not as yet been granted an exclusive right of way over public thoroughfares. In the presence of the uncontroverted testimony that the defendant Holthaus just prior to the accident was driving his motorcycle at a speed of 15 miles an hour upon a wet and slippery street crowded with the traffic of street cars, motor vehicles, and pedestrians, which speed was sufficient upon a sudden stoppage to throw him over the handlebars, we cannot say that the trial court was not justified in finding that the defendant Holthaus was guilty of negligence. O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36.

The judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

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179 Cal. 797

SMITH v. MATHEWS CONST. CO. et al.

(Sac. 2719.)

(Supreme Court of California. Feb. 24, 1919.)

1. PARTNERSHIP 🔑258(2) — DISSOLUTION BY DEATH—JUDGMENT.

Where complaint was filed against existing copartnership and others, by their answer defendants alleged dissolution of firm by death of partner, but counsel appeared for all defendants, including firm, and defended for them, as they had a right to do under Code Civ. Proc. § 1585, defendants may not complain judgment is against firm after its disolution by death.

2. CONTRACTS 🔑146(12) — PLEADING FULL PERFORMANCE — RECOVERY ON QUANTUM MERUIT.

Pleading of full performance will not support a cause of action on quantum meruit.

3. CONTRACTS 🔑296—FAILURE OF PERFORMANCE—DEVIATION.

Any conscious deviation from the absolute terms of a contract does not necessarily cause a failure of performance.

4. CONTRACTS 🔑305(1)—BUILDING CONTRACT — DEPARTURE FROM SPECIFICATIONS — WAIVER.

By failure of owner to demand any re-execution of a building contract or change in materials, contractor's departures from strict performance according to letter of specifications were waived.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Department 2.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by James F. Smith against the Mathews Construction Company, copartners composed of C. J. Mathews and Lettie P. Mathews and others. From judgment for plaintiff, the construction company and certain others appeal. Affirmed.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellants.

John W. Johnston and Frank J. O'Brien, both of Sacramento, and W. A. Kelly, of San Francisco, for respondent.

MELVIN, J. Defendants appeal from a judgment for something more than $5,000, balance due for work done and materials furnished in the construction of improvements on the Forum building in Sacramento. A lien on the property was also adjudged.

The action was based on a contract between plaintiff and defendant Mathews Construction Company and the work done and materials furnished thereunder. The contract price to be paid for plaintiff's work and materials used for metal furring, lathing and corner beads, and plastering and cementing the five-story addition to the building was $14,790, of which plaintiff alleged $11,021.50 had been paid, leaving a balance of $3,768.50, which defendants owed but refused to pay. There was a separately stated cause of action for extra work and material amounting in value to $1,596.29. All of the defendants, except the Mathews Construction Company, were sued as claiming some ownership and interest in the real property involved.

By their answer defendants admitted that at all times in the complaint mentioned the Mathews Construction Company was a copartnership composed of C. J. and Lettie P. Mathews, but denied that said copartnership was at any time owner of the building or the land on which it was located. There was also an allegation that the copartnership was dissolved by the death of Lettie P. Mathews in November, 1915 (a time long subsequent to the filing of the complaint). The contract and its terms were admitted to be as pleaded, but there were elaborate pleadings to the effect that the work had not been done according to the contract and that the materials were deficient in amount and quantity. There was an allegation that Forum Investment Company, C. J. Mathews, R. A. Herold, and Frank J. Ruhstaller were at all pertinent times the owners of the property. It was admitted that extra work had been ordered, but defendants averred that this work was done in a crude, improper manner. It was also pleaded that by reason of changes in the original plans necessitating the extra work "plaintiff was relieved from the necessity of using material required by the original plans and specifications, of the value of about five hundred dollars ($500) which was to be credited upon said extra work."

By way of counterclaim, defendants alleged that at plaintiff's instance and because of his defective work they did extra work on the building to the value of $674.05; that by reason of the omission by plaintiff of materials required by the contract they were entitled to judgment for $4,346.37; and that by reason of the improper and crude workmanship employed by plaintiff in applying the plaster and cement to the building defendants had been damaged in the sum of $12,000. There was a cross-complaint based upon the alleged insufficiency of the quantities of materials used by James F. Smith, the improper preparation and application of materials, and the poor workmanship. Damages were demanded in the sum of $10,000.

The judgment was for plaintiff's entire demand and against defendants on the counterclaim and cross-complaint.

[1] Defendants contend that the judgment against the Mathews Construction Company was erroneous. The court found it to be true, as alleged in the answer, that the copartnership had been dissolved by the death of one of its members, which occurred subsequently to the execution of the contract and after the filing of plaintiff's liens. It is insisted that the court was powerless to render a judgment against a copartnership no longer existing. When the complaint was filed the Mathews Construction Company was an existing copartnership. It is true that by their answer defendants alleged the dissolution of the copartnership by death of one of the partners, but nevertheless counsel appeared for all of the defendants including the copartnership and defended for them as they had a right to do. Section 1585, Code Civ. Proc. They may not complain, therefore, at the form of the judgment.

The principal attack of appellants is directed against certain findings with reference to the manner of performance of the contract. It was found that the work was done in accordance with the plans and specifications; that the materials used were proper, and mixed in the specified proportions; and that the work was done in a good and workmanlike manner, as required by the contract, plans, and specifications, except as follows:

> "Some of the plastered surfaces were not straight and true, and some of the angles were not worked plumb, the exact amount or number of which the evidence does not definitely disclose. This was caused by the act of the defendants in rushing the work and in requiring the plaintiff to place and apply second and third coats of plaster before previous coats of plaster were dry, and also from the fact that some of the lathing underlying said surface and said work was not laid on true and smooth by a

> previous contractor in charge thereof. That plaintiff notified defendants of such fact that such lathing was not so laid and defendants directed plaintiff to proceed with his work and to place the plaster upon such surfaces and upon such lathing so, as aforesaid, improperly laid on by such other and independent contractor.
>
> "That the scratch coat was not carried to the floor, but to within less than five inches thereof, and that such space was later filled in with the second or brown coat. This departure from the terms of the contract was not willful or done with the purpose or intention to deceive or defraud the defendants, and it did not deceive them. It was done openly by the plaintiff, in good faith and in the belief that it was a performance of his contract, and was offered by him as a performance of the contract. It was in plain view of the defendants, who were constantly in and about the building, and they made no objection to this work, and it was at the time accepted by them as a performance of the contract. That the departures from the contract as herein stated were slight and unimportant and immaterial; that they were each and all known of by defendants, and that such defendants were not deceived, defrauded, or injured thereby."

[2-4] Appellants insist that the deviations from the strict letter of the contract (such, for example, as the failure in each room to carry the "scratch coat" clear to the floor at that part of the wall subsequently concealed by the baseboard) were intentional, willful violations of the agreement necessarily involving bad faith, and that the doctrine of substantial performance has no application. They also assert that such doctrine may only be invoked by pleading and where, as here, plaintiff alleged full performance and the court found that there were any deviations, however slight, from strict performance on the part of the lien claimant, the judgment must be against him.

In support of the point last stated, appellants cite such cases as Herdal v. Sheehy, 173 Cal. 163, 159 Pac. 422, and Daley v. Russ, 86 Cal. 114, 24 Pac. 867, which hold, in effect, that where one seeks to recover for the value of work done or material furnished in the partial performance of a contract, full performance of which has been prevented by the other party to the agreement, he must plead the excuse for failure of full performance. Undoubtedly, if the omissions on the part of the plaintiff were material and substantial failures to complete his contract, the pleading was not sufficient to support a cause of action based upon the quantum meruit. But the court held that there was a substantial performance of the contract, and the real question is whether or not that ruling was justified. It is not true, as appellants contend, that any conscious deviation from the absolute terms of the agreement causes a failure of performance. As Mr. Justice Shaw said in Connell v. Higgins, 170 Cal. 541, 556, 150 Pac. 769, 775:

> "The definition of 'substantial performance' is difficult to give in general terms. It is usually a question to be determined in each case with reference to the existing facts and circumstances."

In the same opinion quotation is made from 2 Elliott on Contracts, § 1607, in which the learned text-writer uses the following language:

> "A substantial performance must be established, in order to entitle the party claiming the benefit of the contract to recover; but this does not mean a literal compliance as to the details that are unimportant. There must be no willful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intend to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact."

The contract itself was pleaded, and the complaint contained averments that the owners at all times were familiar with the work; and allegations amounting to a pleading of acceptance by them. The contract gave the architect power, in his discretion, to order any imperfect work re-executed and to demand that proper be substituted for improper material. Respondent contends, and we think correctly, that, by failure of appellants to demand any re-execution of the work or change in materials, the departures from the strict performance of the work according to the very letter of the specifications were waived, and that the case is governed by the rule announced in City Street Improvement Co. v. Marysville, 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317; American-Hawaiian Engineering, etc., Co. v. Butler, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44; Connell v. Higgins, supra; and similar cases. This seems to have been the view of the learned judge of the superior court whose opinion in this case, which covers all of the serious points of controversy, we quote as follows:

> "The particulars in which substantial objection is made to the claim of plaintiff for payment for plastering done by him are:
>
> "1. That the finish coat was not 'well troweled to give a good, smooth, hard, straight, and uniform surface,' as required by the specifications. Mr. Weiland says that no such objection can properly be taken to the work, and I would dispose of it upon this ground alone. If the objection was otherwise good, it would fail in this case from the fact that the plaintiff was greatly rushed by the defendants in the performance of the work and from the further fact that, if any such defects existed, they were plainly apparent to the defendants and should have been called to the attention of the plaintiff while he was doing the work and when he could have readily and inexpensively corrected them.
>
> "2. That the surfaces were not made 'straight, true and smooth, and all angles worked plumb' as required for the 'scratch coat,'

and that the 'brown coat' was not 'floated on true and level.' It is true that the finished job shows beam surfaces out of level, corners not sharp, and angles not clean cut and true, in many places throughout the job. This I deem excused, from the fact that the work was hurried, that the plasterer was required by the defendants to place successive coats before prior ones were dry, and by the further fact that these uneven conditions were largely caused by the way in which the lathing was done by another contractor; the work done by plaintiff having to be placed on such irregular lathing. These imperfections, which are not substantial, were plainly in view of defendants while plaintiff was doing his work and should have then been called to his attention.

"3. That the contract provided that the 'scratch coat' should be 'properly scratched and to extend to the floor' and that it is admitted that it was not carried entirely to the floor, but only just below the top of the baseboard. It came within about five inches from the floor. This space was filled in by the 'brown coat,' and defendants afterwards placed the baseboards over this work, and entered upon the use of the building. It would seem that this omission was of no practical injury to defendants. Mr. Wieland stated that he did not 'deem it a matter of any importance.' Defendants, by their conduct, seem to have so regarded it at the time. I feel that I can justly announce a like conclusion. Counsel for defendants cites the omission in this particular as a willful departure from the contract, which because it was willful was substantial. I do not so view it. Plaintiff did the work in plain view of the defendants, and in that particular, I think, with entire good faith, offered it as a compliance with the contract. Defendants saw the work as offered and with every opportunity to object and demand a different execution made no objection and permitted plaintiff to go ahead and finish the work as he did. I think they have waived any objection they might have made on this score, and that they accepted the work as offered. With reference to the foregoing objections of defendant, it should be recalled that they had many representatives constantly on and about the work. Mr. Mathews, one of the owners of the building, was constructing it. Mr. Herold, the supervising architect, was also a co-owner. In addition they also employed a superintendent, Mr. Basler, who was in constant attendance on the work at all the times at which plaintiff was employed.

"The contract between the parties provided:

" 'Improper Work. Should any of the work be, in the opinion of the architect, executed with improper materials or workmanship, the contractor will, when required by the architect, during the progress of the work forthwith re-execute the same and substitute proper materials and workmanship; and in case of default of the contractor in so doing within five days after being notified, the owner is to have full power to employ other persons to re-execute the work, and the cost thereof is to be borne by the contractor.'

"In view of this provision, the constant attendance of defendants upon the work, and the conspicuous character of the defects complained of and the ease with which they might have been remedied, such small imperfections should be considered as having been waived.

"4. It is claimed that the mixture as prepared and applied was deficient in plaster; that it contained too great a proportion of sand. This I have always regarded as practically the only issue in the case. During the trial the impression was made on me, and apparently on counsel for defendants, that the mixture was to be what is known as one and one-half to one for the 'scratch coat' and two to one for the 'brown coat,' and much argument has been had upon that assumption.

"This impression seems to have been entirely mistaken. The specifications do not directly provide the proportions of sand to plaster. What they do provide is this:

" 'The contractor must carefully observe all directions and precautions on the printed instructions from the manufacturers relating to the different materials used, and comply strictly with them in the execution of the work.'

"During the trial defendants introduced in evidence a circular of the manufacturers of the plaster used which purported to give the directions referred to in the specifications, and which Mr. Herold testified did give such directions. This was 'Defendants' Exhibit 9.' It provides, under the heading 'Proportion for Mixing':

" 'Scratch coat, * * * 12 shovels sand to sack of 100 lbs.'

" 'Brown coat, wire lath, 20 shovels sand to sack of 100 lbs.'

"These proportions at the trial were assumed to produce a 'two to one mixture.'

"Mr. Wieland produced a circular which contained different instructions, and testified that if that circular was the one applicable to this case, if it was followed that the plaster on the walls should give a composite analysis of 1.90 to 1. He analyzed many samples and found that they averaged about 2.26 to 1, which he said was distinctly a poorer mixture than 1.90 to 1. But the circular produced by him was not the one according to which the plaster was to have been mixed. It was to have been mixed according to the terms of the circular marked 'Defts. Ex. 9.' If mixed according to this formula, a composite sample of the plaster on the wall should have analyzed 2.5 to 1. This, of course, would be a poorer plaster than that which plaintiff actually applied, which was according to Mr. Wieland 2.26 to 1. So the plaster, instead of being poorer than required by the specifications, was considerably richer.

"With the settlement of this question, all my doubts in this case vanish. I have withheld decision and reopened the case because of a doubt as to whether the plastering not only in the richness of its proportions, but otherwise, was a good, practical, durable job. I feared that it was soft and crumbly, that it would not give good service and would at an early date have to be expensively renewed. I wanted to know, before requiring the defendants to pay for this work, that it was a good average commercial job from which they could get a long and valuable use. From Mr. Wieland's testimony, I am now satisfied on this point.

"After the fullest investigation, Mr. Wieland said it was much better than the average in quality and workmanship, that it was free from shrinkage cracks and it was well put on, that it was a substantial and durable job, that it was far above the average, and he concluded by saying that he felt conscientious in saying that the job was a good one. I adopt his experienced and disinterested views, and adjudge it to be such."

Without entering upon an extended discussion of the testimony on that subject, it is sufficient to say that it supports the findings against the counterclaim of defendants.

No other matters require analysis, as the specifications of alleged error in the rulings of the court were based upon the same theories of defendants that have been discussed above.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

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179 Cal. 793

PEOPLE v. ROLLINS. (Cr. 2218.)

(Supreme Court of California. Feb. 24, 1919.)

1. JURY 🔑108—COMPETENCY OF JURORS—CHALLENGES.

Under Pen. Code, § 1074, subd. 8, prosecuting attorney in homicide case may challenge jurors who would in no case agree to verdict carrying death penalty, but would concur in verdict which assessed imprisonment for life, despite section 190, which provides that every person guilty of murder in first degree shall suffer death, or confinement, at discretion of jury.

2. HOMICIDE 🔑354—MURDER IN THE FIRST DEGREE—PUNISHMENT.

Under Pen. Code, § 190, a verdict of guilty of murder in first degree without any express provision as to penalty requires imposition of death penalty.

3. JURY 🔑84—CONSTITUTIONAL LAW—CHALLENGE OF JURORS—RELIGIOUS WORSHIP.

Pen. Code, § 1074, subd. 8, prescribing grounds of challenge for implied bias, is not violative of Const. art. 1, § 4, which provides that no person shall be rendered incompetent as a juror on account of religious belief, law leaving matter of competency to legal sanctions, or, at least, to considerations independent of religious sentiments or convictions.

In Bank.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Clarence Rollins was convicted of murder in the first degree, and he appeals. Affirmed.

J. T. B. Warne, of Sonora, and J. B. Zimdars, of San Francisco, for appellant.

U. S. Webb, of San Francisco, and J. Charles Jones, of Sacramento, for the People.

ANGELLOTTI, C. J. The defendant was convicted of murder in the first degree for the unlawful killing on July 9, 1918, of one Charles G. Allen, and sentenced to death. This is an appeal by him from the judgment and from an order denying a new trial.

No question of insufficiency of evidence is presented. Admittedly the evidence conclusively shows that defendant and a companion named Rogers, went to the house occupied by deceased, which was some two or three miles from Knight's Ferry, in pursuance of a plan to there commit the crime of robbery, and that there, in the perpetration of the robbery, they brutally killed the deceased.

[1, 2] The only point made on the appeal is that the trial court erred in allowing challenges interposed by the district attorney to several jurors under subdivision 8 of section 1074 of the Penal Code, which provides as follows:

> "If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror."

There were several jurors excused by the trial court on challenge by the district attorney on this ground. As to all of them it was clear from their answers to questions on their examination that in no case would they agree to a verdict of guilt carrying the death penalty. As to each of them it may be assumed that the examination showed that he or she would concur in a verdict of guilt which assessed the punishment at imprisonment for life. Our law providing that "every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same" (section 190, Pen. Code), it is claimed that these jurors were not the subjects of challenge under subdivision 8, § 1074, Penal Code, the theory being that, inasmuch as his opinion would not preclude any of them from finding a verdict of guilty, provided the jury would concur in the exercise of the discretionary power to assess the penalty at imprisonment for life, such opinion would not "preclude his finding the defendant guilty." We do not find that this precise point in regard to the construction of subdivision 8 of section 1074 has ever before been expressly made, but certainly it is opposed to the general understanding of the meaning of the provision and the universal practice thereunder. It has heretofore always been thought that the provision means that, if the offense "be punishable by death," as is true of the offense of murder in the first degree notwithstanding that it is also punishable in the discretion of the jury in the particular case by imprisonment for life, the entertaining by a juror of such conscientious opinions relative to capital punishment as would preclude his rendering in any case a verdict carrying the death penalty brings him within its scope, and requires the allowance of a challenge interposed to his serving. See particularly People v. Ah Chung, 54 Cal. 398; People v. Amaya, 134 Cal. 531, 535, 66 Pac. 794; People v. Cebulla, 137 Cal. 314, 317, 70 Pac. 181. We have no doubt that this is the meaning and proper construction of the provision. The clear object of the provision is to accomplish the exclusion from the jury in such a case of any one whose conscientious opinion as to capital punishment would not permit him to concur in a verdict of guilty which entailed the death penalty—in other words, would not permit him to act as the law contemplates he should act, free to render any verdict that the circumstances of the case call for, regardless of the effect of such verdict. Murder in the first degree is punishable by death unless the jury sees fit to affirmatively assess the penalty at imprisonment for life. A verdict of guilty of murder in the first degree, without any express provision as to penalty, requires the imposition of the death penalty. It has several times been held that the discretion given to the jury to provide for life imprisonment in such a case is not an arbitrary discretion to be exercised without regard to the circumstances of the particular case, but only where it appears to the jury that there is some circumstance that warrants or justifies the imposition of the lesser punishment. Of course, the conclusion of the jury on such a matter is final, but the provision under discussion contemplates that the state shall have jurors who are not so bound by conscientious opinions as to capital punishment that they will be unable to act as the circumstances of the case demand in view of the law.

[3] It is further claimed that subdivision 8 of section 1074 of the Penal Code, a section prescribing grounds of challenge for implied bias, is violative of section 4 of article 1 of our state Constitution, which, after providing that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state, provides:

> "And no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

This also appears to be a new contention in this state. No authority is cited in its support, and we see no merit in the claim. All that the provision quoted means is that a person called as witness or juror "is competent without any respect to his religious sentiments or convictions; the law leaving this matter of competency to legal sanctions, or, at least, to considerations independent of religious sentiments or convictions." Fuller v. Fuller, 17 Cal. 605, 612. In other words, he may not be debarred as a witness or juror because of his religious faith, and that element must be disregarded in determining his "competency." Section 1074, Penal Code, has nothing whatever to do with any question of "competency" of jurors, a matter covered by sections 198 and 199, Code of Civil Procedure, and section 1046, Penal Code. That section prescribes grounds of challenge for implied bias, matters going to the ability of the juror, regardless of his competency to act as a juror generally, to fairly and impartially try the particular case in accord with the law applicable thereto. Certainly the constitutional provision cannot be held to preclude legislation reasonably looking to the exclusion by challenge from a jury in any case of any person whose mind is in such condition from any cause whatever that he cannot try and determine the cause in accord with the law applicable thereto.

The judgment and order denying a new trial are affirmed.

We concur: MELVIN, J.; SHAW, J.; SLOSS, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

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179 Cal. 818

PEOPLE v. ROGERS. (Cr. 2206.)

(Supreme Court of California. Feb. 24, 1919.)

In Bank.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Joe Rogers was convicted of murder in the first degree, and he appeals. Affirmed.

J. T. B. Warne, of Sonora, for appellant.

Rowan Hardin, of Sonora, U. S. Webb, of San Francisco, and J. Charles Jones, of Sacramento, for the People.

PER CURIAM. This is an appeal by defendant from a judgment pronounced on a conviction of murder in the first degree, and from an order denying his motion for a new trial.

The record is in all material respects the same as that in People v. Clarence Rollins (Cr. 2218) 179 Pac. 209, this day decided. The defendant and said Rollins were jointly engaged in the robbery of one Allen, and in the perpetration of that robbery killed Allen. The points made for reversal are the same as those made in that case. For the reasons stated in the opinion therein those points must be held to be without merit. Examination of the record discloses no ground for reversal.

The judgment and order denying a new trial are affirmed.

ANGELLOTTI, C. J., and MELVIN, SHAW, SLOSS, WILBUR, LAWLOR, and LENNON, JJ., concur.

39 Cal. App. 394

SAN FRANCISCO CASING CO. v. MUELLER et al. (Civ. 2569.)

(District Court of Appeal, First District, Division 1, California. Jan. 18, 1919.)

1. EVIDENCE 🔑442(6) — PAROL EVIDENCE —INCOMPLETE CONTRACT.

Where a contract of sale was manifestly incomplete, oral evidence was admissible to show an express warranty of the goods, though it would have been inadmissible had the written contract been formal and complete on its face.

2. SALES 🔑287(6) — REJECTION OF MERCHANDISE—WAIVER.

A seller of goods, by repeated and persistent requests that buyers make further trials of goods, which they had stated did not conform to warranty as being unsuitable for their business, waived contract requirement that any rejection of merchandise be made within **10** days from receipt.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by the San Francisco Casing Company against Otto Mueller and another. From judgment for defendants on their cross-complaint, plaintiff appeals. Affirmed.

R. S. Norman, of San Francisco, for appellant.

W. E. Rode, of Oakland, for respondents.

KERRIGAN, J. This is an action to recover a certain balance of an account for goods sold and delivered by plaintiff to the defendants. In the answer the sale and delivery of the goods is admitted, but under facts therein alleged the defendants deny liability, and in a cross-complaint they set forth a breach of warranty as to part of the goods, and demand an affirmative judgment in their favor. The trial court found in accordance with the allegations of the cross-complaint, and rendered a judgment in favor of the defendants.

[1] The particular item of the account which is the basis of this controversy arises from an order for sheep casings dated February 12, 1917. These casings were delivered March 28, 1917, and two days later the defendants in writing rejected them as unsatisfactory for the purpose for which they were bought. There is an abundance of evidence in the record that the casings were expressly warranted as suitable for defendants' business and sound and merchantable, and also that they did not comply with such warranty. Plaintiff claims that the contract for the sale of the sheep casings was in writing, and that oral evidence was inadmissible to show the express warranty. It does not seem to have made that objection in the trial court; nor does the rule here relied upon apply where, as here, the contract was manifestly incomplete. Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109; Luitweiler Co. v. Ukiah Co., 16 Cal. App. 198, 116 Pac. 707, 712. That rule would be applicable, of course, where the transaction was evidenced by formal written contract complete on its face, as was the case in Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 594, 96 Pac. 319.

[2] Passing to the only other point urged by appellant, it appears that while the defendants immediately upon the receipt of the goods notified the plaintiff in effect that the casings were unsuitable for their business, and not in accordance with plaintiff's representations, still defendants did not finally reject them within the ten days specified for rejection of goods found unsatisfactory; and upon this fact appellant bases an argument that defendants did not act promptly or offer to return everything of value received by them. We think the answer to this position is that the evidence received by the court shows that plaintiff waived the provision of the contract requiring any rejection of merchandise to be made within ten days from its receipt, by repeated and persistent requests that the defendants make further trials. Under the circumstances of the case it appears that the defendants acted fairly, and took all necessary steps to entitle them to the relief demanded in the cross-complaint and granted by the trial court.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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39 Cal. App. 417

RIDEOUT v. COVILLAUD et al. (Civ. 1900.)

(District Court of Appeal, Third District, California. Jan. 21, 1919.)

1. ADVERSE POSSESSION 🔑115(1) — EVIDENCE—SUFFICIENCY.

In a suit to quiet title, evidence *held* sufficient to show acquisition of title by adverse possession for the requisite period within Code Civ. Proc. §§ 318, 323, 325, as to adverse possession based upon a written instrument.

2. ADVERSE POSSESSION 🔑20 — "CULTIVATION" — "IMPROVEMENT" — "USUALLY CULTIVATED OR IMPROVED."

Although a vacant lot was not inclosed, a grading and filling of the lot, while not a "cultivation," was an "improvement" of the same within Code Civ. Proc. § 323, as to adverse possession based upon a written instrument; the requirement of the statute that the land be "usually cultivated or improved" meaning that it should be done in the manner usual in case of similar property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cultivation; Improvement; Second Series, Usually Cultivated or Improved.]

3. Adverse Possession 🔑117—Findings—Sufficiency to Support.

Although there was no specific finding that a lot was possessed and occupied by plaintiff for 5 years, a finding that it was possessed and occupied for more than 20 years was sufficient to support a judgment for plaintiff, under Code Civ. Proc. § 318, and the proviso to section 325, providing that one not seised or possessed of land shall bring suit within 5 years.

Appeal from Superior Court, Yuba County; Eugene G. McDaniel, Judge.

Action by Phebe M. Rideout against Charles Covillaud, Mary Helen McLean, and others. From a judgment for plaintiff, defendants Mary Helen McLean and others appeal. Affirmed.

Kipp & Kipp, of Marysville, for appellants.

W. H. Carlin, of Marysville, for respondent.

HART, J. The action was brought to quiet title to one-half of a certain block of land in the city of Marysville.

In addition to the seven appealing defendants, a large number of persons and the city of Marysville were joined as defendants, some of whom appeared and filed disclaimers; the others, who were served with summons by publication, made no appearance and their defaults were duly entered.

The land in controversy was a portion of a Spanish land grant to John A. Sutter, which grant was confirmed by a patent issued to him by the United States. The property was platted in 1850 and divided into streets and lots. The appeal is concerned only with lot 4, there being no contest as to the remainder of the half block.

On January 18, 1850, John A. Sutter conveyed the land included within said grant to Charles Covillaud, Jose Manuel Ramirez, Theodore Sicard, and John Sampson, and, on February 19th of the same year, Theodore Sicard conveyed said land to Gabriel A. Swezy and Robert B. Buchanan. Other deeds introduced in evidence it will not be necessary to detail. Robert B. Buchanan died in 1855, his estate was administered, and, on the 2d of February, 1858, a final decree of distribution conveyed all his right, title, and interest in and to said lot 4 to his widow, Minerva E. Haun, and his daughter, Minna E. Buchanan, share and share alike. All the appellants except Mary Helen McLean are descendants of Robert B. Buchanan. The interest claimed by Mary Helen McLean came to her from her mother, Mary E. McLean, who acquired the interest in 1860.

The complaint was filed July 20, 1916. Plaintiff claims title by reason of the actual, exclusive, and adverse possession of herself and her predecessors in interest continuously for more than 20 years and the payment by her and her predecessors in interest of all taxes levied on the property during the 5 years preceding the filing of the complaint.

Plaintiff offered in evidence a tax deed, dated May 15, 1880, purporting to convey to J. H. Krause said lot 4. It was stated by counsel that the offer was "for the purpose of laying a foundation for color of title, to be afterwards supplemented by the actual occupation and possession and improvement of the property." Over objection of the defendants, the court admitted the deed for the purpose stated. It is not contended by plaintiff that this deed conveyed title. On May 20, 1880, J. H. Krause conveyed said lot to P. C. Slattery, who thereafter died and his interest descended to his widow, Mary Jane Slattery. The lot was conveyed by her to the city of Marysville, in January, 1902, and on February 20, 1904, the city of Marysville conveyed it to N. D. Rideout, who died in 1908, and his interest became vested in his widow, the plaintiff in this action.

The testimony showed that, from 1890 to 1898, inclusive, said lot 4 was assessed to P. C. Slattery, and the taxes marked "paid" on the assessment roll each and every year before they became delinquent. For the years 1899, 1900, and 1901, said lot was assessed to the estate of P. C. Slattery and the taxes similarly marked "paid." For the years 1902 and 1903 (during which time the lot was owned by the city of Marysville), there was no assessment. From 1904 to the date of the trial (February 27, 1917), the property was assessed in succession to N. D. Rideout, the estate of N. D. Rideout and Phebe M. Rideout, and the taxes were paid.

Lot 4 and the remainder of the half block (lots 1, 2, and 3) originally constituted a slough. In 1898 and 1899 the city of Marysville filled in the streets and alleys, leaving the half block practically a water hole, and the board of health later condemned the property as a nuisance. In 1901 the city filled lots 1, 2, and 3 with sand up to the grade of the streets. Lot 4 was used as a dump; brush, tree trimmings, and stable manure being deposited thereon. Mrs. Slattery partially filled the lot, and the city allowed her $85 or $100 for that work, and, in 1901, 1902, or 1903, the city filled the lot with sand to the depth of three or four feet, it was brought up to grade, and converted from a sump or cesspool into a residence lot. In 1914, while the lot belonged to Mrs. Rideout, there was further filling and grading of the half block at a cost of $2,669, the east end of lot 4 being the lowest portion. In 1916 and prior thereto, sidewalks were constructed along the whole of the half block on the west side, and there is a dirt sidewalk along the north line of lot 4. At the date of the trial the lot had not been completely filled in.

[1] To our minds it is very clear that nothing further than the reproduction of the foregoing statement is required to be said herein to show that the decree quieting plaintiff's title to the parcel of land in controversy is impregnably founded, and therefore beyond impeachment. While the plaintiff does not rely upon and has not shown a good record title, it is nevertheless unquestionably true, that from May 20, 1880, at which time one Krause, having previously obtained a purported but defective tax title to the lot, conveyed the property to P. C. Slattery, down to the time of the commencement of the action—July 20, 1916—the plaintiff and her predecessors in interest openly and notoriously held possession of the lot under color of title, during which period of time, except when the title was in the city of Marysville, they paid all the taxes thereon and improved the same. It is to be added that during that period of time, so far as the record discloses, none of the appealing defendants or their predecessors ever made any effort judicially to assert their title thereto, or, so far as we know, made any other claim to title until this action was brought.

Section 323 of the Code of Civil Procedure provides that, to constitute an adverse possession by any person claiming a title founded on a written instrument, land is deemed to have been possessed and occupied when it has been usually cultivated or improved.

[2] In view of the undisputed evidence, of which the above statement involves a correct epitome, it is mere supererogation to say that the plaintiff's case fully meets the requisites prescribed by said section of adverse possession founded on an instrument in writing. It is true that the lot was not shown to have been inclosed or "cultivated," but it is undisputed that it had been improved by the plaintiff and her predecessors, and this was sufficient under said section. Gray v. Walker, 157 Cal. 381, 385, 108 Pac. 278, 279. In that case, it is said by Mr. Justice Sloss:

> "The requirement of the statute that the land be 'usually cultivated or improved' means that it should be cultivated or improved in the manner or to the extent usual in the case of similar property. Allen v. McKay, 120 Cal. 332, 52 Pac. 828. If so improved, it is not necessary that it should be either cultivated or inclosed. Daniels v. Gualala M. Co., 77 Cal. 300, 19 Pac. 519."

Appellants, however, attack the finding that—

> "At the date of the commencement of this action plaintiff by herself and her predecessors in interest had been, she ever since has been, and now is, in the actual, exclusive, and adverse possession of all of said real property herein described continuously for more than 20 years prior and up to the filing of the complaint in this action, claiming during all of said times to own the same in fee against the whole world."

[3] We think, as above stated, that there is no ground for successfully disputing the proposition that the evidence shows that for nearly 40 years the plaintiff and her predecessors in interest have been in unchallenged possession and occupancy of the property; but, conceding that the evidence does not support the finding of 20 years of possession and occupancy by the plaintiff and her predecessors, it cannot for a moment be doubted that such possession and occupancy were shown to have been had for over a period of 5 years, during which time none of the appealing defendants or their predecessors in interest or grantors made any claim of title or right of possession to the lot. While there is no specific finding that the lot was possessed and occupied by the plaintiff for a period of 5 years, the finding that it was so possessed and occupied for the period of more than 20 years is sufficient to support the judgment; there being, as stated, evidence clearly supporting a finding of five years' adverse possession. The lesser period is obviously included in the greater period specifically found.

Thus it is very clear that the evidence discloses the fulfillment of all the requisites of section 323 and of the proviso of section 325 of the Code of Civil Procedure essential to the establishment of title to land by adverse possession based upon a written instrument.

It is further to be suggested that, so far as we are advised by the present record, the defendants, long prior to the commencement of this action, had lost their right of action to recover the property or the possession thereof by the bar of the statute (Code Civ. Proc. § 318; Beckett v. City of Petaluma, 171 Cal. 309, 153 Pac. 20), and in such case, of course, their claim of title as set up in their answer in resistance to the like claim of plaintiff is likewise legally nonenforceable.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(39 Cal. App. 406)

BIBB v. BIBB. (Civ. 2855.)

(District Court of Appeal, Second District, Division 2, California. Jan. 20, 1919.)

1. DIVORCE 🔑37(21)—"DESERTION"—REFUSAL TO FOLLOW HUSBAND TO NEW ABODE.

Under Civ. Code, § 103, providing that the husband may choose any reasonable place of living, and that if the wife does not conform thereto it is "desertion," the husband's right is not entirely arbitrary, but he must provide and establish a suitable home for his wife ere he can insist that she follow him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desertion.]

2. DIVORCE 🔑37(21)—DESERTION.

It is only when the husband has established a new domicile which is a reasonable place of living and in good faith has offered the new abode to his wife, and she, without sufficient cause, has refused to comply with his selection, that a cause of action for desertion arises.

3. DIVORCE 🔑37(21) — DESERTION — ANTICIPATORY BREACH.

Under Civ. Code, § 103, as to divorce for desertion because of wife's failure to follow husband to new abode, it is not enough that, prior to his establishing the new domicile, she informs him she will not follow him.

4. DIVORCE 🔑109—DESERTION—CHANGE OF ABODE BY HUSBAND.

Where husband seeks divorce because of wife's refusal to follow him to a new abode, he must affirmatively show that the new domicile selected by him is a reasonable place of abode, since no presumption in that respect is indulged in his favor.

5. DIVORCE 🔑133(1)—DESERTION—EVIDENCE.

Evidence *held* insufficient to support decree for divorce to husband based on wife's desertion, in failing to follow to a new abode under Civ. Code, § 103.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit by Ida J. Bibb against Robert L. Bibb, in which defendant cross-complained. From decree for defendant and denial of new trial, plaintiff appeals. Reversed.

William Lewis, of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

FINLAYSON, P. J. Plaintiff sued defendant for a divorce on the ground of desertion alleged to have commenced February 9, 1913. Defendant answered, and in a cross-complaint containing two counts charged, in the first count, desertion, and in the second certain acts of alleged cruelty. The court adjudged defendant entitled to a divorce upon the ground of desertion as charged in the first count of his cross-complaint. Plaintiff moved for a new trial, which was denied. She appeals from that order and likewise from the interlocutory decree adjudging defendant entitled to the divorce.

In his cross-complaint respondent charges appellant's desertion as follows:

> "On or about February, 1911, at the city of Los Angeles, * * * plaintiff willfully and voluntarily separated herself from the cross-complainant herein, with the intent to desert said cross-complainant, and said plaintiff did at that time, in the city and county of Los Angeles, refuse to remove from the then home of plaintiff and cross-complainant at New Jersey street, to the city of Hollywood, where this cross-complainant had provided a suitable home for said plaintiff, and said cross-complainant at said time informed the plaintiff that he had secured a position as the Hollywood representative of the Union Ice Company, and that the position required that he should reside in the city of Hollywood for convenience in attending to said work."

Appellant contends that the evidence is insufficient to support the decree adjudging respondent entitled to a divorce on account of the desertion thus charged against her in the cross-complaint.

Though the evidence is of an unsatisfactory and fragmentary character, particularly with respect to the vital facts essential to a cause of action for the desertion as charged in the cross-complaint, the controlling facts, stated most favorably to respondent, are substantially as follows: On January 1, 1911, he went to work for the Union Ice Company at its plant in Hollywood, a suburb of the city of Los Angeles, and now an integral part of that municipality. At that time he and his wife were living in Los Angeles at 1624 New Jersey street, Boyle Heights, whence, on April 12, 1911, she moved to 1705 East Sixty-Third street. When he took employment with the ice company he looked for a home in Hollywood. He testified, in substance, as follows:

> "When I first went to Hollywood, I wanted her to go. I had my position there, and I looked for a house, and found a house, and I insisted that she go out there, and she refused to go; and she said we did not have enough money to keep house. She absolutely refused to live with me at that time, and she did two or three days after that. She absolutely refused to go to Hollywood, not only at that time—some time in February, 1911—but two or three other times. When we went to Sixty-Third street (April 12, 1911), I insisted several times that she go to Hollywood, and behave herself, and that I would give her a good home, and she refused it."

On February 9, 1913, a stormy interview ensued between the spouses, evoked by the arrival of respondent's sister from the East. This, says respondent, was the straw that broke the camel's back. He testified that that evening "she begged me not to leave her, and begged me to take her to Hollywood; that she would be good—but it was too late. I had offered to take her there lots of times before, and she would not go."

It seems that, notwithstanding appellant's refusal to go with him to Hollywood, he, nevertheless, for an indefinite period immediately following the commencement of the desertion of which he complains, spent his nights with his wife, at the house occupied by her in Boyle Heights, and later, for an indefinite period, he spent his Saturday nights and Sundays with her. As to this phase of the case he testified, in substance, as follows:

> "When I first went to Hollywood, I came home every day. When my wife left the house on New Jersey street, for the house on Sixty-Third street, I went out once a week. I would usually go out there Saturday nights after I got through with my work. I stayed with her during that time on account of the little girl"—referring to their adopted child. "I stopped going out there in February, 1913, but I had had nothing to do with her before. I did not have any relations with her for probably nearly a year. I don't believe I ever had any marital relations with Mrs. Bibb, or lived with her, after she left Boyle Heights. I don't remember."

There are no findings of fact. The interlocutory decree recites that the parties waived written findings, and adjudges that—

> "The defendant, Robert L. Bibb, is entitled to a divorce from the plaintiff, Ida J. Bibb, upon the ground of desertion."

From this the only legitimate inference is that the court found against the charges of cruelty set forth in the second count of respondent's cross-complaint. So that the decree must find support, if any, in the charge of desertion, as alleged in the first count of respondent's cross-complaint, which is based upon section 103 of the Civil Code, whereby it is provided that—

> "The husband may choose any reasonable place * * * of living, and if the wife does not conform thereto it is desertion."

[1-4] Ordinarily the husband may choose the family domicile at pleasure. It is the wife's duty to follow his fortunes—"to go whither he goeth"—and abide in that place where it is most convenient for him to enjoy her society, and where he is able and willing to make provision for her support and that of his family. But his right to determine the family abode does not give him an entirely arbitrary power; it is not without its limitations. He is bound to provide and establish a suitable home for his wife, ere he can insist that she follow him. The law has limited his right to change the family abode. It is so limited that he can only "choose any reasonable place of living." Civ. Code, § 103. It is when, and only when, he has so chosen and established the new domicile, and, in good faith has made offer of the new abode to her, and she, without a sufficient cause, has refused to comply with his selection, that a cause of action for desertion arises. Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694. See, also, Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518; Keesey v. Keesey, 160 Cal. 727, 117 Pac. 1054; Phelan v. Phelan, 35 Ill. App. 511, affirmed in 135 Ill. 445, 25 N. E. 751; King v. King, 122 La. 582, 47 South. 909; Heaton v. Heaton, 23 Pa. Co. Ct. R. 218. It is not enough that, prior to his establishing the new domicile, she informs him she will not follow him. For, perchance, he may accede to her wishes and not make the change; or she, perhaps, when the new domicile shall have been actually chosen and established, may exercise a woman's privilege and change her mind. The law does not countenance a divorce for a mere disagreement as to whether a contemplated change shall or shall not be made. Her duty is to follow him if and when he actually moves to a new, but suitable, domicile. Until he moves she cannot follow. Nor is she in default until, having established a new domicile, he has offered it to her and requested her to follow him. Until such offer and request be made, and she thereby informed as to the location and character of the place chosen by the husband, she cannot know whether it is a "reasonable place of living." Until she has been afforded a reasonable opportunity for knowing whether the abode chosen by the husband is a "reasonable place of living," she is under no obligation to follow him. Says the court in the Vosburg Case:

> "She was not guilty of desertion until he had made the choice, offered it to her, and she, without sufficient cause, had refused to comply with his selection." 136 Cal. 204, 68 Pac. 697.

The husband, seeking a divorce from his wife because of her refusal to follow him to a new abode must show that the new domicile selected by him is a reasonable place of abode. No presumption in that regard can be indulged in his favor. It is incumbent upon him to show affirmatively, not only that he has chosen a particular abode and offered it to his wife, but that the domicile so chosen is a reasonable place for the family abode. By affirmative evidence, he must show its character and its suitableness. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037. Finally, if it be his intention to visit upon his wife the penalty of her failure to follow him to the new domicile, he should present to her, in plain and unequivocal terms, the alternative of a compliance with his wishes or a surrender of all her conjugal rights. Hardenbergh v. Hardenbergh, 14 Cal. 654. Unless such alternative be so presented to her, it cannot readily be ascertained whether or not she harbors an actual intent to desert him; and the actual intent to desert is as much an essential ingredient of the desertion as is the voluntary separation itself. Civ. Code, § 95; Hardenbergh v. Hardenbergh, supra. Were this not the rule, the marital relation—instituted for the good of society, and not to be dissolved save for the gravest causes—might easily be subject to dissolution by the husband's guile and crafty duplicity.

[5] Viewing the facts disclosed by the record in the light of these principles, we are constrained to hold that the trial court erred in granting a divorce to respondent. There is no evidence that he ever chose for himself and family an abode in Hollywood. True, he says he "looked for" and "found" a house in Hollywood. But there is no evidence that he ever bought or rented or even tentatively bargained for the house that he "found." On the contrary, he himself testifies that for some time after he went to Hollywood to work for the ice company he returned to and slept at his house in Boyle Heights, where his wife and adopted daughter lived; and later, after appellant with their adopted daughter moved to the Sixty-Third street house, he returned thereto every Saturday, remaining until the following Monday morning, and frequently he spent a night with his wife during the middle of the week. Doubtless it may be inferred from some of the facts in evidence that for some part of the period during which he claimed his wife was guilty of willful desertion he slept in Hollywood; but there is nothing to show that, while in Hollywood, he did not occupy a single bed in a single room suitable for his own use but wholly insufficient as a family abode for himself, wife, and adopted daughter. The evidence fails utterly to show that he ever actually established a matrimonial domicile in Hollywood, or that he ever there chose a house that he could rightfully expect his wife and daughter to occupy. There was no evidence as to the character of the house in Hollywood which he says he "found," though the burden is upon him to show that he had chosen a reasonably suitable place of abode. In the absence of evidence, no presumption can be indulged that the house which he says he "found" was a "reasonable place of living." There is no evidence that he ever offered her, as a home for the family, the house which he says he "found." She testifies they went out one afternoon to Hollywood and looked for a house, but could not find any that he felt he could afford to pay for. She also testifies that he never informed her that he had rented a place in Hollywood. Her testimony that he never so informed her is uncontradicted; at any rate, it is not contradicted by evidence printed in any of the briefs, though the appeal was taken under the so-called alternative method. There is no evidence whatever that he ever offered appellant any particular abode in Hollywood, and unless such an offer were made she could not possibly know whether or not the place "found" by him was a "reasonable place of living." Furthermore, assuming that for a year or more immediately prior to the action respondent had not cohabited with his wife, and conceding that during such year or more of conjugal abstinence she could be guilty of willful desertion for which he would have a cause of action for divorce, nevertheless, for an indeterminate but considerable time immediately subsequent to appellant's alleged declination to follow respondent to Hollywood, they continued their customary matrimonial cohabitation as man and wife at the old abode in Boyle Heights, where, for some time following her alleged refusal to go to Hollywood, the husband daily returned to their home and cohabited with her. By this equivocal conduct he failed to present to her, clearly and definitely, the alternative of a compliance with his will to move to Hollywood, or be deemed guilty of willful desertion.

Judgment and order reversed.

We concur: SLOANE, J.; THOMAS, J.

39 Cal. App. 396

KRAMER v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2276.)

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1919.)

1. MUNICIPAL CORPORATIONS 🔑184(4)—POLICE—VOLUNTARY RESIGNATION OF OFFICER.

In view of Civ. Code, §§ 1569, 1570, defining such duress or menace as will avoid an agreement, resignation of police officer from police department of city and county of San Francisco *held* voluntary, and not induced by either duress or coercion, so that its acceptance by board of police commissioners worked a final severance of the officer's relation with the department.

2. MANDAMUS 🔑143(2)—REINSTATEMENT OF POLICE OFFICER—LACHES.

Petition of police officer for writ of mandate to compel reinstatement on ground that his resignation from department had been procured by duress not brought for nearly five years, affirmatively showing delays of two and three years on his part in moving police department to have resignation set aside, *held* barred by laches.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Petition for writ of mandate by John H. Kramer against the Board of Police Commissioners of the City and County of San Francisco and others. From judgment directing issuance of the writ, defendants appeal. Reversed.

George Lull, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for appellants.

Edward Lande and Harry Gottesfeld, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment directing the issuance of a writ of mandate requiring the defendants to reinstate the plaintiff and respondent herein as a police officer. The judgment followed an order overruling the defendants' demurrer to the plaintiff's amended petition for such writ, the defendants declining to answer.

The facts, as presented in the plaintiff's petition, are as follows: Prior to the month of August, 1906, the plaintiff was a regularly appointed and acting police officer of the city and county of San Francisco, but in that month, owing to conditions created by the earthquake and fire of that year, the board of police commissioners of said city and county suggested to certain members of the police department, the plaintiff being among the number, that they apply for leave of absence from the department without pay for the purpose of engaging temporarily in business, the object of this suggestion being to work a temporary reduction in the cost of maintaining the police department during the critical period following the earthquake and fire. Acting upon this suggestion, the plaintiff applied for a leave of absence for three months, which was granted him, and it was thereupon stated and represented to him that if he should engage in business and apply for additional leave of absence the said board of police commissioners would extend his leave for the further time of one year. The plaintiff thereupon purchased a business, paying therefor and for a stock of merchandise therein, a sum totaling $2,300, and then engaged in said business. Within the period of the plaintiff's three months' leave of absence, however, the board of police commissioners, through its acting president, directed the chief of police to forthwith order back to duty all police officers then absent on leaves of absence, and accordingly and within the period of his three months' leave of absence the plaintiff was ordered to return to duty forthwith. This order the plaintiff was unable to comply with without abandoning and neglecting his said business and losing the money he had invested therein, and he so informed the said chief of police, whereupon he was granted a suspension of the order for a time, during which he diligently attempted to dispose of his business, but was unable to do so. Shortly before January 1, 1907, the plaintiff was ordered by the chief of police, acting under the instruction of the police commissioners, to return to duty as a police officer on or before January 1, 1907, or resign from the police department. The plaintiff, protesting against this order on December 31, 1906, presented his resignation from the police department to the board of police commissioners, which board then and there adopted an order and resolution accepting the same.

Plaintiff asserts that his course in so doing was compelled by the fact that he could not dispose of his said business at that time without suffering great and irreparable loss, and that having been induced to seek a leave of absence and to engage in business upon the assurance of the board of police commissioners that his leave of absence would be extended for an additional year in the event of his engaging in such business, his resignation was thus not voluntary, but was induced by duress and coercion.

On November 27, 1908, the plaintiff applied for reinstatement as a police officer, setting forth in his application the foregoing facts. The board of police commissioners denied his said application without a hearing. On October 26, 1911, the plaintiff appeared before the board of police commissioners, and then and there demanded that his application, filed on November 27, 1908, should be heard, and that he be permitted to offer evidence in support thereof, and the said board of police commissioners did then consent to hear and did hear said application and the plaintiff's proofs in support thereof. At said hearing no proofs to the contrary were presented, but the said board of police commissioners, after hearing the plaintiff's said proofs, took the matter of his application and of his proofs supporting the same under advisement until on or about November 23, 1911, when said board denied said application upon the ground of plaintiff's laches in not demanding a hearing upon the same within three years from and after January 2, 1907, the date of acceptance of his resignation; and said board has ever since refused to further consider his said application on the merits, or to admit or restore plaintiff to his former position in the police department.

The trial court upon these averments ordered the writ of mandate to issue, and from such judgment or order this appeal has been taken.

[1] The main contention of the appellants is that the respondent's resignation from the police department was not induced by duress or coercion, but was voluntary, and hence that its acceptance severed finally the relation of the plaintiff to the police department.

We think this contention must be sustained. Conceding that upon the face of the averments of the plaintiff's petition he was treated unfairly by the action of the defendants in inducing him to believe that his leave of absence from the department would be extended for the additional period of one year, it cannot be said that the action of the board of police commissioners, in recalling him to duty before this latter period had expired was unlawful in view of the large discretion reposed in such bodies in respect to the proper management and conduct of the police department. In order for the action of the board of police commissioners in presenting to the plaintiff the alternative of either resigning from or returning to his post of duty in the police department to have savored of duress or coercion, such action must have been unlawful under the long accepted definitions of these terms. Bouvier's Law Dict., "Duress," "Coercion"; 14 Cyc. 1123, "Duress"; 11 Corpus Juris, 945, "Coercion." Our Civil Code, in defining such duress or menace as will avoid an agreement, embraces the element of unlawfulness in its definition of these terms. Civ. Code, §§ 1569, 1570.

In the case of State v. Ladeen, 104 Minn. 252, 116 N. W. 486, 16 L. R. A. (N. S.) 1058, which involved a resignation from office, it was held that the coercion or duress which would render such resignation either void or voidable must be such as would exist where one by the unlawful conduct of another was induced to resign his office under circumstances which deprived him of his free will.

Measured by these definitions it must be concluded that the plaintiff's resignation from the police department was not induced by either duress or coercion, but that the same was voluntary, and hence, upon its acceptance by the board of police commissioners, worked a final severance of the relation of the plaintiff as a police officer with the police department of the city and county of San Francisco.

[2] But aside from these considerations the plaintiff's petition shows upon its face other and sufficient reasons why the writ which he sought should not have issued. Assuming, for the sake of argument, that the plaintiff's resignation and the acceptance thereof by the board were for the reasons stated in said petition voidable, the plaintiff would have been bound, under well-settled principles, to take the necessary steps to avoid the same promptly upon the removal or cessation of the conditions out of which the duress or coercion claimed by him to have existed arose; in other words, as soon as the plaintiff had succeeded in disposing of the business in which, according to his petition, he had been induced to engage, he should have moved to have his resignation and its acceptance set aside; and since his petition affirmatively shows that he made no move in that direction for a period of nearly two years after his resignation had been presented and accepted, his petition should have shown reasons for his delay in action for a period far beyond the utmost limit of the leave of absence which he asserts himself to have been assured. His petition, however, is entirely silent upon this subject; and is not only so in so far as his first application for reinstatement is affected, but it is further devoid of any showing as to why, after the plaintiff's first application for reinstatement had been denied, without hearing, as he asserts, he waited a further period of nearly three years before applying for a hearing upon his said first application, for which further delay not only is there no reason shown in plaintiff's petition, but from the facts therein stated it affirmatively appears that whatever of duress or coercion had originally attended the presentation and acceptance of his resignation on January 2, 1907, such conditions had certainly ceased to exist when in November, 1908, he applied for reinstatement. His further delay until October, 1911, before taking any further action with relation to his application for reinstatement, is utterly unexplained. The affirmative record thus made by the plaintiff's own averments shows that a period lacking one month of being five years from the date of his alleged resignation from the police department intervened before the commencement of this proceeding, during the major portion of which time no impediment to its institution is shown to have existed. In addition to these deficiencies in the plaintiff's petition it may be further stated that no showing whatever is made that the position in the police department vacated by the plaintiff's resignation has not been long since filled, or that his reinstatement after so long a period has elapsed would not result either in ousting a successor, or in entailing the payment on the part of the municipality of two salaries for the same position. We think as to this latter point that upon the plaintiff's own affirmative showing, as well as by these deficiencies therein, he was debarred by laches from the remedy which he sought and obtained by the judgment and order for the issuance of the writ from which this appeal has been taken. Harby v. Board of Education, 2 Cal. App. 419, 83 Pac. 1081; Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 Pac. 69.

Judgment reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

39 Cal. App. 425

AUENER v. NORMAN. (Civ. 2047.)

(District Court of Appeal, Second District, Division 2, California. Jan. 21, 1919.)

MALICIOUS PROSECUTION ⚷21(2)—ADVICE OF COUNSEL — CONCEALMENT OF MATERIAL FACT.

Where defendant, in an action for malicious prosecution, concealed from his attorney a fact material to the question of plaintiff's probable guilt, a finding against his defense of advice of counsel was warranted.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by August Auener against L. E. Norman. From a judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

Lamy & Putnam, of San Luis Obispo, for appellant.

A. B. Bigler, of Santa Maria, for respondent.

THOMAS, J. This is an action to recover damages for alleged malicious prosecution. The case was tried by the court without a jury.

It is alleged in the complaint that on or about the 26th day of June, 1914, within the county of Santa Barbara, said defendant caused a criminal complaint to be filed in the justice's court, charging plaintiff with the crime of forgery, which, according to the allegations of said criminal complaint, was that plaintiff did "willfully, unlawfully, feloniously and fraudulently make and forge a certain telegram or telegraphic message," which "message" purports to have been signed by L. E. Norman, the defendant herein, and delivered to the Western Union Telegraph Company for transmission; that the same was uttered, published, passed, and sent by said company accordingly; all this with intent to prejudice, damage, and defraud the defendant herein, the complainant in that action; and, further, that this was done by the defendant here with malice, and without probable cause. That because of plaintiff's being arrested and imprisoned, and of the shock and nervous strain produced thereby, and the fact that the alleged facts and circumstances of said arrest and imprisonment had been published in certain newspapers and circulated accordingly, plaintiff's health and physical condition have been greatly impaired. Then follows a prayer for damages, actual and exemplary, and for attorney's fees.

The defendant, by his answer, admits the filing of the criminal complaint as aforesaid, the issuing of the warrant of arrest, the preliminary examination, and the dismissal of the proceeding; but denies that these things, or any of them, were done, or caused to be done, by him with malice, and without probable cause, and relies upon the following propositions as a complete defense here: (1) That he acted upon probable cause, (2) without malice, and (3) upon advice of an attorney.

The court found for the plaintiff, and assessed his actual damages at $500, and held that he was not entitled to any exemplary damages. Judgment was entered accordingly. There was a motion for a new trial, which was denied. This appeal is taken from both the judgment and said order.

The seventh, eighth, ninth, and twelfth findings of the trial court are challenged as not supported by the evidence. Finding No. 7 finds that the facts alleged were done maliciously, etc.; No. 8, that these were done without probable cause; No. 9, that plaintiff had been, and is now, paralyzed on the left side, etc., and that because of the actions of defendant, as aforesaid, plaintiff had "and does now suffer increased and greater physical pain and mental anguish, and as a result of said arrest and imprisonment plaintiff's health and physical condition have been greatly impaired"; and No. 12 is a finding that defendant did consult an attorney, who, after hearing defendant's statement of the case, advised him that there was probable cause to believe the plaintiff guilty of forgery; and finding further "that when defendant communicated with said J. F. Conkey (the attorney consulted by him) he did not state all the facts bearing on the case, of which he had knowledge, fairly or truthfully."

We have carefully examined the testimony as disclosed in the transcript. There was evidence on behalf of plaintiff showing that defendant had given plaintiff authority to use his name in ordering goods. This was denied by defendant.

Defendant says that he told his attorney all he knew about the case. His language is:

> "I disclosed to him [Conkey] fairly and truthfully all the facts that were within my knowledge concerning the matter of the charge against Mr. Auener at that time, and before the filing of the criminal complaint."

On cross-examination, however, defendant testified that he did not remember telling his attorney "about signing for the express coming in my name, nor that I had gotten millinery out of parcels post at the post office addressed to me." This was a material fact, and appellant's failure to communicate it to his attorney justified the trial court in inferring actual malice and want of probable cause. There is other corroborative evidence. No other points raised need our consideration. We think, from an examination of the record presented to us, that there is ample evidence to support all of the findings here challenged.

The court having resolved the conflict in the evidence in favor of the plaintiff, it follows, as a matter of law, we think, that malice was present, and that defendant acted without probable cause.

The judgment and the order appealed from must be affirmed. It is so ordered.

We concur: FINLAYSON, P. J.; SLOANE, J.

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39 Cal. App. 414

AALWYN'S LAW INSTITUTE v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 2541.)

(District Court of Appeal, First District, Division 1, California. Jan. 21, 1919.)

1. MUNICIPAL CORPORATIONS 🔑122(1) — PLEADING ORDINANCES.

In action to recover taxes paid, asserting the invalidity of certain ordinances, the court was justified in refusing the relief sought, where plaintiff did not comply with the requirement of Code Civ. Proc. § 459, that in pleading an ordinance must be set out in hæc verba or by reference to its title and the day of its passage; the complaint merely referring to such ordinances by number and asserting their adoption on a certain date.

2. JUDGMENT 🔑123(1)—DEFAULT—APPLICATION FOR JUDGMENT — RECOVERY OF TAX PAID.

Action to recover taxes paid, under Pol. Code, § 3819, while in the nature of an action for money had and received, is one based upon statute, and takes the place of the ordinary action of assumpsit for money had and received, and therefore does not come within the provisions of section 585, subd. 1, authorizing the clerk to enter judgment, but is controlled by subdivision 2, requiring upon default an application for the relief demanded, which implies more than a motion for judgment.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Aalwyn's Law Institute against the City and County of San Francisco. Judgment for plaintiff was vacated and judgment rendered for defendant, and from the latter judgment and the order vacating the former judgment, plaintiff appeals. Affirmed.

See, also, 178 Pac. 966.

Arthur Crane, of San Francisco, for appellant.

George Lull, City Atty., of San Francisco, for respondent.

KERRIGAN, J. This is an action to recover taxes paid under protest upon a tax levy alleged to be illegal and invalid. The action was commenced on May 27, 1911, and the amended complaint was filed January 8, 1915. A general demurrer to each cause of action was filed and overruled. Due notice of the order overruling the demurrer was given, and, defendant having failed to answer within the time allowed, its default was duly and regularly entered. Thereafter, upon request of plaintiff, the clerk of the court entered judgment in favor of plaintiff and against defendant for the amount prayed for in the amended complaint. Notice of entry of judgment was thereupon duly served upon defendant. Defendant then moved to set aside the default and vacate the judgment. The judgment was vacated by the court, but the motion to set aside the default was denied. Thereafter the case was submitted upon the record. The court subsequently rendered judgment in favor of the defendant. Plaintiff appeals from this judgment, and also from the order vacating the former judgment entered by the clerk.

The questions presented upon this appeal are: First, whether or not the complaint states a cause of action upon which the court was bound to order judgment for plaintiff; and, second, whether or not the court erred in vacating the judgment entered by the clerk.

The litigation arose out of certain ordinances adopted by the city and county of San Francisco for the purpose of suspending chapter 1, article 3, section 11, of the charter of that city, which provisions contain a restriction upon the general grant of the taxing power to the municipality, known as the dollar limit, on the ground of "great necessity and emergency," as authorized by section 13 of the same article. Plaintiff alleged that the ordinance suspending the so-called dollar limit, and the ordinance levying the taxes thereafter, were void, for the reason that there was no great necessity or emergency for their passage. The allegations of the complaint simply refer to the ordinances as being numbered 1208 and 1209, and assert that they were adopted on the 22d day of June, 1910. It is further alleged that copies are attached to the complaint as Exhibits A and B, and made a part thereof. No such copies are so attached, nor is there any allegation in the complaint of either the words or substance of the ordinances, nor are they referred to by their titles.

[1] In pleading an ordinance it must be set out in hæc verba or by reference to its title and the day of its passage. Code Civ. Proc. § 459. This requisite plaintiff has failed to comply with. Without the ordinance or any evidence before it, the court was in no position to declare the legislation valid or invalid, and upon submission of the case upon the record it was justified in refusing the relief sought.

[2] Nor do we think that the court erred in setting aside the judgment entered by

the clerk. While in the nature of an action for money had and received, the case is one based upon statute (Pol. Code, § 3819), and takes the place of the ordinary action of assumpsit for money had and received. The case does not therefore come within the provisions of subdivision 1 of section 585, authorizing the clerk to enter judgment, but is clearly controlled by the second subdivision of that section, requiring upon default an application for the relief demanded, which implies more than a motion for judgment. This being so, the court was justified in vacating the clerk's judgment.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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39 Cal. App. 412

TRABUCCO v. COLLINS et al. (Civ. 2496.)

(District Court of Appeal, First District, Division 1, California. Jan. 21, 1919.)

1. NOVATION ⚷11—NECESSITY OF PLEADING.

Novation is new matter of defense or discharge, which must be specially pleaded.

2. APPEAL AND ERROR ⚷179(2)—WAIVER OF OBJECTIONS.

Where trial court sustained objection to a certain question to plaintiff on cross-examination by defendants, as not being proper cross-examination, but stated that it might be matter of defense, which defendants could prove as part of their case, but defendants did not seek to avail themselves of this permission, they should not complain on appeal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Frank Trabucco against M. J. Collins and Elizabeth Collins. From judgment for plaintiff, the last-named defendant appeals. Affirmed.

Edward J. Lynch, of San Francisco, for appellant.

Olin L. Berry, of San Francisco, for respondent.

WASTE, P. J. This is an appeal from a judgment in favor of plaintiff. Defendant Elizabeth Collins alone appeals. Her first contention is that plaintiff's own case proved a "novation," by which his claim against her was extinguished, to wit, the creation of an obligation on a promissory note, signed by defendant M. J. Collins alone, in place of an obligation of both defendants to repay money loaned by plaintiff. She relies upon the two documents introduced in evidence by plaintiff, the first being a receipt for $476 in favor of plaintiff, signed by both defendants; the second dated later, being a promissory note in favor of plaintiff for the amount sued for, signed by defendant M. J. Collins only.

The defense of novation was not pleaded in the original answer, which denied the loan, and all, or any, indebtedness. Neither was it pleaded in the answer as amended at the conclusion of the trial, and which alleged, as a further and separate defense, that the money was paid by plaintiff in accordance with an agreement for the purchase of a one-half interest in the marble business conducted by the defendants. The finding of the court was squarely against both defendants on each of the defenses.

[1] It is clear from the whole case that defendants did not rely upon a novation, but upon the alleged agreement set out in their answer. This, no doubt, is the reason they did not plead it. Novation "is held to be new matter of defense * * * or discharge, which must be specially pleaded." McGinn v. Wiley, 24 Cal. App. 312, 141 Pac. 53, and cases therein cited. Furthermore, the evidence in the case, if considered in the light of such defense, would not support an allegation, or finding, that novation had resulted. Appellant, by her own acts, prevented the full consummation of any intent on the part of the parties, if any such existed. to extinguish the old obligation. She refused to sign the note on which she relies for novation, although plaintiff many times endeavored to have her do so, and he never by any act or word released her from her liability in the premises.

[2] Appellant complains of two rulings of the trial court in sustaining objections to questions on cross-examination. Respondent had testified that he was not a partner in the marble business. On cross-examination he was asked whether or not he had guaranteed payment of an account against appellant's business, and whether or not he had bought certain materials from one Cassarelo. While neither act would conclusively establish a partnership relation and might be considered immaterial, no harm would have resulted from overruling the objection and allowing the witness to answer. The trial court, however, held the matter not proper cross-examination, but stated that it might be matter of defense, which defendants could prove as part of their case. They did not seek to avail themselves of this permission, and should not now complain.

While there is a conflict in some material parts of the testimony, the evidence beyond question supports the finding of the trial court. The defendants, husband and wife, were jointly conducting a marble and terrazzo business. Plaintiff advanced the money to both for the use and benefit of the business (a part of the amount being his own unpaid wages). The larger portion of the money appears to have been given directly to the wife for use in the business.

The judgment of the lower court is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

39 Cal. App. 422

HELLWIG et al. v. TITLE GUARANTY & SURETY CO. (Civ. 1923.)

(District Court of Appeal, Third District, California. Jan. 21, 1919.)

1. Limitation of Actions 🔑34(1)—"Liability Created by Statute."

An action upon the official bond of a notary public is an action upon a "liability created by statute," within Code Civ. Proc. § 338, subd. 1, providing that such action must be brought within three years.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liability Created By Law.]

2. Limitation of Actions 🔑180(2) — Statute as a Bar—Pleading.

In action upon official bond of a notary public, where it appeared from the face of the complaint that the action was barred under Code Civ. Proc. § 338, subd. 1, the court should have sustained a demurrer.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by R. Hellwig and another against the Title Guaranty & Surety Company. Judgment for plaintiffs, and defendant appeals. Reversed.

George F. Hatton, Hartley F. Peart, and Gus L. Baraty, all of San Francisco, for appellant.

A. A. Caldwell, of San Jose, for respondents.

HART, J. This is an action on a notary public's surety bond executed by the defendant, and grows out of an alleged false acknowledgment by the notary of the execution of a certain deed of trust.

It appears that one Frank L. Dreischmeyer was, on the 31st day of August, 1910, a duly appointed, qualified, and acting notary public, in and for the county of Santa Clara, and that the defendant had become and was on said date a surety on his official bond as such notary; that, on said 31st day of August, 1910, and while said bond was a valid, subsisting obligation and on file in the office of the county clerk of said county, said Dreischmeyer, in his official capacity as such notary public, purported to acknowledge the execution of a trust deed purporting to have been executed by one Marie F. Smith and others, conveying the legal title to certain lands situate in the county of Santa Clara, to the plaintiff, the same to be held, however, as security for the payment of a promissory note for $800, purporting to be executed by the said Marie F. Smith and one Temperance E. Smith in favor of the plaintiff, from whom the loan evidenced by said note was obtained. It further is made to appear from the complaint, as well as from the findings, that the name of Marie F. Smith as subscribed to said trust deed and the said promissory note was forged, and that said Dreischmeyer, at the time that he as a notary public pretended to acknowledge the execution of said trust deed, knew that the name of said Marie F. Smith was forged to the said deed.

The defendant, both by demurrer and, among other defenses, by answer, set up the bar of the statute of limitations as set forth in section 338, subdivision 1, of the Code of Civil Procedure. The court overruled the demurrer, and upon a trial of the issues tendered by the answer found in favor of and awarded judgment to the plaintiffs. This appeal here is from said judgment.

The contention of the appellant is that the action is barred by virtue of the provisions of the section and subdivision of the Code of Civil Procedure above mentioned, and there can be no doubt that the contention is well made.

[1] Section 338, supra, provides, among other things, that an action upon a liability created by statute, other than a penalty or forfeiture, must be brought within three years from the date of the accrual of the cause of action. That an action upon the official bond of a notary public is an action upon a liability created by statute, within the meaning of section 338, subdivision 1, of the Code of Civil Procedure, is no longer an open question in this state. It has been so expressly held in the cases of Norton v. Title Guaranty & Surety Co., 176 Cal. 212, 168 Pac. 16, and Peterson v. Title Guaranty & Surety Co., 35 Cal. App. 103, 169 Pac. 239. In the first-named case, Mr. Justice Melvin, speaking for the court, says:

> "Respondent insists that while, ordinarily, a suit upon a bond of a public officer for breach of official duty is 'upon a liability created by statute,' and therefore is governed by the first subdivision of section 338 of the Code of Civil Procedure, this is an action based upon the fraud of the public officer, and that therefore the fourth subdivision of the section, giving to plaintiff three years after the discovery of the fraud for the commencement of the action, is the only statute of limitations which may be applied in such a litigation. Both theories seem to be supported by adjudications in different jurisdictions, but in California, under the reason-

ing in County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459, and the authorities cited therein, we are constrained to hold that, without regard to the form of the action, a surety sued upon the bond of a public officer may successfully plead the first subdivision of section 338 of the Code of Civil Procedure if the action shall have been commenced after the lapse of three years following, not the discovery, but the misfeasance or malfeasance itself."

[2] This action was instituted on the 19th day of December, 1913, and, as above shown, it appears upon the face of the complaint, as it also appears from the evidence, that the alleged wrongful act of Dreischmeyer, in falsely acknowledging as a notary public the purported execution of the trust deed by Marie F. Smith, was committed on the 31st day of August, 1910. Thus it will be noted that more than three years had elapsed between the date of Dreischmeyer's act of official malfeasance and the date of the commencement of this action. Obviously, therefore, the action was barred under the terms of the first subdivision of the section above referred to, and, that fact having been made to appear in the complaint itself, the court below should have sustained the demurrer to that pleading on that ground, or, having overruled the demurrer, should have dismissed the action upon the evidence which conclusively established the bar of the statute.

We may with no impropriety add that the respondents filed no brief herein, nor was the cause orally argued on their behalf when the same was called up for hearing at the last regular term of this court, and that, therefore, in view of the above-cited cases, which are directly in point here, we are in the dark respecting the theory upon which they could have maintained in the court below that the action was not barred by the above-mentioned section. However, it is clear from the cases above cited that the judgment cannot be sustained, and it is, therefore, reversed.

We concur: BURNETT, J.; BUCK, Presiding Judge pro tem.

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39 Cal. App. 430

LENTZ et ux. v. CLOUGH et al. (Civ. 2626.)

(District Court of Appeal, First District, Division 1, California. Jan. 22, 1919. Rehearing Denied by Supreme Court March 20, 1919.)

PLEADING 🔑225(2) — AMENDMENT AFTER SUSTAINING DEMURRERS—DISCRETION.

Where complaint was not, as it purported to be, an action to quiet title, and there was misjoinder of causes of action, none of which were sufficiently stated to avoid demurrer, and also misjoinder of parties defendant, and defendants' fraudulent acts were alleged to have occurred so long ago they were barred by limitations, and claims were stated which plaintiffs' laches would have debarred them from asserting, trial court, in refusing to permit plaintiffs' further opportunity to amend after sustaining defendants' demurrers, did not abuse discretion under Code Civ. Proc. § 472.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by C. W. Lentz and wife against George A. Clough and others. From judgment for defendants on demurrers to the complaint, plaintiffs appeal. Affirmed.

F. A. Kelly, of Susanville, for appellants.
Herbert Chamberlin, Frank J. Hennessy, Edwin H. Williams, A. E. Bolton, and Tobin & Tobin, all of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants upon the entry of an order sustaining the defendants' several demurrers to the plaintiffs' amended complaint. The only serious contention which the appellants urge upon the argument of this appeal is that the trial court abused its discretion in not allowing the plaintiffs a further opportunity to amend their complaint.

The original complaint is not embraced in the record before us, nor are the demurrers to its sufficiency, but if the plaintiffs' first amended complaint and the demurrers of the several defendants—almost all of whom are lawyers—are to be taken as a sample of these earlier pleadings the plaintiffs must have been fully informed as to the deficiencies of their original pleading at the time they prepared and filed their first amended complaint. An examination of this latter pleading has satisfied us that it is subject to each and every one of the numerous objections which were urged against it by the several demurring parties; that it is not, as it purports to be, an action to quiet title; that there is a misjoinder of several causes of action, none of which are sufficiently stated to avoid general demurrer; that there is also a misjoinder of parties defendant; that the alleged fraudulent acts and conduct with which the defendants are charged not only fail to constitute a cause of action against all or perhaps any of them, but are all alleged to have occurred between the years 1906 and 1910, and hence are not only long since barred by the statutes of limitations pleaded by the several defendants, but are also upon their face stale claims which the plaintiffs' laches would long since have debarred them from asserting. The plaintiffs' averment that they did not discover the matter set forth in their complaint until the year 1916 cannot aid their pleadings, since it is clear that as to many of such matters they were either known to them several years prior to that date, or that they were sufficiently apprised thereof to put them upon inquiry. The plaintiffs state no reason why their alleged discovery of the facts constituting the gravamen of their complaint from six to ten years after their occurrence was not earlier made, and it is plain that no such reasons could be stated, since the facts themselves as set forth in this amended complaint are of such a nature that they must in the nature of things have become known to the plaintiffs at or about the time of the alleged happening of most of them. Under these conditions the trial court very properly determined that it would be impossible for the plaintiffs to state a cause of action by any further attempt at the amendment of their pleading, and hence ordered judgment for the defendants upon sustaining their several demurrers to the plaintiffs' hopelessly inadequate amended complaint. We find no abuse of the discretion with which the trial court was invested under section 472 of the Code of Civil Procedure to permit or refuse to the plaintiffs the further privilege of amending their pleading.

No error appearing in the record before us, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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39 Cal. App. 401

SCOTT v. THOMAS. (Civ. 2863.)

(District Court of Appeal, Second District, Division 2, California. Jan. 20, 1919.)

JUDGMENT ⚷392—MOTION TO VACATE—DISCRETION OF COURT.

Refusal of the court to grant a motion to set aside a judgment based on contradictory affidavits relating to misconduct of movant's counsel *held* not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by J. George Scott against Henry Thomas. From a purported order denying defendant's motion to vacate and set aside a judgment entered in favor of plaintiff, defendant appeals. Affirmed.

Davis & Rush and C. B. Ladd, all of Los Angeles, for appellant.

Edward Winterer, of Los Angeles, for respondent.

THOMAS, J. This is an appeal taken from a purported order denying defendant's motion to vacate and set aside the judgment entered in favor of plaintiff. We have considered the whole record carefully. A statement of the facts, so far as material here, is as follows:

This action is one to quiet title to certain land. The trial of the case in the court below was set for July 20, 1915. Defendant admits that he knew this. Defendant, in his affidavit to support his motion, says that he employed a certain firm of attorneys to represent him in this action; that this firm did represent him, filing an answer, etc., and had charge of the case up to about July 10, 1914, at which time said firm notified him that because of other matters they would be compelled to withdraw from the case; that they did withdraw; and that because of such withdrawal he employed another attorney to represent him therein, who notified him that the case had been set for trial as stated above. The defendant, by said affidavit, says, among other things, that on the 20th day of July, 1915, he was ill and unable to be in court, but that he sent his sister, Louisa Thomas, with his attorney, that she might assist him "in securing the required adjournment"; that when his sister returned she informed him that matters were all right, and some time thereafter his attorney informed him that he would have 60 days in which to prepare the case, and that after said period this case would be set for trial; that on August 20, 1915, he discovered by inquiring that judgment had gone against him on July 20, 1915; that thereupon he immediately consulted and employed his present attorneys, and instructed them to take whatever steps might be necessary to protect his rights.

Another affidavit on the part of defendant was by his sister, corroborating all that is set forth in defendant's said affidavit, and, further, that she went to the courthouse with said attorney, and was present with him during the morning session; that she was informed by said attorney "that the case would go over until 2 o'clock, at which time it would be adjourned"; that prior to 2 o'clock she was informed by said attorney "that it was not necessary for her to be in the court, or in the courtroom, and that it was best that she should not be in said courtroom"; that she believed and relied upon such representations, and did not go into the courthouse, and hence did not know what took place there.

Witness W. M. Palmer, who was the said attorney, says "that on the 16th day of July, 1915, in Santa Monica, Cal., Miss Louisa Thomas and one John Tong came to affiant's residence and asked affiant if he was in a position to take charge of a certain case known as Scott v. Thomas, being the above-entitled action;" that she represented herself as having authority from her brother, the defendant here, to employ an attorney for the defense of this action, and also stated that the law firm which formerly had charge of the matter had informed her that they would go no further with the case. Palmer further deposed that he told the said Louisa Thomas that it would be impossible on so short a notice to prepare a satisfactory defense, but that he would appear on the day of the trial and move the court for a continuance, in order to enable him to do so; that he arranged with said Miss Thomas to meet him at the office of the former attorneys on the following day to arrange for a substitution of attorneys; that they met according to agreement; that they there found that the member of said firm who had charge of the matter was out of the city; whereupon it was agreed that they meet again at the same place on July 19, 1915, which agreement was carried out, and substitution of attorneys effected, and the papers in said action delivered to said Palmer.

On July 20, 1915, the plaintiff here, with his attorney, said Louisa Thomas and said Palmer, were present in court when said cause was called. Palmer moved for a continuance of the case, and his motion was denied by the court. Thereupon the case was continued to 2 o'clock p. m. of said day. During the time intervening a conference was held between plaintiff and his attorney and said Miss Thomas and defendant's attorney, at which time matters in controversy were carefully canvassed, with a result that it was agreed between said Miss Thomas, as agent for said defendant, and the plaintiff here, that if the said defendant would pay to plaintiff, at or before 2 o'clock p. m. of that day, $100 in cash, said defendant might have the option to buy the premises described in the complaint for the amount due on the contract, with additional amount as costs, and that execution should be stayed on any judgment which might be rendered in the action for 45 days, and at that time, upon the payment of the balance due on the contract, the judgment was to be satisfied; this agreement to be void and of no effect unless said $100 was so paid. Plaintiff, at said conference and at all times, declined to consent to the continuance or postponement of the trial of the action, and insisted that the same should be tried at the hour of 2 o'clock p. m. on said day. At the close of this conference Miss Thomas said she would go out and try to get the $100. She failed to do so.

At 2 o'clock p. m. on said date Palmer was again in court representing the defendant at the trial. He denied that he ever told Miss Thomas that the case would be adjourned or continued, or that he ever told her that it was best for her not to be in the courtroom. In short, he denied each and every averment contained in her affidavit as to continuances, etc., and stated affirmatively that he never had any conversation at all until after the trial with the defendant; that he at no time misstated any fact to Miss Thomas, or to the defendant herein; that he did not conceal from them, or either of them, any matter pertaining thereto, but, on the contrary, that Miss Thomas was fully informed by him as to all said matters.

By the affidavit of the plaintiff it appears that he was present in court on said day of trial, at 10 o'clock in the forenoon, and again at 2 o'clock in the afternoon. He supports fully Palmer's testimony as to all that took place in the courtroom, and his version as to the conference referred to therein, and the result thereof. Plaintiff further deposed that said Palmer took part in the trial of the case by cross-examining plaintiff's witnesses.

On this state of facts, and after a full hearing, defendant's motion to vacate and set aside the judgment was denied. The motion was for an "order to vacate and set aside the judgment heretofore entered in this action," etc., and this was supported and opposed by the affidavits already referred to. The record contains no copy of the order appealed from, as required by statute, but does contain a copy of an "order denying motion for new trial."

Assuming—though there has been no suggestion of diminution of record—that the trial court did make an order denying a motion by appellant to set aside the judgment, still, under the facts as we have recited them, we see no error or abuse of discretion.

The order appealed from is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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39 Cal. App. 427

JENSEN v. GOSS et al. (Civ. 2577.)

(District Court of Appeal, First District, Division 1, California. Jan. 22, 1919. Rehearing Denied Feb. 20, 1919; Denied by Supreme Court March 20, 1919.)

1. Sales ⟹82(1)—Time of the Essence.

In mercantile contracts, such as contracts for the manufacture and sale of goods and the like, it is generally held that the parties have intended to make time the essence of the contract.

2. Sales ⟹99—Rescission—Defaults.

Sellers were justified in rescinding contract under which hay, delivered by them, was to be paid for "on the 13th day of each month following delivery," where the buyer for some time was dilatory in making payments, and showed a clear intention not only to violate the provisions of the contract, but to withhold payments due until the delivery of more hay.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. SALES ⚷106 — RIGHT TO RESCIND — WAIVER.

Under a contract to deliver hay, for which payments were to be made monthly, sellers' rights to rescind were not waived, nor were they affected, by the fact that they did not stop delivery of hay immediately after failure of buyer to make his first payment as required, since they had the right to rely, for a reasonable length of time, upon the buyer's promise to pay.

4. SALES ⚷406—BUYER IN DEFAULT.

Buyer cannot offset any damages for sellers' alleged breach in failing to deliver the quality of goods contracted for without showing performance on his own part of his own agreement.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Fred Jensen against Charles E. Goss and another. From a judgment for plaintiff, defendants appeal. Reversed.

Hankins & Hankins, of San Francisco, for appellants.

Frank J. Hennessy, of San Francisco, for respondent.

WASTE, P. J. This is an appeal from a judgment for $231 for damages found to have been suffered by plaintiff by reason of the failure of defendants to deliver to him hay under a written contract dated June 1, 1916, by the terms of which the hay was to be paid for "on the 13th day of each month following delivery." The defense is that plaintiff refused to pay for the hay as required by the contract, thereby releasing defendants from further performance on their part.

The testimony of and in behalf of defendants is corroborated by the evidence and admissions of plaintiff while on the stand, and fails to support the findings of the trial court. Plaintiff never met his obligations to pay as required. On the 15th day of July, the first month following deliveries of hay, one of the defendants personally called on him and demanded payment of the "money due according to his contract." Defendant promised "that in a matter of a few days he would pay." He made no payment until the 28th of the month, when he paid $275 on account.

Defendants continued to deliver hay as required by the plaintiff, and the latter continued his dilatory payments. Statements of the account were regularly sent to him on the 13th of each month. Collectors of the defendants repeatedly called on him. Members of the firm (defendants) as repeatedly conversed with him on the telephone, demanding payment. This condition of affairs continued until October 3d, after which defendants delivered no more hay. At that time plaintiff owed them $920, on account of which he made three payments of $200 each, the last on December 12th.

On December 14th one of the defendants personally called on plaintiff and demanded payment of $320.22, the balance due. Plaintiff, admitting that he "would pay him, that he had some money then," refused to pay until defendants delivered two more carloads of hay. There was some conversation relative to the quality of the hay delivered by the defendants, but refusal to pay the balance due was not predicated on that ground. Defendant told him that he considered the contract canceled. The same day defendants' attorneys made demand for "immediate payment of the" balance due, and notified plaintiff that, unless such payment was made upon receipt of the demand and notice, defendants would, by reason of the breach of the contract by plaintiff in failing to make payments for said hay as provided therein, refuse to deliver any further amount of hay.

Plaintiff did not pay the balance until December 21st at which time, through his attorneys, he requested the defendants to deliver two carloads of hay. No hay being delivered, the plaintiff four or five days later went to the barn of defendants and personally demanded delivery of the hay, and was informed by them that the contract was at an end. After giving further orders to defendants for delivery of hay, no one of which was filled, plaintiff commenced this action.

[1, 2] In view of the evidence in the case, we have looked to respondent to sustain the findings and judgment of the trial court by weight of authority. This he has not done. None of the cases cited by him, so far as we are able to find, relate to a mercantile contract such as the one here under consideration. They have to do with purchase of real estate on the installment plan, forfeitures, and equitable rights or leasehold interests.

> "In mercantile contracts, such as contracts for the manufacture and sale of goods and the like, it is generally held that the parties have intended to make time the essence of the contract." 13 Corpus Juris, 688, and cases cited.

The defendants were justified in rescinding the contract when plaintiff showed a clear intention to violate its provisions, and to withhold payments due until the delivery of more hay. Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110.

[3] The rights of defendants to rescind were not waived, nor were they affected, by the fact that they did not stop delivery of hay immediately after failure of plaintiff to make his first payment as required. They had the right to rely, for a reasonable length of time at least, upon the promise of plaintiff to pay. San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 51 Pac. 335.

[4] Had plaintiff rested his refusal to pay

on the ground of a failure to deliver the quality of hay required by the contract, such position would not aid him in this action. He could not offset any damages for such alleged breach on the part of defendants without showing performance on his own part of his own agreement. Minaker v. California Canneries Co., supra.

For the reasons above stated, the judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

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39 Cal. App. 405

PIONEER PAPER CO. v. HATHAWAY et al. (Civ. 2862.)

(District Court of Appeal, Second District, Division 2, California. Jan. 20, 1919.)

MECHANICS' LIENS ⟹132(4)—FILING CLAIM OF LIEN—TIME.

Where a notice of completion is filed under the Code provisions, time for filing a claim of lien may run from date of filing of notice of completion, and not necessarily from actual date of completion or acceptance or occupancy of building.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Pioneer Paper Company against Lillian Hathaway, J. C. Coney, Lillian Coney, and the Long Beach Home Builders. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Reversed, with directions.

Schweitzer & Hutton and Albert A. Kidder, Jr., all of Los Angeles, for appellant.

Frank D. McClure, of Minneapolis, Minn., for respondents.

SLOANE, J. This is an appeal from a judgment for defendants and from an order denying motion for new trial in an action to foreclose a mechanic's lien. The only question involved in the appeal is as to whether or not the claim of lien was filed by plaintiff within the period of 30 days allowed it by law. The findings of fact of the trial court, the correctness of which are not disputed, support the claim of the plaintiff and entitle it to judgment.

The court found that the contract in question was completed, and the buildings occupied by the defendants, on the 7th day of August, 1913, and that notice by the owners of the completion of the contract was filed in the office of the county recorder of Los Angeles county on the 16th day of August, 1913, and that the claim of lien was filed on the 11th day of September, 1913, within 30 days of the date of the filing of the notice of completion, but more than 30 days after the actual completion, acceptance, and occupancy of the buildings in question.

In its conclusions of law the court held that the plaintiff was not entitled to judgment by reason of the claim of lien having been filed more than 30 days after the completion of the buildings. This conclusion is erroneous, and not justified by the findings of fact.

This precise question, under the same building contract, in another action against the same defendants, has been determined by the Supreme Court of this state since this appeal was taken. Hughes Manufacturing Co. v. Lillian Hathaway et al., 174 Cal. 44, 161 Pac. 1159. It is there held that, where a notice of completion is filed under the Code provisions, the time for filing claim of lien may run from the date of the filing of the notice of completion, and not necessarily from the actual date of completion or acceptance or occupancy of the building.

Judgment reversed, with directions to the trial court to enter judgment for the plaintiff in accordance with the views herein expressed.

We concur: FINLAYSON, P. J.; THOMAS, J.

180 Cal. 128

CAMPBELL v. SPARE et al. (L. A. 4800.)

(Supreme Court of California. March 5, 1919.)

1. LANDLORD AND TENANT 🔑200(2)—LEASE—ABROGATION OR MODIFICATION.

Correspondence and conduct relating to agreements to accept, and acceptance of, less than rent provided for in a lease, *held* not to show that parties intended that terms of original lease be impaired or abrogated.

2. LANDLORD AND TENANT 🔑200(2)—LEASE—MODIFICATION.

Mere agreements to accept, and acceptance, during dull periods, of less rent than provided by a lease, are not alone sufficient to establish change in written lease, so as to affect amount of future installments of rent.

Department 2.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Clinton Campbell against Frank J. Spare and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Oscar C. Mueller and Alfred Wright, both of Los Angeles (Wm. W. Lovett, Jr., of Los Angeles, of counsel), for appellants.

James, Smith & McCarthy, of Los Angeles, and Neil S. McCurdy, for respondent.

LENNON, J. In this action the plaintiff recovered a judgment in the sum of $2,329, found to be due to the plaintiff as the unpaid balance of rent reserved by the terms of a written lease entered into on January 29, 1913, between the plaintiff, as lessor, and the defendants Frank J. Spare and Anna E. Spare, his wife, as lessees. The demised premises consisted of a furnished apartment house in the city of Los Angeles known as the Campbellton, and the lease, which was to continue for a term of five years, prescribed as rental the sum of $675 a month, payable monthly in advance, from February 1, 1913, to and including January 31, 1914, and the sum of $700 a month, payable in advance, for the remainder of the term. The defendants T. L. Henderson, George J. Morgan, and F. Nutting were sureties on a bond in the sum of $2,500 conditioned for the faithful performance of the covenants of the lease. Substantially stated, the further facts of the case as revealed by the pleadings and proof are as follows:

The lessees took possession of the leased premises under the lease on the 1st day of February, 1913, and vacated them on August 10, 1914, without paying any rent for the months of June, July and August of that year. At the beginning of the term the lessees regularly made monthly payments of rent as provided in the lease up to and including the month of May, 1913, when they notified the plaintiff by letter addressed to him at Phœnix, Ariz., that they found "it utterly impossible to produce an income commensurate with the rent required by the terms of the lease," and were therefore "in the position of either continuing in the occupancy under the lease at a heavy loss * * * or surrendering possession," and the lessees, so the letter said, called the situation to the attention of the plaintiff, to the end that he might judge which he desired they should do. The letter assumed that the plaintiff appreciated the conditions which existed during that period of the year, and, following an assertion that the house was substantially vacant, concluded by saying:

> "We feel that it is more than right for us to ask that you lower the rent to such a reasonable amount which will enable us to meet it promptly at the time it is due."

The plaintiff on May 29, 1913, replied by letter that he had written his wife to call on the lessees "and talk matters over regarding the Campbellton." Accordingly, plaintiff's wife, who was then residing in Los Angeles for the summer, called upon the lessees, and as the result of oral negotiations an arrangement was entered into whereby she was to occupy an apartment of the leased premises, and the lessees were to pay whatever they could from month to month over and above their living expenses and the cost of operating the apartments. On October 10, 1913, the lessees mailed plaintiff a check in the sum of $350, which the letter accompanying stated was "sent in full for September." On October 24, 1913, the plaintiff acknowledged the receipt of the check and requested the lessees to "render * * * a statement of the receipts and expenditures for the month of September." On January 2, 1914, plaintiff wrote to the lessees, calling attention to the fact that he had not received the rent due for the preceding month of December, and also to remind the lessees that the terms of the lease provided "that this rent shall be paid in advance on the 1st of each month, and I must insist upon the payments being made promptly as provided." On April 30, 1914, the lessees wrote plaintiff as follows:

> "Los Angeles, Calif., April 30, 1914.
>
> "Mr. Clinton Campbell, Phoenix, Arizona—Dear Sir: Referring to the rent proposition: It is impossible to state at this time what can be done in the future, but can say that since the 1st of April we have had several empties, and at this writing have nine vacant apartments, which reduce the rent income $320. You may think these are a great many vacancies for this time of the year, but I can assure you that most of the apartment houses are about half empty. Several of the new apartment houses are unable to get any one to lease them, and those that are running are obliged to reduce their rents, so that we have had to do likewise.
>
> "We have had several people looking within

the last few days, and hope to land some of them.

"I had a real estate man here yesterday looking over the proposition, but it is all exchange and no cash, for land situated in the San Joaquin valley. I am still working on a sale of the property.

"Yours truly, F. J. Spare."

The plaintiff did not reply to this last letter, and on May 5, 1914, the lessees again wrote plaintiff as follows:

"Los Angeles, 5/5/14.

"Mr. Clinton Campbell, Phœnix, Arizona—Dear Sir: Not having had a reply to my letter of April 30th regarding the rent proposition, I would like to know what concession you are willing to make from April 1st. The net income for April did not exceed $400, and for May the rent income is not likely to exceed $700, unless we are able to rent some of our vacant apartments. Owing to other apartment houses reducing the rents, we have also been obliged to do so, making our rent income less.

"Kindly let me hear from you by return mail.

"Yours truly, F. J. Spare."

To this letter plaintiff replied as of May 7, 1914, acknowledging the receipt of it and the preceding letter, and declaring in effect that in so far as he was concerned neither letter seemed to need reply, and then proceeded to say:

> "I presume, from your explanation about vacancies, reduced rents, etc., that you desire that I make a reduction in rentals; you will remember that your original contract calls for a rental of $700 per month, and in many ways I think that I have made all the concessions that I want to, and, as I have said before, I must insist upon your getting your account to date."

This last letter from the plaintiff, notwithstanding its tenor and text, was not acknowledged nor directly replied to by the lessees, and on June 14, 1914, the defendant F. J. Spare wrote plaintiff, inclosing a check for $100 "in full for May rent," and expressing the regret "that business is not better," which brought a reply from plaintiff dated July 8, 1914, acknowledging the receipt of the "check for $100 on April account," and stating that the inscription thereon "in full for May rent" was erased by plaintiff, because he did not care to commit himself to an acceptance of that amount "in full settlement for that month." In addition to these letters of the parties, there were offered and received in evidence numerous receipts of the plaintiff and checks of the lessees accepted by plaintiff, evidencing the payment of sums varying in amounts from $150 to $500, all of which—receipts and checks—by express inscription purport to have been made, given, and accepted as evidencing payment in full of the rent for the particular month specified in each instance, commencing with the month of May, 1913, and covering each of the following months, ending with and including the month of March, 1914.

The foregoing facts constitute primarily the basis of appellants' contention that the dealings of the parties with regard to the lease of the premises operated as a modification of the original terms of the lease relative to the payment of rent reserved thereunder, to the extent that the lease itself was abandoned and the lessees' occupancy of the premises thereby and thereafter transformed into a tenancy from month to month. The inception of this contention is found in the arrangement which was entered into in the first instance by plaintiff's wife and the lessees, which it is claimed contemplated creating, and fixed, a modification of the terms of the lease, which, though orally made subsequently, became, by the parties performing pursuant to its terms, an executed agreement, and therefore binding upon and enforceable against both parties, despite the fact that the lease itself provided that it should "not be changed, altered, or modified, except by writing indorsed hereon and signed by the parties hereto."

We find nothing in the evidence which would have compelled the trial court to find and conclude that the initial arrangement was sought, intended, and understood by the parties to be a permanent modification of the terms of the lease, or that it eventuated into anything more than a mere temporary abatement of the rent from month to month, which was acceded to from time to time in response to the urgent and insistent importunities of the lessees. Clearly, the correspondence of the parties, considered in its entirety, cannot be taken as decisively indicating that the initial agreement was at its inception intended to extend beyond and control the situation for any greater length of time than might be necessary to temporarily tide the lessees over the slack summer months. To the contrary, that correspondence, we think, tends to show that the lessees understood the initial arrangement to be nothing more than a temporary concession; otherwise, why should they, as late as April and May, 1914, writing plaintiff, say:

> "Referring to the rent proposition. It is impossible to state at this time what can be done in the future. * * * What concessions are you willing to make from April 1st."

Then, again, there is the evidence of plaintiff's wife to the effect that at no time was there any discussion with her concerning a permanent reduction in the rent, and that she entered into the initial arrangement with the lessees "only because they said they were up against it; that the house was nearly empty, and wanted to know if we would do that for the summer months." The testimony of plaintiff's wife in the particular that the arrangement was only for the slack summer months is fortified in a measure by a letter of the lessee Anna Spare, dated November 20, 1913, to the plaintiff, wherein she said:

> "I arranged with Mrs. Campbell before she left to endeavor to pay a monthly rent of $400 during the winter months commencing with October providing the business justified."

[1, 2] Aside from the fact that the truth of the statement contained in this letter concerning a new arrangement for a fixed rental for the winter months was flatly denied by the testimony of the plaintiff's wife, and was therefore a controverted fact in the case, the letter itself not only falls short of supporting, but in a measure tends to defeat, the contention that the initial arrangement was intended to extend beyond certain months, and contemplated the permanent substitution of a varying sum in payment of the rentals to be derived from the contingent profits of the business, in lieu of the sum certain fixed and reserved as rentals by the terms of the lease. Driscoll v. Myers, 34 Cal. App. 490, 168 Pac. 145. The fair inference, it seems to us, to be drawn from the dealings and conduct of the parties is that they were desirous and willing to meet and overcome an embarrassing financial situation through the medium of temporary concessions, which were not intended or accepted by the parties as permanently impairing or abrogating the original terms of the lease.

The case of Raymond v. Krauskopf, 87 Iowa, 602, 54 N. W. 432, so strongly relied upon to support appellants' contention, does not seem to us to be in point. That case was an action to recover rent originally reserved in a written lease of land, which required the lessee to farm the land in a farmerlike manner, to plant corn by the 20th of May, and to deliver to the lessor by the 25th day of the following November 16 bushels of corn per acre. The lessee cultivated the land as required, but the growing crops thereon having been damaged by storms, the parties entered into a parol agreement whereby the lessee was to replant the leased land to corn, farm it to the best of his ability, and then deliver to the lessor "in full of all demands for rent" one-half of the replanted corn. In keeping with the new agreement the lessee replanted the land to corn, farmed it during the remainder of the season, and, of the 350 bushels of corn ultimately harvested, delivered about 200 bushels to the lessor in payment of the rent. The appeal was from a judgment entered upon a directed verdict in favor of the lessor in the sum of $204, which evidently represented the difference betwen the value of the delivered and accepted 200 bushels of corn and that of 480 bushels, which the lessor claimed was due him under the provisions of the written lease. It will be noted that in that case no question of a periodical reduction in the payment of rent was, as here, involved, and that when disposing of the appeal the court evidently proceeded upon the theory that the evidence showed, as it doubtless did, that the oral negotiations of the parties had ripened into a fully executed contract, and the only question really decided was whether or not the oral agreement was supported by a good consideration. In discussing that question, the court, while distinguishing, in effect, approved the case of Wheeler v. Baker, 59 Iowa, 86, 12 N. W. 767, where it was held that the rental terms of a written lease for the entire term were not abrogated, nor was the lessor bound to accept for the full term the reduced rental of certain months, because of the fact that the lessor had ex mera gratia accepted the reduced rental for a portion of the time.

The case of Sinnige v. Oswald, 170 Cal. 55, 148 Pac. 203, seems to be decisive of the point presented here. Its facts are practically parallel, in their essential features with the facts of the present case, and it was there said:

> "The finding that there was no change in the terms of the lease in the alleged particular of reducing the rent is sustained by the evidence. Concessions of the kind that were shown by the defendants, when supported by a consideration, are valid to the extent that a lower rent has been tendered and accepted as satisfaction in full of the instalments thus paid. They are not sufficient to establish a change in the written contract so as to affect the amount of future instalments of rent where no such change of terms has been made in writing."

The judgment is affirmed.

We concur: WILBUR, J.; MELVIN, J.

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180 Cal. 121

SAN FRANCISCO-OAKLAND TERMINAL RYS. v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8921.)

(Supreme Court of California. March 4, 1919.)

1. MASTER AND SERVANT 🔑417(7) — FINDINGS OF INDUSTRIAL ACCIDENT COMMISSION —REVIEW.

Findings of fact by the Industrial Accident Commission on conflicting evidence are conclusive on the courts.

2. MASTER AND SERVANT 🔑361 — WORKMEN'S COMPENSATION ACT—RELATION—"EMPLOYÉ."

Where one carrier employed a watchman at a crossing and another company operating a parallel track paid one-half of salary of watchman, who acted for both companies, relation of employer and employé, within the meaning of the Workmen's Compensation Act, existed between each railroad and watchman.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

3. MASTER AND SERVANT 🔑365—FEDERAL EMPLOYERS' LIABILITY ACT—JURISDICTION OF ACCIDENT COMMISSION.

Where interstate and intrastate carriers had parallel tracks, and each paid half of salary of a watchman at a crossing, and watchman was killed by a train of interstate carrier at a time when a train also came by for intrastate carrier, jurisdiction of state Industrial Accident Commission was not lost as to intrastate carrier by reason of federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665).

4. COMMERCE 🔑8(6) — WORKMEN'S COMPENSATION ACT—FEDERAL EMPLOYERS' LIABILITY LAW.

Jurisdiction of Industrial Accident Commission of state is excluded by federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) only as to such matters as are covered by the act.

5. MASTER AND SERVANT 🔑382 — WORKMEN'S COMPENSATION ACT—RELEASE.

Where watchman was killed while acting at a crossing for both an intrastate and an interstate carrier, and his wife executed a written release to interstate carrier in consideration of a certain amount, release, in so far as any claim under the Workmen's Compensation Act was concerned, was invalid as against the intrastate carrier, where it did not provide for payment of full compensation in accordance with provisions of act and was never approved by commission.

In Bank.

Proceedings under the Workmen's Compensation Act by Abigail M. Robinson to obtain compensation for the death of her husband, Washington L. Robinson, opposed by the San Francisco-Oakland Terminal Railways, employer. There was an award in favor of the applicant, and the employer brings certiorari. Award affirmed.

W. H. Smith, of Oakland, for petitioner.

Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in certiorari having for its purpose the annulment of an award in favor of Abigail M. Robinson against petitioner for death benefit and burial expense on account of the death of her husband, Washington L. Robinson, who was killed as the result of an accident occurring in the course of his employment and arising out of his employment as a crossing watchman at the crossing of Shattuck avenue and Bancroft way, in the city of Berkeley.

The proceeding before the commission was against both petitioner and the Southern Pacific Company, upon the theory that they were both the employers of deceased. The findings of the commission substantially declare that on January 20, 1918, deceased "was in the service, other than as an independent contractor, jointly of defendants * * * as a flagman at a certain street crossing"; that his duties in said employment were to warn and signal indiscriminately the operators of the trains of both defendants as to vehicles and pedestrians at or approaching said street crossing and to warn and signal pedestrians and the drivers of vehicles as to the approach at said crossing of the trains of both defendants; "that at the said time and place, while engaged in rendering service for both of said defendants, the employé sustained an injury, to wit, he was struck accidentally by a passing train of said Southern Pacific Company while engaged in flagging; that such injury arose out of and in the course of "his joint employment by said defendants" and was proximately caused thereby; "that said injury proximately caused death on the 23d day of January, 1918," and "that the earnings of the employé in said employment at said time were $45 per month, one-half whereof was paid by each defendant." It was further found that the system of the Southern Pacific Company at said crossing was "at all times engaged indistinguishably in interstate and suburban traffic, and therefore as to said defendant the employé was engaged in interstate commerce," with the result that as to the Southern Pacific Company the commission was without jurisdiction. The award therefore was made solely against petitioner.

We construe these findings as sufficiently declaring that at the time of the accident deceased was in the employ of both defendants, that at the time of the accident he was actually engaged in rendering service for both of the defendants, and that his injury arose out of and in the course of said employment while rendering such service. They sufficiently show the relation of employer and employé within the meaning of the "Workmen's Compensation, Insurance and Safety Act" (St. 1917, p. 831), which defines an employer as one "who has any person in service under any appointment or contract of hire, * * * express or implied, oral or written * * *" (section 7), and an employé as "every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire, * * * express or implied, oral or written * * *" (section 8), as well as under the general law.

It is earnestly urged that the evidence received by the commission fails to furnish any support for a conclusion that the relation of employer and employé existed between petitioner and deceased, or that deceased was injured while engaged in any service for petitioner. The situation in this connection was as follows:

Both petitioner and the Southern Pacific Company operated suburban electric lines to and through parts of Berkeley; the interstate character of the Southern Pacific Company being based on the fact that interstate passengers and freight, as well as United States mail, were carried on its trains. At and near the place of the accident the tracks of both companies are along Shattuck avenue, a street running in a northerly and southerly direction. Each company has two tracks, and the four are parallel, the two Southern Pacific Company tracks being on the westerly side of the avenue, and there being about 15 feet between the two sets of tracks. These tracks run along Shattuck avenue, across its intersection with Bancroft way, and then on along Shattuck avenue northerly. Just across this intersection, on the northerly side, is a stopping place or station for both systems. The evidence shows very clearly that, acceding to a request of the Berkeley authorities made for the purpose of giving protection to pedestrians and vehicles passing over the tracks of the two companies at certain street crossings, including that of Shattuck avenue and Bancroft way, the two companies had entered into an oral understanding several years before under which the Southern Pacific Company was to place crossing watchmen at such crossings, and bill one-half the wages of such watchmen to petitioner. This arrangement had been faithfully complied with from the time it was made up to and including the time of the accident, and the Southern Pacific Company had each month rendered its bill to petitioner for one-half the wages of each man so employed, and petitioner had each month paid such bill. At the time of the accident and for some weeks prior thereto deceased was the crossing watchman so installed at the Shattuck avenue-Bancroft way crossing. While the two systems of railroad were absolutely separate and distinct, the duties of these watchmen were absolutely the same as to each, and they were so instructed. But they were directly selected and employed by the Southern Pacific Company, were carried on the pay roll of that company for all of their wages, were directly paid all of their wages by that company, were under the supervision of that company in the performance of their duties, and that company alone exercised directly the power of discharge, though it was admitted that such power would be exercised as to any watchman whose discharge was insisted on by petitioner.

The accident occurred about 5:57 p. m. on January 20, 1918. Trains of both companies going north arrived at the Shattuck avenue-Bancroft way station about the same time; petitioner's train being a little ahead of the other. Deceased was standing near the west rail of the track of the Southern Pacific Company, on which the train of that company approached, facing east, apparently in the discharge of his duties as crossing watchman, and apparently looking in the direction of petitioner's train. The evidence is not entirely in accord as to the relative position of the trains at the moment of the accident, but in view of the findings we must consider it in the light most favorable to the claimant. According to some of the evidence, the trains came in practically together, the head of petitioner's train being only about half a car length ahead going "into the station," and stopped at the same time in that relative position. Deceased was apparently standing too near the Southern Pacific Company track, and was struck by the first car, and thus received his injury.

[1] The evidence is in such condition as to fairly warrant a conclusion that at the time of the accident deceased was actually engaged in his duties as crossing watchman with reference to the two trains which were then arriving, and so was actually engaged, as found by the commission, in rendering service, in the course of his employment, for both of the defendants. It is true that there was other evidence tending to show that petitioner's train had arrived earlier than indicated by the evidence above referred to, and that the duties of deceased in connection therewith had ended before the accident, but, upon the whole case, that was a question of fact for the commission, and its finding is conclusive in so far as the courts are concerned.

[2] We are also of the opinion that, upon the facts we have stated, the commission correctly held that deceased was in the employ of both companies, and that therefore the relation of employer and employé existed between deceased and petitioner. This appears to us to necessarily be the result of the arrangement between the companies and their course of conduct thereunder. The deceased was engaged to perform his service for both companies, and was in reality paid his wages by the two companies, each paying one-half. That he was selected for this service by the Southern Pacific Company, was placed on its pay roll as its employé, was under its supervision, direction, and control, and was given his wages by it, was simply the result of the arrangement between the two companies as to the method by which the thing contemplated should be done. In all this, including the contract of employment, the Southern Pacific Company was acting on behalf of petitioner as well as itself, and in no respect as an independent contractor. We cannot see, looking at the substance of the transaction, why petitioner and deceased did not fully measure up to the definitions

of employer and employé contained in our "Workmen's Compensation, Insurance, and Safety Act." That such is the situation under the general law to which it has been held "we must look" in determining such questions (see Employers' Liability, etc., Co. v. Industrial Accident Commission, 177 Pac. 273) is fully sustained by such cases as Vary v. B. C. R. & M. R. Co., 42 Iowa, 246, and Atlanta Coast Lines R. Co. v. Tredway's Adm'x, 120 Va. 735, 93 S. E. 560. None of the cases cited by petitioner is in point upon such facts as we have in this case.

[3, 4] Although petitioner is not a common carrier by rail engaged in interstate commerce, it is claimed that, if deceased was at the time of the accident rendering service for both petitioner and the Southern Pacific Company, which was engaged in interstate commerce, his serivce as to the latter being of an interstate character, that character must attach to the whole of his service, and thus, in view of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657–8665]) exclude the jurisdiction of the state commission, even as to the petitioner, which is not engaged in interstate commerce. This claim loses sight of the fact that the service as to each company, though confused in point of time of rendition, was absolutely separate and distinct in every other way. For one company he was doing one thing, and for the other company an entirely different and distinct thing, and his service for petitioner had no element of an interstate character. The claim further loses sight of the fact that the jurisdiction of the state commission is excluded by the federal Employers' Liability Law only as to such matters as are covered by the act, and necessarily the federal act cannot be held to affect the rights under the state law of an employé of a common carrier by railroad in no way engaged in interstate commerce, or the rights of his dependents in the event of his death, to obtain compensation under such state law on account of injuries or death occurring in the course of his employment by such carrier, and arising out of such employment.

[5] It is suggested, though not argued by petitioner in his briefs, that a release given by the claimant to the Southern Pacific Company had the effect of releasing petitioner. It appears that, prior to the commencement of this proceeding before the commission, the claimant, in consideration of $250 paid her by such company, executed a written release of the company from all claims and causes of action on account of the death of her husband. This amount was credited by the commission to petitioner in its final award, thereby reducing the full compensation of $1,539 by $250. The release did not "provide for the payment of full compensation in accordance with the provisions of" the act, and it was never "approved by the commission." In so far as any claim under the Workmen's Compensation, Insurance, and Safety Act is concerned, it was therefore invalid (section 27), and it is material only in considering any claim that may be asserted against the Southern Pacific Company under the federal Employers' Liability Law.

No written notice was served on petitioner within 30 days after the injury to Robinson stating name and address of person injured, etc., as required by section 15 of the Compensation Act. That section provides, however, "that the failure to give any such notice * * * shall not be a bar to recovery under this act if it is found as a fact in the proceedings for the collection of the claim that there was no intention to mislead or prejudice the employer in making his defense, and that he was not in fact so misled or prejudiced thereby." The commission so found in this proceeding. Section 19 (d) of the act provides that "prejudice to the employer by failure of the employé to give notice, as required by section fifteen" is an affirmative defense, and that "the burden of proof shall rest upon the employer to establish them." In the light of these provisions it certainly cannot be held that the finding of the commission is without sufficient support in the evidence.

What we have said disposes of all points in the briefs as to which discussion is necessary.

The award is affirmed.

We concur: SHAW, J.; MELVIN, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; OLNEY, J.

176 Cal. 771

In re SEILER'S ESTATE.

(Supreme Court of California. Jan. 17, 1918.)

On motion for hearing in banc. Hearing denied.

For departmental opinion, see 176 Cal. 775, 170 Pac. 1138.

THE COURT. In denying the petition for a rehearing of this case in banc, the court deems it advisable to say that the declaration in the department opinion that the writing accompanying the deposit of money in the Bank of Italy was one creating a trust was not intended as a ruling that any trust created or attempted to be created by said writing is not open to attack in any other proceeding in which its efficacy may properly come before a court. This was a will contest, and appellant's counsel emphatically contended that the writing in question was on its face a will. It was in answer to this contention that the department opinion pronounced it to be on its face something quite different. The question of the sufficiency of the trust sought to be created was a matter not involved. The only question was whether or not the writing was testamentary, and the department correctly declared that it was not.

SAN PEDRO, L. A. & S. L. R. CO. v. CITY OF LOS ANGELES (two cases).

(L. A. 4504, 4600.)

(Supreme Court of California. Aug. 12, 1918.)

1. APPEAL AND ERROR ⚷1097(1) — SUBSEQUENT APPEAL—LAW OF THE CASE.

Where judgment was given for defendant on sustaining demurrer to the complaint, and reversed on appeal, and on second trial all the questions remained the same, the court on second appeal was bound by the conclusions expressed in the prior opinion, which constituted the law of the case.

2. COURTS ⚷90(6)—PRECEDENTS.

Where two actions involving same facts and subject-matter were brought by one plaintiff against the one defendant, and in one of them, on appeal from an order sustaining a demurrer, the judgment was reversed, such judgment was not necessarily conclusive on appeal of the other case, if ruling was wrong; no property rights having been acquired on the faith of that ruling.

Melvin, J., dissenting.

In Bank.

Appeals from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Two actions by the San Pedro, Los Angeles & Salt Lake Railroad Company against the City of Los Angeles. Judgment for plaintiff in each case, and defendant appeals. Judgment in the first case affirmed, and in the second reversed, with directions.

Albert Lee Stephens, City Atty., Charles S. Burnell, Asst. City Atty., and Jess E. Stephens, Deputy City Atty., all of Los Angeles, for appellant.

A. S. Halsted, W. F. Palmer, W. W. Peck, Fred E. Pettit, Jr., and James E. Kelby, all of Los Angeles, for respondent.

SLOSS, J. The above-entitled actions were brought to recover from the city of Los Angeles certain taxes paid under protest. In each, judgment went in favor of the plaintiff, and the defendant appeals. The facts of the two cases are substantially the same, and the appeals are submitted on a single set of briefs. The litigation in L. A. No. 4504 has, however, had a prior history, which requires a disposition of this case upon considerations other than those governing L. A. No. 4600.

[1] This is the second appeal in L. A. No. 4504. Judgment was originally given in favor of the defendant on the sustaining of its demurrer to plaintiff's second amended complaint, and on appeal that judgment was reversed by Department 2 of this court. San Pedro, etc., Co. v. Los Angeles, 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991. In accord with the direction of this court, the court below overruled the demurrer, and permitted the defendant to answer. Upon trial, it was found that all the averments of the plaintiff's complaint were true, and that certain allegations of the answer were true. There is, however, no claim that the allegations so set up by way of defense affect the determination of the legal questions involved, which remain precisely the same as those presented and decided upon the first appeal. We are therefore, in L. A. No. 4504, bound by the conclusions expressed in the opinion heretofore rendered. Where, upon successive appeals, no difference in the facts appears, this court has consistently followed the rule of "the law of the case," a rule founded on the simple principle that "this court has no appellate jurisdiction over its own judgments, and such judgment, therefore, constitutes an estoppel of record of the highest character, and is conclusive between the parties as to the matters adjudged." Klauber v. San Diego St. Car Co., 98 Cal. 105, 107, 32 Pac. 876. The first of the judgments appealed from must accordingly be affirmed.

[2] On the appeal in L. A. No. 4600 we are, however, at liberty to consider the appellant's contention that the former decision of this court was erroneous, and that it should not be followed. That decision has, to be sure, the persuasive force attaching to any deliberate expression of the court. No property rights appear, however, to have been acquired on the faith of the ruling, and if, upon further consideration, we should feel satisfied that a wrong conclusion was reached, it is right and proper that we should so declare, to the end that the true rule, as we now see it, should be established and enforced.

The essential facts are stated in the opening paragraph of the opinion in the earlier case:

> "Appellant is the tenant of certain lands under a lease from the city of Long Beach, which lease acquires validity through a ratifying act of the Legislature. It is, in legal contemplation, a lease by the state of certain of its tide and submerged lands. The city of Los Angeles assessed this leasehold and levied a tax thereon which by appellant [plaintiff] was paid under protest. In due time appellant [plaintiff] brought its action for the recovery of the tax."

The single question, as stated in the opinion to which we have referred, is "whether under the laws of this state it is contemplated that leasehold interests, such as this, may be taxed to the lessees." Considering this question, the department held, in effect, that while a leasehold is, "under certain circumstances and for certain purposes," property, it is not property within the meaning of our fiscal laws.

[1][That a leasehold interest is property is a proposition not open to dispute. "The thing of which there may be ownership is called 'property.'" Civ. Code, § 654. Interests in real property are called "estates." Civ. Code, § 701. They are classified by section 761 of the same Code as (1) estates of inheritance; (2) estates for life; (3) estates for years; (4) estates at will. The interest of the plaintiff under the lease from the state is an estate for years. There may be ownership of such estate. It is therefore property.

[Is it property for the purposes of taxation? Our Constitution declares (article 13, § 1): "All property in the state, except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. * * *" The section exempts property belonging to the state, and certain other kinds of property, not including interests like the one here involved. With respect to all property not so exempted, the provision of the Constitution that it shall be taxed in proportion to its value, to be ascertained as provided by law, is direct and mandatory. Const. art. 1, § 22. The provision for the taxation of all property not exempt is repeated in section 3607 of the Political Code.

[The constitutional provision is not self-executing. It imposes upon the Legislature the duty of providing a mode whereby to ascertain the value of the property to be taxed. McHenry v. Downer, 116 Cal. 20, 24, 47 Pac. 779, 45 L. R. A. 737. See De Witt v. Hays, 2 Cal. 463, 468, 56 Am. Dec. 352. If, then, the Legislature had not provided any mode for the assessment of leasehold estates, it might well be said, as was said in the former opinion, that such an estate is not "property for the purposes of taxation" under our fiscal laws. But there does not appear to be any such deficiency in our revenue laws. Section 3617 of the Political Code declares that the term "property" includes "all matters and things, real, personal, and mixed, capable of private ownership," and that the term "real estate" includes "the possession of, claim to, ownership of, or right to the possession of land." A leasehold estate carries a right to the possession of the land leased. Civ. Code, § 819. It is therefore real property within the above definition. Other sections of the Political Code provide for the listing of real property, the description and valuation thereof, and contain a complete scheme for the assessment of the property, and the levy and collection of the taxes. This scheme is as readily adaptable to an estate for years as to a freehold estate.

[It is true that the Code makes no specific provision for separate assessments of leasehold and reversion to the lessee and the owner of the fee, respectively. The usual procedure in this state, as elsewhere, has been to assess the entire value of the land to the owner of the reversion. Such assessment covers the value of the leasehold as well as of the reversionary interest, the sum of the two being comprised in the value of a complete ownership of the land. Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. (N. S.) 211. The state thus receives the tax upon every interest in the land, and the requirement of the Constitution, and of section 3607 of the Political Code, is satisfied. Where, however, the state owns the reversion, its reversionary interest, like all property owned by it, is exempt from taxation. In such a case it cannot be said that the private property right of the lessee is taxed through the medium of the taxation of the interest of the owner. Still less can it properly be said that because the interest of the state is not taxable, the private owner of a leasehold interest should be exempt from paying taxes upon the property that is owned by him.

[An illuminating discussion of the question is found in Trimble v. Seattle, 231 U. S. 683, 34 Sup. Ct. 218, 58 L. Ed. 435, a case which was not called to the attention of the Department on the former appeal. The Supreme Court of Washington had upheld an assessment on certain leaseholds of tidelands owned by the state. The assessment of the leaseholds was authorized by statutes enacted after the execution of the leases by the state. A writ of error was granted to review the judgment of the state court. The plaintiff in error contended that the leases imported an obligation that the lessor should pay all taxes and assessments, and that the federal Constitution prohibited the impairment of this contract by a subsequent law. The Supreme Court of the United States held that no such obligation was included in the lease, saying:

> ["In ordinary cases the whole property is taxed and which party shall bear the burden is not a matter of public concern. But when the state makes the lease, the supposed obligation would be an obligation not to tax—a restriction of public import not lightly to be imposed [citing cases]. It is urged that to deny the state's obligation discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the prac-

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[1] The portion of the opinion in brackets was adopted and included as a part of a rehearing opinion rendered in Case No. 4600. The headnotes applicable to it are set forth as a part of the rehearing opinion. See 179 Pac. 393.

tice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee. When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property and therefore is subject to being taxed."

[In Graciosa Oil Company v. Santa Barbara, supra, a separate assessment of a leasehold interest to the lessee was upheld. The case was discussed at some length in the opinion on the former appeal in the first of the cases before us, and it was pointed out that the lease in the Graciosa Case carried with it a right to take a part of the substance of the land itself. There is, no doubt, a distinction between the grant of such right and an "ordinary lease for usufructuary purposes," and it may be conceded that the decision in the Graciosa Case is not a controlling authority in favor of the appellant's contention here. On the other hand, that decision does not, as suggested by the former opinion dealing with the rights of the parties to the present appeals, support the respondent's position that its leasehold interest is not taxable. What was said in Graciosa Oil Company v. Santa Barbara regarding the mode of taxing property leased by one private individual to another had no reference to a case like this, where the lessor is a governmental agency whose property is exempt from taxation. The opinion fully recognizes that, in the usual case, the assessment to the owner of the fee includes the value of both the reversion and the leasehold interest, and that, under such conditions, both interests are assessed, and the mandate of the Constitution is followed.

[The principle that a possessory right in public land is private property, and that it may be assessed for purposes of taxation to the person in possession, although in point of law he may have no right as against the state or government owning the land, has long been settled in this state. People v. Shearer, 30 Cal. 646, 655; People v. Frisbie, 31 Cal. 146; People v. Cohen, 31 Cal. 210. The first two of these cases are referred to in the decision of the first appeal in San Pedro, etc., R. Co. v. Los Angeles, and they are sought to be distinguished upon the ground that the possession of the claimant was one designed to ripen into an ownership of the fee, under the land laws of the United States. But a careful examination will show that this ground of distinction is not tenable. In the Shearer Case the court pointed out that the occupant had not made the payment which was necessary to vest in him any legal or equitable right as against the government. He was, however, in possession, and his right as possessor was held to be property subject to taxation. The court said:

> ["The possession itself of the public lands and the improvements thereon, whether by naked trespassers, or those who claim in addition a right of pre-emption, as to everybody except the United States, have always in California, and in most, if not all of the new states, been regarded as valuable property interests. The transfers of such possession and improvements have always been held to constitute a valuable consideration for a promise. The possessors often derive and enjoy large revenues from them. Contracts for such possession, and rights growing out of them, are constantly recognized, protected, and enforced by the courts, and, in this state, a very large share of the litigation in the courts maintained by means arising from taxation grows out of this very class of rights. * * * Such possession of the public lands, and the improvements put upon them, are therefore, recognized and protected as a valuable species of property in the possessor."

[It was further said that these possessions "exist wholly independent of pre-emption laws, without any pre-emption right or intention to claim such right, and always anterior to the existence of those rights. * * * And this property is property in the citizen or inhabitant having possession, and not in the United States. This property, so recognized and protected, in our judgment is clearly not exempt from taxation." Page 660. And accordingly it was held that such possessory rights should be assessed and that "the value of the possessory right should be put down and not the value of the land itself," as the basis of the assessment for taxation. A mandate was issued to the assessor to compel him to do so.

[This conclusion was reached regardless of whether the person in possession was intending to claim as pre-emptioner or homesteader, or whether his possession could ever have ripened into a fee. Nor was the decision in People v. Frisbie put upon any such theory. Each of these cases was decided upon the ground that possession of land, with or without right or expectation of right or title from the government, was a species of property in the possessor, and as such subject to taxation. The inability to tax the fee vested in the public is therefore no obstacle to the taxation of the possessory right, whatever its nature may be. If a bare possession by the sufferance of the real owner is subject to taxation where the estate of the real owner is exempt because the state or the United States is such real owner, it is impossible to uphold the proposition that the estate of one holding a valid estate for years under lease from the state is not subject to taxation. That estate is not included in any assessment to the landlord or owner of the estate in remainder.

[We do not agree with the suggestion made in the closing paragraph of the decision in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N.

S.) 991, that a holding that the plaintiff's leasehold interest is subject to assessment and taxation would make void every assessment against the owner of land subject to a lease without an assessment against the lessee of the value of his leasehold. As has already been said, in the ordinary case the value of the leasehold is included in the value assessed to the owner of the fee. What the Constitution and the law require is that all property shall be taxed in proportion to its value. And this is done when the whole value of the land is assessed to the owner of the fee. Section 3628 of the Political Code provides that no mistake in the name of the owner of real property shall render the assessment thereof invalid. The validity of the assessment would not, therefore, be affected by the fact that the values of the several estates in the land are united in a single assessment in the name of the owner of one of such interests.]

We conclude, therefore, that the department decision in San Pedro, etc., R. Co. v. Los Angeles, 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, should not be followed.

In L. A. No. 4504 the judgment is affirmed.

In L. A. No. 4600 the judgment is reversed, with directions to the trial court to enter judgment on the findings in favor of the defendant.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; RICHARDS, Judge pro tem.; LORIGAN, J.

MELVIN, J. I dissent from order of reversal in the case designated as L. A. No. 4600, and adhere to the views expressed in the opinion in San Pedro, etc., Co. v. Los Angeles, 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, which has been the declared law of this state upon this subject for more than four years. It seems to me highly probable that property rights have been acquired under the rule announced in that case and in reliance thereon. Moreover, I believe that the opinion delivered in Department and so long unquestioned is in accord with the better reason and the weight of authority.

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180 Cal. 18

SAN PEDRO, L. A. & S. L. R. CO. v. CITY OF LOS ANGELES. (L. A. 4600.)

(Supreme Court of California. Feb. 25, 1919.)

1. TAXATION 🔑178 — "PROPERTY" — TIDELANDS LEASED FROM STATE — "ESTATE FOR YEARS."

Under Civ. Code, § 654, defining "property" as that of which there may be ownership, section 701, describing interests in real property as estates, and section 761, classifying estates as those of inheritance, for life, for years, and at will, the interest of one under lease of tidelands from the state is an "estate for years," and is property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estate for Years; Property.]

2. TAXATION 🔑49 — CONSTITUTIONAL PROVISIONS—TAXATION ACCORDING TO VALUE.

Const. art. 1, § 22, declaring that all property shall be taxed in proportion to its value, is direct and mandatory.

3. CONSTITUTIONAL LAW 🔑29 — SELF-EXECUTING PROVISIONS — TAXATION ACCORDING TO VALUE.

Const. art. 1, § 22, and article 13, § 1, requiring all property to be taxed in proportion to its value, are not self-executing, but impose on the Legislature the duty of providing a mode to ascertain the value of the property to be taxed.

4. TAXATION 🔑64—NATURE OF PROPERTY—LEASEHOLD ESTATE—"REAL PROPERTY."

Under Pol. Code, § 3617, defining property as all things capable of private ownership, and Civ. Code, § 819, providing that a leasehold estate carries a right to possession of the land, a leasehold in tide and submerged lands from the state is "real property," for the purposes of taxation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

5. TAXATION 🔑338—MODE OF ASSESSMENT—FEE AND LEASEHOLD.

The requirement of Pol. Code, § 3607, that all property shall be taxed, is satisfied as to land in which there is a fee and a leasehold, by the taxation of the entire value of the fee; but if the state owns the fee, and the land is leased, the leasehold may be taxed apart from the fee.

6. TAXATION 🔑178 — PROPERTY SUBJECT —POSSESSORY RIGHT IN PUBLIC LAND — "PRIVATE PROPERTY."

A possessory right in public land is "private property," and may be assessed for purposes of taxation to the person in possession, although in point of law he may have no right as against the state, which owns the land.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Private Property.]

7. TAXATION 🔑338 — SEPARATE ASSESSMENT OF FEE AND LEASEHOLD.

A ruling that, when state-owned property is leased, the leasehold is subject to taxation, does not, in view of Pol. Code, § 3628, make void every levy of a tax against private-owned property which is leased, although there is no separate assessment against the leasehold.

8. TAXATION 🔑65—"IMPROVEMENT."

Where a lessee of tide and submerged land builds a stone retaining wall and fills in submerged land, by depositing thereon earth and sand, raising level of surface above line of high tide, fill so made is not an "improvement," within meaning of Pol. Code, § 3617, relating to taxation of improvements.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement.]

9. Taxation 🔑441 — Assessment — Partial Validity.

Where an assessor includes and blends in an assessment property not legally assessable, the entire assessment is void.

Melvin, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the San Pedro, Los Angeles & Salt Lake Railroad Company against the City of Los Angeles. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

Albert Lee Stephens, City Atty., C. S. Burnell, Asst. City Atty., and Jess E. Stephens, Deputy City Atty., all of Los Angeles, for appellant.

E. E. Bennett, Fred E. Pettit, Jr., and James E. Kelby, all of Los Angeles (A. S. Halsted and Dana T. Smith, both of Los Angeles, of counsel), for respondent.

SHAW, Judge pro tem. The plaintiff is lessee of certain tidelands situated in the city of Los Angeles and belonging to the state. The city assessed this leasehold estate and levied a tax thereon, which plaintiff paid under protest and in due time brought this action to recover the same. Judgment went for plaintiff, from which the defendant appealed.

On a hearing heretofore had of the case, it was considered in connection with L. A. No. 4504, entitled San Pedro, Los Angeles & Salt Lake R. R. Co. v. City of Los Angeles, 179 Pac. 390, which, as to the power of the municipality to assess a leasehold estate in such property for the purpose of levying a tax thereon, involved the same questions. The latter case, however, had been before the court on a former appeal prosecuted by the plaintiff from a judgment in favor of the city upon sustaining its demurrer to the complaint, with the result that the judgment was reversed. See San Pedro, etc., R. R. Co. v. City of Los Angeles, 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991. Upon going down of the remittitur the city was permitted to file an answer, and upon trial a judgment was entered in favor of the plaintiff, from which the city appealed. The hearing of the two cases thus considered together resulted in an affirmance of L. A. No. 4504, based solely upon the ground that the former decision thereof, as reported in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, constituted the law of the case. As to the case now under consideration, however, the court took a different view of the question involved, and reversed the judgment rendered against the city. Thereafter the petition of the city of Los Angeles, as appellant in L. A. No. 4504, for a rehearing, was denied, thus finally disposing of the subject of litigation involved therein. A like petition for a rehearing was presented by the plaintiff in L. A. No. 4600, being the case now under consideration, which was granted, upon the sole ground that the court had failed to consider the question as to the assessment made of certain alleged improvements upon the leasehold. By an order made, granting said rehearing, the court restricted further argument to the question alone of the validity of the assessment of the alleged improvements. See Minutes, September 11, 1918, 56 Cal. Dec. No. 2969.

The question to which the court on the former consideration of the case addressed itself and to which the chief argument of counsel was directed, was whether the laws of this state authorize the taxation of leasehold interests in the tidelands of the state. Upon this point, holding that municipalities have such power, we adopt the opinion of Mr. Justice Sloss, filed at the former hearing of the appeal, which is as follows:

[1] "That a leasehold interest is property is a proposition not open to dispute. 'The thing of which there may be ownership is called "property."' Civ. Code, § 654. Interests in real property are called 'estates.' Civ. Code, § 701. They are classified by section 761 of the same Code as (1) estates of inheritance; (2) estates for life; (3) estates for years; (4) estates at will. The interest of the plaintiff under the lease from the state is an estate for years. There may be ownership of such estate. It is therefore property.

[2] "Is it property for the purposes of taxation? Our Constitution declares (article 13, § 1) 'All property in the state, except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. * * *' The section exempts property belonging to the state, and certain other kinds of property, not including interests like the one here involved. With respect to all property not so exempted, the provision of the Constitution that it shall be taxed in proportion to its value, to be ascertained as provided by law, is direct and mandatory. Const. art. 1, § 22. The provision for the taxation of all property not exempt is repeated in section 3607 of the Political Code.

[3, 4] "The constitutional provision is not self-executing. It imposes upon the Legislature the duty of providing a mode whereby to ascertain the value of the property to be taxed. McHenry v. Downer, 116 Cal. 20, 24, 47 Pac. 779, 45 L. R. A. 737. See De Witt v. Hays, 2 Cal. 463, 468, 56 Am. Dec. 352. If, then, the Legislature had not provided any mode for the assessment of leasehold estates, it might well be said, as was said in the former opinion, that

such an estate is not 'property for the purposes of taxation' under our fiscal laws. But there does not appear to be any such deficiency in our revenue laws. Section 3617 of the Political Code declares that the term 'property' includes 'all matters and things, real, personal, and mixed, capable of private ownership,' and that the term 'real estate' includes 'the possession of, claim to, ownership of, or right to the possession of land.' A leasehold estate carries a right to the possession of the land leased. Civ. Code, § 819. It is therefore real property within the above definition. Other sections of the Political Code provide for the listing of real property, the description and valuation thereof, and contain a complete scheme for the assessment of the property, and the levy and collection of the taxes. This scheme is as readily adaptable to an estate for years as to a freehold estate.

[5] "It is true that the Code makes no specific provision for separate assessments of leasehold and reversion to the lessee and the owner of the fee, respectively. The usual procedure in this state, as elsewhere, has been to assess the entire value of the land to the owner of the reversion. Such assessment covers the value of the leasehold as well as of the reversionary interest, the sum of the two being comprised in the value of a complete ownership of the land. Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. (N. S.) 211. The state thus receives the tax upon every interest in the land, and the requirement of the Constitution, and of section 3607 of the Political Code, is satisfied. Where, however, the state owns the reversion, its reversionary interest, like all property owned by it, is exempt from taxation. In such a case it cannot be said that the private property right of the lessee is taxed through the medium of the taxation of the interest of the owner. Still less can it properly be said that because the interest of the state is not taxable, the private owner of a leasehold interest should be exempt from paying taxes upon the property that is owned by him.

"An illuminating discussion of the question is found in Trimble v. Seattle, 231 U. S. 683, 34 Sup. Ct. 218, 58 L. Ed. 435, a case which was not called to the attention of the Department on the former appeal. The Supreme Court of Washington had upheld an assessment on certain leaseholds of tidelands owned by the state. The assessment of the leaseholds was authorized by statutes enacted after the execution of the leases by the state. A writ of error was granted to review the judgment of the state court. The plaintiff in error contended that the leases imported an obligation that the lessor should pay all taxes and assessments, and that the federal Constitution prohibited the impairment of this contract by a subsequent law. The Supreme Court of the United States held that no such obligation was included in the lease, saying:

"'In ordinary cases the whole property is taxed and which party shall bear the burden is not a matter of public concern. But when the states makes the lease, the supposed obligation would be an obligation not to tax—a restriction of public import not lightly to be imposed [citing cases]. It is urged that to deny the state's obligation discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the practice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee. When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property and therefore is subject to being taxed.'

"In Graciosa Oil Company v. Santa Barbara, supra, a separate assessment of a leasehold interest to the lessee was upheld. The case was discussed at some length in the opinion on the former appeal in the first of the cases before us, and it was pointed out that the lease in the Graciosa Case carried with it a right to take a part of the substance of the land itself. There is, no doubt, a distinction between the grant of such right and an 'ordinary lease for usufructuary purposes,' and it may be conceded that the decision in the Graciosa Case is not a controlling authority in favor of the appellant's contention here. On the other hand, that decision does not, as suggested by the former opinion dealing with the rights of the parties to the present appeals, support the respondent's position that its leasehold interest is not taxable. What was said in Graciosa Oil Company v. Santa Barbara regarding the mode of taxing property leased by one private individual to another had no reference to a case like this, where the lessor is a governmental agency whose property is exempt from taxation. The opinion fully recognizes that, in the usual case, the assessment to the owner of the fee includes the value of both the reversion and the leasehold interest, and that, under such conditions, both interests are assessed, and the mandate of the Constitution is followed.

[6] "The principle that a possessory right in public land is private property, and that it may be assessed for purposes of taxation to the person in possession, although in point of law he may have no right as against the state or government owning the land, has long been settled in this state. People v. Shearer, 30 Cal. 646, 655; People v. Frisbie, 31 Cal. 146; People v. Cohen, 31 Cal. 210. The first two of these cases are referred to in the decision of the first appeal in San Pedro, etc., R. Co. v. Los Angeles, and they are sought to be distinguished upon the ground that the possession of the claimant was one designed to ripen into an ownership of the fee, under the land laws of the United States. But a careful examination will show that this ground of distinction is not tenable. In the Shearer Case the court pointed out that the occupant had not made the payment which was necessary to vest in him any legal or equitable right as against the government. He was, however, in possession, and his right as possessor was held to be property subject to taxation. The court said: 'The possession itself of the public lands and the improvements thereon, whether by naked trespassers, or those who claim in addition a right of pre-emption, as to everybody except the United States, have always in California, and in most, if not all of the new states, been regarded as valuable prop-

erty interests. The transfers of such possession and improvements have always been held to constitute a valuable consideration for a promise. The possessors often derive and enjoy large revenues from them. Contracts for such possession, and rights growing out of them, are constantly recognized, protected, and enforced by the courts, and, in this state, a very large share of the litigation in the courts maintained by means arising from taxation grows out of this very class of rights. * * * Such possession of the public lands, and the improvements put upon them, are therefore recognized and protected as a valuable species of property in the possessor.' It was further said that these possessions 'exist wholly independent of preemption laws, without any pre-emption right or intention to claim such right, and always anterior to the existence of those rights. * * * And this property is property in the citizen or inhabitant having possession, and not in the United States. This property, so recognized and protected, in our judgment is clearly not exempt from taxation.' Page 660. And accordingly it was held that such possessory rights should be assessed and that 'the value of the possessory right should be put down and not the value of the land itself,' as the basis of the assessment for taxation. A mandate was issued to the assessor to compel him to do so.

"This conclusion was reached regardless of whether the person in possession was intending to claim as pre-emptioner or homesteader, or whether his possession could ever have ripened into a fee. Nor was the decision in People v. Frisbie put upon any such theory. Each of these cases was decided upon the ground that possession of land, with or without right or expectation of right or title from the government, was a species of property in the possessor, and as such subject to taxation. The inability to tax the fee vested in the public is therefore no obstacle to the taxation of the possessory right, whatever its nature may be. If a bare possession by the sufferance of the real owner is subject to taxation where the estate of the real owner is exempt because the state or the United States is such real owner, it is impossible to uphold the proposition that the estate of one holding a valid estate for years under lease from the state is not subject to taxation. That estate is not included in any assessment to the landlord or owner of the estate in remainder.

[7] "We do not agree with the suggestion made in the closing paragraph of the decision in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, that a holding that the plaintiff's leasehold interest is subject to assessment and taxation would make void every assessment against the owner of land subject to a lease without an assessment against the lessee of the value of his leasehold. As has already been said, in the ordinary case the value of the leasehold is included in the value assessed to the owner of the fee. What the Constitution and the law require is that all property shall be taxed in proportion to its value. And this is done when the whole value of the land is assessed to the owner of the fee. Section 3628 of the Political Code provides that no mistake in the name of the owner of real property shall render the assessment thereof invalid. The validity of the assessment would not, therefore, be affected by the fact that the values of the several estates in the land are united in a single assessment in the name of the owner of one of such interests."

Upon the views thus expressed, it follows that the decision in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, must be deemed overruled.

[8] The improvements upon the leasehold were assessed at the sum of $92,850, upon which a tax of $1,151.35 was levied. As described in the assessment book, the property assessed was:

"Improvement on a tract of land leased from Long Beach city to S. P., L. A. & S. L. R. R. Co., dated October 2, 1905, for 46 years, for land and water rights in 61.90 acres, being that part of fill lying south of Terminal Island and north of strip reserved by city, in section 18, T. 5 S., R. 13 W."

The court found, as alleged in the answer of defendant, that after the execution of said lease, but prior to the assessment, plaintiff constructed a breakwater of rocks upon said premises and along the southerly line thereof, and filled or caused to be filled with earth and sand the lands lying between the mainland and said breakwater, by dredging in such manner that all of the lands described in said lease were at the time of such assessment no longer submerged, but dry lands lying above the line of high water. It thus appears that the improvements consisted of a stone retaining wall or breakwater built of rock and the filling in of the submerged land by depositing thereon earth and sand to a depth or thickness sufficient to raise the level of the surface above the line of high tide. In its supplemental brief, counsel for the city, which is the appellant here, concede that respondent is correct in its contention that the fill so made upon the land is not an improvement within the meaning of section 3617, Political Code, which defines improvements as "all buildings, structures, fixtures, fences and improvements erected upon or affixed to the land, except telephone and telegraph lines." We are in full accord with this agreed view of the subject of the parties. The fill was not an "improvement erected or affixed to the land," but, when made, was a part of the realty; indeed, it was the land itself, the surface of which was changed by bringing it to a higher grade. Surely it could not be said the tenant would be entitled to remove this fill at the expiration of the lease by virtue of a provision contained therein to the effect that it might remove all improvements made. In the case of Kern Valley, etc., Co. v. County of Kern, 137 Cal. 511, 70 Pac. 476, the court had under consideration the question as to whether the embankments and levees constructed along the margin of a canal constituted an improvement within the meaning of section 3617, Political Code, or was a part of the canal. The court said:

"We do not think this definition [section 3617] can be said to include embankments or banks forming the margin of the canal, and it was therefore proper to include the levees as part of the canal."

So here, we think the fill was not an improvement within the meaning of the section, but when made constituted the realty itself, the fee of which was in the state, and hence not subject to assessment.

[9] While appellant concedes the fill is not subject to assessment, it insists that as an abstract proposition of law the breakwater constructed of rock is an improvement within the meaning of section 3617, and as such assessable for taxation. It is unnecessary to determine such question. The assessment was not merely for improvements upon the leasehold; hence we can indulge in no presumption that the assessor in making the assessment included therein only such property as was legally assessable. Western Union Tel. Co. v. Los Angeles, 160 Cal. 124, 116 Pac. 564. It conclusively appears that the breakwater was not separately assessed, but included in the assessment with the fill with which unlawful assessment it is indivisible. Therefore, conceding the breakwater to be assessable, the assessment thereof, as shown by the record, is so blended with the assessment of the fill that it renders the entire assessment void. People of the State of California v. Central Pacific R. R. Co. [127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150] and County of Santa Clara v. Southern Pacific Co., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118. "If the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal." California v. Central Pacific R. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150. Indeed, appellant recognizes this fact and concedes "that the judgment should be sustained in so far as the assessment upon improvements is concerned."

The judgment, in so far as it declares the assessment upon the improvements void, is affirmed, and in so far as it in effect adjudges the assessment of the leasehold estate void, is reversed, and the trial court is directed to modify the judgment in accordance herewith.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; RICHARDS, Judge pro tem.

MELVIN, J. I dissent from that part of the foregoing opinion which readopts the opinion of Mr. Justice Sloss filed at the former hearing of the appeals, and I adhere to the views expressed in the opinion in San Pedro, etc., R. R. Co. v. Los Angeles, 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, which has been the declared law of this state upon this subject for more than four years. That property rights have been acquired under the rule announced in that case and in reliance thereon seems to me to be without the possibility of a doubt. Whether the state or its mandatories charge a lessee additional rental under the guise of a tax or merely by arbitrarily increasing the demand and still calling the exaction rent makes no difference, it seems to me. It is in either case a violation of the lessee's contract to enjoy land exempt from taxation for a certain stipulated payment. It cannot justly be said, therefore, it seems to me, that no property rights appear to have been acquired upon the faith of the ruling in the former appeal in L. A. No. 4504. The arguments which impel the application of the rule of "law of the case" in that appeal seem to me equally to apply to this. The Constitution and statutes as interpreted by this court form a part of every contract, and I cannot see how this court may now violate the obligation of one contract made and partly performed on the faith of an interpretation now held to be erroneous, while at the same time an exactly similar contract is pronounced inviolable because of "the law of the case."

One reason for the "rule of property" is the presumed dependence upon judicial decisions. In 11 Cyc. 755, the principle is thus stated:

> "Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of stare decisis, to adhere to such decisions without regard to how it might be inclined to decide if the question were new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable. So such a rule controls as to decisions involving questions of constitutional law and the construction and operation of statutes."

The text is supported by a wealth of citation, including such cases as Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813, and Smith v. McDonald, 42 Cal. 484. That this rule should find application to the case here considered is emphasized when we remember that the lessee has spent large sums in the betterment of the property. It is a logical, indeed almost an inevitable, conclusion that the amount of these expenditures was governed, in some degree, by the supposed exemption in favor of the plaintiff.

In the opinion of Mr. Justice Sloss, approved by the majority of the Justices of this court, the following paragraph seems to me to be particularly erroneous:

> "We do not agree with the suggestion made in the closing paragraph of the decision in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, that a holding that the plaintiff's leasehold interest is subject to assessment and taxation would make void every assessment against the owner of land subject to a lease without an assessment against the lessee of the value of his leasehold. As has already been said, in the ordinary case the value of the leasehold is included in the value assessed to the owner of the fee. What the Constitution and the law require is that all property shall be taxed in proportion to its value. And this is done when the whole value of the land is assessed to the owner of the fee. Section 3628 of the Political Code provides that no mistake in the name of the owner of real property shall render the assessment thereof invalid. The validity of the assessment would not, therefore, be affected by the fact that the values of the several estates in the land are united in a single assessment in the name of the owner of one of such interests."

This reasoning takes advantage of a statute intended only to cover cases of misnomer, and excuses that which, if the rest of the opinion is correct, is an absolute misassessment of property to the wrong owner, for the assessor knows in every case in which there is a landlord and a tenant that the leasehold and the reversion belong to different individuals. The opinion contains nothing which in my judgment logically overcomes the following portions of the opinion in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, written by Mr. Justice Henshaw and cited above:

> "No assessor has the right to assess and tax the leasehold interest, if it be taxable at all against the fee which belongs in the remainderman or reversioner, for our laws are just and mandatory to the effect that property shall be assessed against the true owner and in the name of the true owner. Pol. Code, §§ 3627, 3636. And if it be held that in general a leasehold is property having a taxable value within our fiscal statutes, it must necessarily follow that every assessment which 'includes the value of both the estate for years and of the remainder or reversion,' which is levied against the landlord, is void as being an assessment against property not his own. The foundation for the rule which ignores the leasehold and puts the assessment of the whole estate upon the landlord, is that the leasehold, while property for certain purposes, yet for fiscal purposes is not property at all; and as the tenant may not deny his landlord's title, so his possession is but the landlord's possession, and the value of that possession, whatever it may be, is therefore the property of the landlord and assessable against him. The tenant's right to possession is always in subordination to the landlord's paramount right, and in the eye of the law is no more separate property apart from the landlord's property than would be the landlord's permission to use a part of his land for a private right of way. The true reason, therefore, why, in general, leaseholds conveying the right to possession, with the usual usufructuary rights, are not assessable against the tenant, is that they are not, for fiscal purposes, regarded as property. * * * If, under these circumstances, we are to hold that this leasehold is property within the meaning of our fiscal laws, every leasehold must equally be declared to be property subject to assessment and taxation. The immediate result of this would be to force a declaration that, in every case where a lease is in existence, the assessment against the owner for the full value of the property, without an assessment against the lessee of the value of his leasehold is void. Such a disturbance of our fiscal system is not to be contemplated, saving under the plain mandate of the Legislature, and no such mandate has as yet been pronounced."

And in the future assessors may not keep their official oaths if they continue to assess leasehold interests to the owners of the fees. They cannot plead mistake, and so take advantage of section 3628 of the Political Code, because they must know, as everybody knows, that commonly leaseholds and reversions belong to different individuals. I sincerely regret that in this later decision the majority of this court is thus disturbing our fiscal system.

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180 Cal. 31

PACIFIC WHARF & STORAGE CO. v. LOS ANGELES COUNTY (two cases).

(L. A. 4279, 4317.)

(Supreme Court of California. Feb. 25, 1919.)

In Bank.

Appeals from Superior Court, Los Angeles County; John W. Shenk and Leslie R. Hewitt, Judges.

Two actions by the Pacific Wharf & Storage Company against the County of Los Angeles. Judgments for plaintiff, and defendant appeals. Reversed.

A. J. Hill, Co. Counsel, and Roy V. Reppy, Asst. County Counsel, both of Los Angeles, for appellant.

Goodwin & Morgrage, of Los Angeles, for respondent.

PER CURIAM. Plaintiff in both actions is lessee of certain tidelands belonging to the state and situated in the county of Los Angeles, which assessed the leasehold and levied a tax thereon. Plaintiff paid the tax under protest, and in due time sued to recover the same. Judgment went for plaintiff, from which defendant has appealed.

The sole question involved is whether a leasehold interest in tide and submerged lands owned by the state is subject to assessment and taxation under the revenue laws thereof. The subject is fully discussed, and answered in the affirmative, by what is said in the opinion this day filed in the case of San Pedro, Los Angeles & Salt Lake R. R. Co. v. City of Los Angeles (L. A. No. 4600), 179 Pac. 393, which involved a like question. Upon the authority thereof, the judgments in both cases are reversed.

ANGELLOTTI, C. J., and VICTOR E. SHAW, Judge pro tem., SLOSS and WILBUR, JJ., and RICHARDS, Judge pro tem., concur.

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39 Cal. App. 11

KERR v. REED et al. (Civ. 2607.)

(District Court of Appeal, Second District, California. Nov. 29, 1918.)

1. VENDOR AND PURCHASER ⚷97—CONTRACT OF SALE—FORFEITURE.

In view of Civ. Code, § 1439, a purchaser under contract of sale of land did not forfeit his contract by a mere failure to make final payment due, including execution of a mortgage and note.

2. VENDOR AND PURCHASER ⚷334(5)—CONTRACT OF SALE—BREACH BY VENDOR—ACTION FOR RETURN OF MONEY PAID.

Where vendor in contract of sale of land conveys land to a third person without vendee's consent, and under such circumstances that vendee's rights are not protected, vendee may abandon contract and recover money paid.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John N. Kerr against David C. Reed and Juliet C. Reed. Judgment for defendants, and plaintiff appeals. Reversed.

Dwight D. Bell, of San Diego, for appellant.

Luce & Luce, of San Diego, for respondents.

CONREY, P. J. On or about the 4th day of December, 1912, an agreement in writing was entered into between the defendants as vendors and the plaintiff as vendee, whereby the defendants agreed to sell and convey to the plaintiff certain real property in the city of San Diego. The purchase price was $25,000, of which $5,000 was paid upon the signing of the agreement. It was provided that—

> The purchaser would pay the sum of $5,000 on or before one year from the date of the contract, "and the balance of $15,000 to be paid by note and mortgage, executed by the party of the second part or his assigns in favor of the parties of the first part, and to be secured by the property described herein. Said mortgage to become due three years from date hereof, and to be executed at the time of the second payment of this agreement, and to draw interest at the rate of 6 per cent. per annum, payable quarterly. All deferred payments to draw 6 per cent. interest per annum, payable quarterly from date hereof."

The contract further provided as follows:

> "And the party of the second part agrees to pay all state, municipal and county taxes and assessments of whatsoever nature which are or may become due on the premises above described after date hereof. Time is hereby declared to be of the essence of this contract, and should purchaser fail or neglect to make said deferred payments, or any of them, at the times and in the manner herein provided, then and in that event this receipt and contract shall at once become null and void, and the said parties of the first part shall be at once released from any and all obligations to make any conveyance hereunder, or to convey the property herein described to said purchaser. It being agreed that it is impossible to fix and determine the actual damage arising out of the failure of said purchaser to make said deferred payments, it is hereby agreed that all moneys paid upon the purchase price of said property shall be by the parties of the first part retained and held as and for liquidated damages arising and caused by the failure of the said purchaser to comply with the terms hereof. And the parties of the first part, on receiving such payment, at the time and in the manner above mentioned agree to execute and deliver to the party of the second part or his assigns, a good and sufficient deed conveying said property to said party of the second part or his lawful assigns, and to furnish a certificate of title from the Union Title & Trust Company, showing property free and clear of incumbrance from date of November 23, 1912."

In this action the plaintiff seeks to recover all moneys paid by him under said contract, being the $5,000 paid as above stated, and certain interest payments made prior to December 4, 1913, and certain other small sums which plaintiff claims that after December 4, 1913, he paid on account of interest. The complaint, after setting forth the terms of the contract by copy thereof, alleged that it was the understanding and intention of the parties that the plaintiff was to have possession and control of the premises described in the contract, and that immediately upon the execution and delivery of the contract the defendants delivered to and the plaintiff accepted possession and control of said premises; that afterwards, on or about the 15th day of June, 1914, or thereafter and prior to the commencement of this action, the property was sold by the defendants to one Horace B. Day. On or about July 14, 1914, the defendants conveyed the property in question to the said Horace B. Day, who recorded his deed at that time and who did not at that time know of the existence of said contract between the plaintiff and the defendants and did not know that plaintiff claimed or had any interest in or to the property. Said Horace B. Day took and received said property for value and in good faith. The defendants made said conveyance to Horace B. Day without reserving or protecting the plaintiff's rights under his contract. The said contract was never recorded. The foregoing statements of fact are contained in the complaint and are not denied by the answer, except that defendants deny that any payment on account of the contract was made on or after December 4, 1913.

Omitting a detailed statement of those allegations of the complaint which are denied by the answer, it suffices to say that the complaint alleges that the plaintiff remained in possession and control of the property described in the contract until on or about the 15th day of June, 1914, whereas the answer denies that plaintiff retained such possession or control after December 4, 1913. The complaint further alleges that, at all times except as in the complaint mentioned, the defendants and each of them treated said contract as in existence and in full force and effect, and that on or about the 15th day of June, 1914, the defendants and each of them refused longer to be governed by said contract or observe the conditions and obligations thereof to be by them observed and performed, and rescinded, repudiated, and abandoned the said contract by resuming possession and control of the land and premises mentioned in the contract, and by selling the same and conveying the same as before stated, and by the defendant D. C. Reed notifying this plaintiff that he, said plaintiff, no longer had any interest in and to said land and premises described in the contract; that the plaintiff accepted and acquiesced in the said rescission, and on or about the 30th day of July, 1914, the plaintiff demanded of the defendants the moneys he had paid under said contract, minus the reasonable value for the use and occupation of the premises and all rentals received by the plaintiff from said property during the time that he was in possession of the same, to wit, $5,600, and demanded the return of said contract from the defendants; with all of which demand the defendants refused to comply. On the contrary, the defendants by their answer deny that on or about the 15th day of June, 1914, the defendants refused longer to be governed by said contract or to observe the conditions or obligations thereof, but allege that the defendants assumed possession of the land mentioned in the contract on December 5, 1913; and allege that the said D. C. Reed notified the plaintiff immediately after he failed to make the deferred payment of December 4, 1913, that the plaintiff no longer had any interest in and to said land and premises.

The case came on for trial before the superior court without a jury. Oral and documentary evidence was introduced on behalf of the plaintiff. Plaintiff having rested, the defendants moved for judgment of nonsuit on the ground that upon the trial the plaintiff had failed to prove a sufficient case in this, that the action is brought for the recovery of a portion of the purchase money paid on a forfeited contract, that failure of payment has been shown on the contract December 4th, and that no waiver of the forfeiture has been shown by the evidence in the testimony. The motion was granted, and judgment of nonsuit was duly entered, from which judgment the plaintiff appeals. The plaintiff testified that on December 10, 1913, which was the first time that he saw defendant Reed after November 20, 1913, plaintiff told Reed that he had been unable to make the payment due on December 4th and would like to have some written agreement in regard to the forfeiture; that Reed told him not to worry, just to let it run along; that Reed did not then, or at any time prior to July, 1914, notify plaintiff that his contract was at an end, or was forfeited; that plaintiff told Reed that he could not make the interest payment as it was due, and Reed said "to do the best I could with it"; that in March, 1914, Reed told plaintiff that he had an opportunity to trade the property for certain bonds which Reed considered to have a stated value, and said "that at that price we could get our money out of it"; that Reed never offered to make a conveyance of the property to plaintiff.

[1, 2] The motion for nonsuit should have been denied. The contract rights of the plaintiff were not forfeited by his mere failure to make the final payment due from him on December 4, 1913. Civ. Code, § 1439; Boone v. Templeman, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126. The evidence is that the defendants never made any offer of performance of their obligations under the contract. The payment due from plaintiff on December 4, 1913, was not of an intermediate installment. It consisted of a certain sum of money, together with a note and mortgage. These together constituted the final payment then due. Concurrently with that final payment the property was to be conveyed to the vendee. On the performance of those concurrent acts, the contract would thereby be brought to an end. It follows, therefore (giving to the evidence the effect to which it was entitled on a motion for nonsuit), that, at the time when defendants made their conveyance to Horace B. Day, the contract rights of the plaintiff had not become forfeited.

The admitted facts in this case show not only that the defendants sold and conveyed the property to a third person during the time of existence of the plaintiff's contract and without the plaintiff's consent; they further show that such conveyance was made in disregard of the rights of the plaintiff, and under such circumstances that those rights were not protected. The facts bring the case within the rule stated in Brimmer v. Salisbury, 167 Cal. 522, 531, 140 Pac. 30, 34, where the point now under consideration was covered as follows:

"The gist of the matter then is this, that a vendee is entitled to rely upon the security of the vendor's title, whatever it may be, in the making of his installment payments. A vendor will not have breached his contract if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee. But where his conveyance has been in disregard of those rights, under such circumstances that those rights are not protected, then this is a breach of contract and a fraud on the vendee. Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the vendor may be able to perfect the title. Such is not the case where the vendor has title and thereafter parts with it. Of the essence of the contract is the security to the vendee, in his payments, of the title which the vendor has, and, if the vendor parts with that title to the impairment or destruction of that security, the vendee may be heard justly to complain, and it is of course no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility and that such a vendor has not the slightest intention of so doing."

In Glock v. Howard & Wilson Colony Co., 123 Cal. 1, at page 10, 55 Pac. 713, at page 716, 43 L. R. A. 199, 69 Am. St. Rep. 17, referring to the remedies which are open to the vendee upon a breach by the vendor of a covenant to convey, it is said that the vendee may treat the vendor's breach as an abandonment, and may himself abandon the contract "when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise." See, also, Pearson v. Brown, 27 Cal. App. 125, 148 Pac. 956. In the case at bar the admitted facts, together with the facts shown by the evidence introduced by the plaintiff, bring the plaintiff within the rule last above stated. The vendor having broken the contract, the vendee also abandoned it, and relies, as of right he may, upon his right to the return of money paid by him upon a consideration which has failed.

The judgment is reversed.

We concur: JAMES, J.; MYERS, Judge pro tem.

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38 Cal. App. 516

WHITE v. DEERING. (Civ. 1826.)

(District Court of Appeal, Third District, California. Oct. 28, 1918.)

1. Executors and Administrators 🔑448—Pleading—Amendment—New Cause of Action.

A pleading setting up a claim against an estate for services "at an agreed price" changed by amendment to read "of the reasonable value" *held* not to change the cause of action from one on contract price to quantum meruit, since the remainder of the pleading states a cause of action either upon express or implied contract.

2. Executors and Administrators 🔑227(1)—Claims Against Estate—Pleading.

A claim against an estate is not required to state the facts with all the precision and minuteness required in a complaint, and its sufficiency is not to be tested by the rules of pleading, and greater liberality should be allowed in amending such claims.

3. Executors and Administrators 🔑221(5) — Claim Against Estate — Value of Services—Evidence.

While there was no direct evidence as to value of the particular kind of services performed, yet it is apparent that it involved no special skill, and there was positive testimony as to reasonable value of unskilled labor, and the finding was for less than the amount claimed, it was supported by the evidence.

4. Pleading 🔑237(7) — Allegation of Time—Amendment.

In an action upon a contract for work and labor, an allegation of time of performance is not controlling and not required to be proved literally, and it was not error to permit reasonable amendments.

5. Executors and Administrators 🔑267—Claims Against Estate—Interest.

A claim established against an estate by judgment will bear interest from the date of its presentation, although recovered upon quantum meruit, in view of Code Civ. Proc. § 1494, allowing interest on claims against estates, and section 1504, placing such claims on the same footing as if allowed by the executor and judge.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Alexander White against Mabel C. Deering, as executrix of the last will and testament of Sophie P. Comstock, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

White, Miller, Needham & Harber, of Sacramento, and Myrick & Deering, of San Francisco, for appellant.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for respondent.

BURNETT, J. The action was to establish a claim against the estate of Sophie P. Comstock, deceased. The claim was properly presented, but was rejected by the executrix. Suit was thereupon brought in the superior court within the time required by the statute and plaintiff obtained judgment, from which the appeal has been taken.

The first item in the complaint was:

"To services rendered in carrying decedent from her room upstairs to lawn and from lawn to her room upstairs at an agreed price of $15 per month, $45."

This was also the exact language of the claim as presented to the executrix. The court permitted this averment of the complaint to be amended by striking out the words, "at an agreed price," and substituting therefor the words, "of the reasonable value."

[1] This action of the court is the occasion for the contention that the cause of action was changed, for the reason that the claim was based upon an express contract for an agreed price, while the amendment permitted recovery on quantum meruit. The basic and vital elements of the cause of action are the services performed and the amount due for said services. As to these elements, the two complaints are identical. Moreover, either the phrase "at an agreed price" or "of the reasonable value" may be eliminated from the original or the amended complaint, respectively, and what remains states a cause of action either upon an express or implied contract. Neither of these phrases is, therefore, material to the statement of a cause of action, and the substitution of one for the other does not change the essential aspect of the case, although, we may add that, if it did not appear in the complaint whether there was an express contract, a demurrer might lie for uncertainty. Indeed, the question has been carefully considered by the appellate courts of this state and a conclusion reached that is directly opposed to appellant's contention herein, and it should be sufficient as to the point to cite: Merchants' C. Agency v. Gopcevic, 23 Cal. App. 217, 137 Pac. 609; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Nellis v. Pacific Bank, 127 Cal. 166, 59 Pac. 830; Cowell v. Snyder, 171 Cal. 294, 152 Pac. 920; Glougie v. Glougie, 174 Cal. 126, 162 Pac. 118; Hicks v. Christeson, 174 Cal. 712, 164 Pac. 395; Doolittle v. McConnell, 174 Pac. 305; Mackroth v. Sladky, 27 Cal. App. 113, 148 Pac. 978; Turner v. Dahnken, 28 Cal. App. 311, 152 Pac. 308.

[2] In this connection, it must be remembered that a claim against an estate is not required to state the facts with all the precision and minuteness required in a complaint, and its sufficiency is not to be tested by the rules of pleading. Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911. It would follow that even greater liberality should be shown in allowing amendments than in the ordinary class of cases, provided, of course, that the cause of action be not entirely changed and there be no prejudice to the substantial rights of those opposed in interest to the claimant.

[3] While there was no direct evidence as to the value of the particular kind of service performed, yet it is apparent that it involved no special skill, but was that of ordinary labor, and there was positive testimony as to the reasonable value of unskilled labor. The finding was for less than the amount so declared, and hence it is supported by the evidence.

[4] As to one item, there was an error in the date, and the court permitted an amendment correcting it. Such action of the court cannot be called in question. It is covered by the cases already cited, but we may add Beason v. Western Meat Co., 40 Utah, 398, 124 Pac. 335, wherein the court declared:

> "The law is elementary that an allegation of time, under the circumstances of the case, is not controlling, and the party responsible for such an allegation is not bound to prove it literally, but may show the actual transaction, although it occurred at a time other than that alleged. Under such circumstances like those in this case, it is the transaction, rather than the time at which it occurred, that is the material thing."

The point is not worthy of more extended consideration.

There was a mistake, also, in the date of the fourth item. This was immaterial and it was proper to allow it to be corrected. The claim for this service recited, like the first item, that it was "at an agreed price," and the court permitted a similar amendment. This was not error, as we have already pointed out. To the foregoing citations we may add these, to which our attention is called in the brief of respondent: Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; Ruiz v. Santa Barbara Gas Co., 164 Cal. 188, 128 Pac. 330.

[5] As to the claim of appellant that no interest should have been allowed, it is admitted by respondent that—

> "The general rule in an action upon quantum meruit is that interest is not allowable until the date of judgment."

It is contended by the latter, however, that in an action to establish a claim against an estate the claim, when established, will bear interest from the date of its presentation, since the judgment relates back and takes effect as of that date. This is undoubtedly true. It may be added that, if the claim did not bear interest until the date of the judgment, it would place the claimant who was compelled to sue at a disadvantage with one whose claim is allowed by the executor, for in the latter case there is no doubt that interest is allowable from the time the claim is approved. Section 1494, Code Civ. Proc. It would also afford the executor a financial inducement to reject a proper claim. But the statute itself (section 1504, Code Civ. Proc.) contemplates that, when established by the court, the claim shall be upon the same footing as if allowed by the executor and judge. To be established "in the same manner as if it had been allowed by the executor or administrator and the judge," it must bear interest from the date when it should have been so allowed.

We find no merit in the appeal, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

36 Cal. App. 201

VAN LOBEN SELS v. PRODUCERS' FRUIT CO. (TIN SAN, Intervener). (Civ. 1795.)

(District Court of Appeal, Third District, California. Feb. 7, 1918.)

1. Landlord and Tenant 🔑139(1)—Farm —Lease—Title to Crop.

A farm lease, under which lessor was to be paid directly all proceeds of crops sold, *held* not to invest lessor with ownership of such proceeds, but only to give him right to handle money to secure payment of rent.

2. Landlord and Tenant 🔑252(1)—Crops —Purchaser from Tenant—Liability.

Where one purchasing crops from a lessee had knowledge of a covenant in lease that all proceeds of crops sold were to be paid to lessor to secure payment of rent, he did not become liable to lessor by paying proceeds directly to lessee, unless lessee was indebted to lessor.

3. Landlord and Tenant 🔑136—Lease—Construction.

In view of Civ. Code, §§ 1647, 1656, a lease expressly providing that lessee should keep edges of all ditches, sloughs, roads, lines, or boundaries clean of weeds, etc., *held* not to require any extraordinary efforts on part of lessee to eradicate Johnson grass on other parts of farm, where there was Johnson grass growing on premises in prior years, although pernicious character of grass was not fully understood at time of execution of lease.

4. Parties 🔑42 — Intervention — Time.

In view of Code Civ. Proc. § 387, intervention made prior to trial of any issues of fact and before cause was set for trial, not materially delaying hearing, was made within time.

5. Parties 🔑40(2) — Intervention — Right.

In action by lessor against third person to recover money under provision in lease that proceeds of all farm produce sold were to be paid directly to lessor, defendant having notice of such provision, lessee had a right to intervene and claim ownership of money; object of provision being only to secure payment of rent.

6. Interest 🔑18(2)—Unsettled Accounts.

Interest should not be allowed on an unsettled account.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by P. J. Van Loben Sels against the Producers' Fruit Company, in which Tin San intervenes. From an adverse judgment, plaintiff appeals. Affirmed.

A. L. Shinn, C. L. Shinn, and G. Shinn, all of Sacramento, for appellant.

White, Miller, Needham & Harber, R. L. Shinn, and A. L. Hart, all of Sacramento, for respondent.

PLUMMER, Judge pro tem. On the 1st day of November, 1909, the plaintiff and intervener entered into an agreement of lease whereby the plaintiff leased to the intervener for a period of years 15 acres of reclaimed land situate in the county of Sacramento. A portion of the land was covered by an orchard, and all of it appears to have been susceptible of cultivation and the raising of grain and vegetables. The lease contained the following provisions, which were the subject of consideration by the trial court in this action, to wit: The lessee covenanted that he would annually, and at the proper seasons, in a husbandlike manner, properly prepare and render fit for cultivation all of said tract, etc., and tend and cultivate the same in a first-class, husbandlike manner, and harvest all crops, etc.; that he would keep all the edges of the ditches, sloughs, roads, or any other lines of boundaries of the land clean of weeds, brush, etc.; that the lessee might sell the crops raised on the leased premises, but that the returns for the same should be made directly to the lessor, upon receipt of which the lessor would place the said amounts to the credit of the account of the lessee; that in case of any violation of the conditions of the lease, the lessor at his option might terminate the same, and re-enter and take immediate possession of the premises, and all crops growing thereon should thereupon belong to the lessor. For the purpose of securing proper performance by the lessee of the conditions of the lease, it was further provided that the lessee mortgaged to the lessor all crops of every kind standing, growing, or being upon said premises, or that might during the term of the lease be planted or produced upon said premises, as security and indemnity to the lessor for the performance by the lessee of all and singular the covenants and conditions of the lease, and as security for all sums that might become due to the lessor as damages for the breach of any of the terms of the lease, or otherwise.

In accordance with the terms and provisions of said instrument the intervener took possession of the premises covered by the lease and continued in possession of the same until the month of November, 1914. It appears that during the years preceding 1914 the lessee marketed his crops through the agency of the defendant, and that the defendant made returns directly to the plaintiff in this action, but during the year

1914 made returns directly to Tin San, save and except that sufficient money was turned over to plaintiff to cover the amount specified as the rent to be paid annually under the terms of said lease.

At the conclusion of the cropping season the plaintiff made demand on the defendant for a return of all of the moneys received by it on account of the produce raised by Tin San on the leased premises, and marketed through the agency of the defendant. At about the same time, or before the then balance in the hands of the defendant, being the sum of $1,200, had been paid to Tin San, the intervener, Tin San, also made demand upon the defendant for the money then in its hands, claiming that there was nothing due from him to the plaintiff, and that the money in the hands of the defendant, save and except the sum of $287, which the intervener admitted was due and owing to the plaintiff, and which sum, upon the authorization of the intervener, was by the defendant paid to the plaintiff, leaving in the hands of the defendant the sum of $913, belonged to him.

The plaintiff began an action for the recovery of all sums arising from the crop raised by the intervener on the leased premises during the year 1914, and marketed through the agency of the defendant, and for an accounting, claiming that he was entitled to have the entire sum paid to him under the provisions of the lease, irrespective of his right to retain the same after its reception; that the ownership of the money was a matter between the plaintiff and Tin San, and that the plaintiff had a right to handle all of the proceeds and make return to Tin San of whatever the plaintiff considered to be due him after deducting all claims made thereon by the plaintiff.

The defendant made answer that plaintiff had informed the defendant that the sum of $1,200 only was the amount due from Tin San to the plaintiff; that the provision of the lease for making returns to the plaintiff was one only for security, and that it did not vest the ownership of the proceeds of the crop in the plaintiff. He brought the money into court and asked that Tin San be made a party to the action, and the ownership of the money determined.

Tin San thereupon filed a complaint in intervention, claiming that there was nothing due from him to the plaintiff, that the sum of $913 paid into court by the defendant belonged to him, and asked judgment therefor. Judgment went for defendant and intervener, from which judgment plaintiff appeals.

While numerous points are raised, only two questions are really involved in this action and require consideration in the determination of this appeal. The first point made for reversal by the appellant is that under the terms of the lease he was entitled to all moneys received by the defendant on account of produce raised on said premises and sold through defendant's agency by the intervener; that the provisions of the lease gave him an absolute right to, and an ownership in, said proceeds. Is this contention sound?

[1, 2] By the provisions of the lease it will be observed that the lessee had a right to sell all crops raised on the leased land, and that the return for the same should be made directly to the party of the first part. This is a covenant or condition inserted in the lease and assented to by the plaintiff and intervener, to which the defendant was not a party, but of which the defendant appears to have had ample notice. However, this condition in the lease does not by its terms, nor by any reasonable construction that can be placed thereon, actually invest the plaintiff with the ownership of the proceeds arising from the sale of the produce raised on the leased premises. The most that can be said for it is that it gave the plaintiff a right to handle the money, and place the amount so received to the credit of the party of the second part named in the lease. The last provision in the lease may also be considered in connection with this contention to determine its meaning, to wit, that portion of the lease which mortgages the crops raised on the leased premises as security for the performance by the lessee of the conditions and covenants contained in the lease.

The conclusion seems to us unescapable that if the clause in the paragraph in the lease, providing that the returns of all sales should be made to the plaintiff, invested him with the ownership of such proceeds, the mortgaging paragraph of the lease has no place in the instrument, because, if the plaintiff or party of the first part in the lease retained ownership, there was nothing left for the party of the second part to mortgage. The two provisions of the lease must be read together, and when so read the making of the returns to the plaintiff, and the mortgaging by the intervener to the plaintiff of all the crops raised on the premises, evidences only an intent to secure the plaintiff, and not to invest him with ownership in the proceeds. If this conclusion is correct, and the provisions of the lease were for the purpose of securing the plaintiff, and did not invest him with ownership, then, even though the defendant had knowledge of the terms of the lease, the plaintiff suffered no damage by reason of the failure of the defendant to pay over to plaintiff moneys which did not belong to him, unless it be shown that at such period the intervener, Tin San, was indebted to plaintiff.

[3] This brings us to the second question tendered for consideration. Was the intervener, Tin San, indebted to the plaintiff? The answer to this question involves the consideration of that portion of the lease as referred to herein, whereby it appears that the lessee agreed that at the proper season he

would, in a husbandlike manner, properly prepare for and render fit for cultivation the leased premises, and tend and cultivate the same in the same manner, etc. Under this provision it is contended on the part of the appellant that it was incumbent upon Tin San to eradicate certain Johnson grass standing and growing upon the premises during the year 1914, and for the eradication of which the appellant made a charge considerably in excess of the amount remaining in the hands of the defendant. It may be stated that the plaintiff also made charges for rents, spraying material, and other accounts, aggregating the total sum of $2,029.56, judgment for which amount appellant claims he is entitled to against both the defendant and intervener. A long series of accounts between the plaintiff and intervener were submitted to the trial court, which accounts appear upon conflicting evidence to have been settled and determined by the trial court, and need not be considered, save and except as to the charge made for the eradication of the Johnson grass. If it was incumbent upon the intervener to eradicate the Johnson grass, the judgment of the trial court should be reversed; if not incumbent upon him, then the judgment of the lower court should be affirmed. An examination of the transcript discloses abundant testimony, if believed by the trial court, to establish the fact that there was Johnson grass growing upon the leased premises as early as the year 1906; that it was in evidence during the years 1907, 1908, and 1909, prior to the month of November, when the intervener took possession. Whether the pernicious character of the Johnson grass was then fully understood does not change the fact of the conditions existing at the time of the execution of the lease. The lease expressly provided that the lessee should keep the edges of all ditches, sloughs, roads, lines, or boundaries clean of weeds, brush, etc., which makes expressly applicable section 1656, Civil Code, which is:

> "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."

Also section 1647, Civil Code:

> "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

The contract between the plaintiff and the intervener expressly mentions certain things which must be done in addition to the usual and ordinary cultivation of the premises. It does not appear from either the testimony or the findings of the court that the Johnson grass was in any of the places referred to by this provision of the lease, or that it entered into the contemplation of either the plaintiff or intervener at the time of its execution; it does not appear, either from the testimony or from the findings of the court, that the intervener, as lessee, failed or neglected to cultivate the demised premises in the manner usual or customary in the section of the country where the lands are situated; but it does appear that rather large and valuable crops were raised upon said premises during each and every year they were occupied by the lessee, including the year 1914. It does not appear that the plaintiff had made any special effort to eradicate the Johnson grass during the years 1907, 1908, and 1909, while it was known to be growing thereon, and before the intervener took possession.

The lease between the plaintiff and the intervener was executed by the plaintiff through the agency of his son, who testifies that the Johnson grass appeared in 1907, which fact must not be lost sight of in determining whether the lease required the lessee to use any extraordinary means in the eradication of the pest not theretofore resorted to by the owner and not specifically mentioned.

It seems to us that the trial court was correct in holding that the lease did not require any extraordinary efforts on the part of the lessee, and that any expense made by the owner in 1914 to completely eradicate the Johnson grass must be borne by himself.

[4, 5] The contention of appellant that this was not a proper case for intervention on the part of Tin San requires no consideration, further than to refer to section 387, Code of Civil Procedure. The intervention was made prior to the trial of any issues of fact, before the cause had been set for trial, and does not appear to have materially, if at all, delayed the hearing. The authorities are too numerous to be mentioned holding that an intervention so made is within time. The ownership of the money in dispute clearly gave the intervener a right to appear in the action, and the trial court properly so held.

[6] Interest upon the unsettled account between the plaintiff and the intervener was properly denied. All the other items in the account appear to have been determined by the court upon conflicting testimony, and do not seem to us to require further consideration.

Being of the opinion that the plaintiff suffered no damage by reason of the failure of the defendant to turn over the money involved in this action by reason of the ownership thereof being vested in the intervener, and that the trial court correctly construed the various provisions of the lease, the judgment of the lower court should be and the same is hereby affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

39 Cal. App. 502

KNIGHT v. BENTEL et al. (Civ. 2872.)

(District Court of Appeal, Second District, Division 2, California. Jan. 29, 1919.)

1. SALES 🔑397—ACTION TO RECOVER PURCHASE MONEY—EVIDENCE.

In an action to recover money paid for an automobile on the ground that car tendered was not a new one, as contracted for, evidence *held* sufficient to support findings for plaintiff.

2. APPEAL AND ERROR 🔑204(7)—REVIEW—NECESSITY OF OBJECTION BELOW.

Objections to evidence because questions called for conclusions of witnesses cannot be reviewed, where not made in the trial court.

3. SALES 🔑38(1)—CONTRACT FOR SALE OF AUTOMOBILE—FRAUD AND DECEIT.

Seller's statement that a second contract, which he induced buyer to sign, was similar to a prior contract except as to matter of payments when the latter was a lease contract and the former was not, and seller's representation that the second hand car delivered was a new one, *held* to constitute fraud and deceit.

4. EVIDENCE 🔑590—CREDIBILITY—INTERESTED PARTY.

Where the testimony of defendant's agent was unsatisfactory, evasive, elusive, and apparently not genuine and in conflict with the positive testimony of plaintiff, the court was justified in resolving the conflict in plaintiff's favor in view of Code Civ. Proc. § 1847, relating to witnesses, and section 2061 relating to instruction of juries as to effect and value of evidence.

5. SALES 🔑38(3)—CONTRACT—FRAUD.

The rule that fraud in a sale contract cannot be predicated on a statement of the law applicable to facts equally well known to both parties or upon mere expressions of opinion does not apply to seller's statement that the car sold is a new one or that a dissimilar contract is a similar contract, which are matters of fact.

6. EVIDENCE 🔑68—PRESUMPTIONS—NECESSARY CONSEQUENCES OF ACTS.

Under Code Civ. Proc. § 1963, as to presumptions, the court is not bound by seller's testimony that he "did not intend to deceive," where his actions indicate otherwise.

7. SALES 🔑126(1)—DELIVERY OF GOODS—ACCEPTANCE.

Where plaintiff in the evening accepted an automobile upon plaintiff's false representations as to contract and as to the car being new, and, without opportunity to examine, drove the car some distance, and upon discovery of the fraud on the next morning immediately drove back and returned the car and demanded return of the money, the right to rescission was not waived by using the car after knowledge of the fraud, under Civ. Code, §§ 1689, 3406, and 1691.

8. INTEREST 🔑46(1)—TIME AND COMPUTATION—STATUTORY PROVISIONS.

Under Civ. Code, § 1917, the law awards interest on money only from the time it falls due, which, in case of claim for money paid under sale contract rescinded by the buyer for fraud, is the date of notice of the rescission or demand for repayment.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Ellen Stuart Bentley Vance against George R. Bentel and others, in which F. A. Knight, as administrator, was substituted for the plaintiff upon her decease. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

H. C. Millsap, of Los Angeles, for appellants.

F. A. Knight, of Long Beach, for respondent.

THOMAS, J. This is an action by Ellen Stuart Bentley, who, since the institution of the action, has died, and which action is now being prosecuted by F. A. Knight, who, by proper order heretofore made and entered, has been substituted as plaintiff in place and stead of said Ellen Stuart Bentley, against the defendants herein. From the record in the case it appears that on January 24, 1914, the said Ellen Stuart Bentley signed an agreement with the defendants whereby she agreed to buy from the defendants a Mercer automobile, for the total price of $3,150, payable $850 at the time of the signing of the contract (payment of which was acknowledged therein), $750 on delivery of the car (which car was to be delivered March 17, 1914), and the balance of the purchase price to be paid in three equal monthly installments. A clause was added to the agreement whereby the defendants were to sell for the plaintiff a Metallurgique car, which the said Ellen Stuart Bentley then owned, as a condition of the contract.

Some time between the signing of the agreement and the 13th day of May, 1914, the defendants sold Mrs. Bentley's Metallurgique automobile for $1,250, which they credited on her contract for the Mercer car as of May 14, 1914. The Mercer car was not delivered on March 17th, nor was any car delivered to her by the defendants herein until May 13, 1914. On May 13, 1914, Mrs. Bentley went to the place of business of the defendants, about dusk, was taken for a short ride in the machine to see how it ran, and, without close examination of the car, accepted the same. The car had no seat on the running board, as provided for in said agreement, and was not of the color called for—"which could be seen at a glance"—but a memorandum was given the said Mrs. Bentley by defendants whereby they, the defendants, agreed that these changes were to be made later. The next morning, upon a closer examination of the car, Mrs. Bentley discovered that it was a secondhand car and had been used and run a great deal. She immediately, on the same day, to wit, May 14, 1914, drove the car back to defendants' place of business, told defendants she refused to accept the car, and demanded the return of her money. Defendants refused to comply with this demand, but told her that they would order a new car. She refused to buy a new car from them, and left the Mercer with the defendants.

Upon making these discoveries, Mrs. Bentley served a notice of rescission of the contract, signed by her, and sued for the return of her money. When the answer of defendants to that suit was filed, they set up an entirely different contract as having been executed by the plaintiff on the day the car was delivered to her, to wit, May 13, 1914. She then demanded an inspection of the original of said document, and claims to have then ascertained, for the first time, that when the car was delivered to her she had signed an entirely different document, which was a "lease" of the automobile. She then remembered the circumstances of having signed the document, and claims that her signature thereto was obtained by a fraud and a trick of the defendants. Mrs. Bentley then dismissed her first suit and served a new notice of rescission of the first agreement and the second document just referred to, and filed her complaint in this action. It is in four counts: The first for money had and received; the second based on failure of consideration; the third based upon partial failure of consideration; and the fourth for the recovery of the money and the revocation of the lease, upon the ground that her signature to the lease was obtained by fraud and trick perpetrated by the defendants. No copy of either of said instruments was given by defendants to plaintiff. Judgment was given for the plaintiff for the recovery of her money, and defendants have appealed to this court for a reversal of that judgment.

It was stipulated at the trial that the defendants had been paid by the said Mrs. Bentley the sum of $2,600, on the following dates: October 27, 1913, $100; January 24, 1914, $750; May 14, 1914 (proceeds from the sale of the Metallurgique car), $1,250; and May 14, 1914, $500.

[1] Defendants challenge the sufficiency of the evidence to support the findings of the trial court. We are satisfied from a careful examination of the record in this case that the evidence abundantly supports the findings of the court. The witness Ruddle is the representative of the defendants with whom Mrs. Bentley had almost all of her business dealings in connection with the purchase, etc., of the car in question. There is no dispute as to the fact that the contract, plaintiff's Exhibit 1, was signed by Mrs. Bentley on January 24, 1914, and that by the terms of that agreement the said Mercer car was to be delivered on or about March 17th of the same year. This was not done. But when Mrs. Bentley heard, some time in May, 1914, that the car had arrived, she went to the place of business of the defendants, which, according to the record, was on May 13, 1914, and about noon of that day. At that time she was told that the car was not ready for delivery; that they were putting on some wire wheels, etc., and agreed to have it ready for delivery at about 4 o'clock that afternoon. It was not ready for delivery, however, until about 5:30 or 6 o'clock. After looking the car over from the outside, without making anything that might be considered an "examination" of it, she was taken out, as has already been set forth herein, for a short ride. She then paid $500 in cash and took the car with her to Long Beach that night. Before this took place, however, there was some talk about payments, and the witness Ruddle said he would arrange it to suit her, and, as she understood it, and as shown by the evidence, the contract of January 24th was modified only as to the amounts of payments and the time when the balance due on the car should be paid. Mrs. Bentley says that Mr. Ruddle said to her:

> "Mrs. Bentley, here is a similar contract to the one which you signed previously, only it will make the payments easier for you, and according to your request."

Mrs. Bentley further says that she looked over and read that portion of the same as to payments and accepted Mr. Ruddle's word that it was a "similar contract," and, in answer to a question from the court as to whether she relied on anything else besides that, answered that she did not. In view of the record here, we feel that the attorney for Mrs. Bentley in this case, when writing to defendants under date of May 15, 1914, was correct when he said that their "methods of dealing with Mrs. Bentley in this matter have been so outrageously unbusinesslike and unfair."

There is no conflict in the evidence that Mrs. Bentley was buying a new car, nor is there any conflict in the evidence that the defendants represented to her that they were selling her a new car, and that the car delivered to her on May 13, 1914, was such a car. We are of the opinion that it will not be seriously contended by defendants and appellants here that a car with the "enamel on self-starting lever worn off; dent in bottom of radiator, cut by shock absorber; front of dash dented in, and paint on same knocked off from raising and lowering hood; molding around top of doors and dash showed weatherworn; paint and varnish off the same; right front fender had been bent clear across; where back fender was attached to running board was split, and showed it was an old break, rusted, and had appearance of having been done some time; tool box lid dented up from inside by loose objects carried in the same; water manifold on motor rust-eaten, indicating age; magneto shaft on motor pitted by rust; front axle showed signs of having been heated to straighten; one of the steering knuckles showed signs of having been heated and straightened; there was about a one-sixteenth inch play in the front spindle; hub cap had been dented in and straightened out; spark and gasoline control levers above steering wheel were battered up, showing they had been removed from car; very rotten job of painting, black paint spattered on car from striping; stripes did not lap each other; varnish on car was so green it would leave the imprint of hands where touched; radiator was loose on car"—can be properly designated a "new car." The quoted portion of the foregoing statement is taken verbatim from the evidence in the record, and it stands without contradiction.

It also appears in the record, without conflict, from the testimony of the witness Tisdale, that he (Tisdale) found Mr. Bentel, one of the defendants, "in his office, and asked him when the car would be ready for delivery, and he said, 'I would like to have a day or two longer on the car,' and said there were several things he wanted to have fixed about the car before he delivered it; and asked me if I thought Mrs. Bentley would be willing to let him have this extra time, and I told him I did not think she would. Then he said he would have the work rushed through, and that Mrs. Bentley could have the car at 4 o'clock p. m. the same day, and that any time she brought the car back they would equip it according to specifications. The mechanics at that time were putting wire wheels on the car, and the wheel racks for the spare rims." It is obvious, therefore, that not only was it known to Ruddle, the representative of defendants, but that also one of the partners himself knew the condition of the car to be as already hereinbefore set forth.

It also appears from the evidence that the next day, after discovering said defects in the car, Mrs. Bentley, together with her chauffeur, Tisdale, took the car back to defendants and left it with them. From the record the following significant facts appear:

> "Mr. Ruddle and Mrs. Bentley, and myself, after we got to Los Angeles, went over to see Mr. Bentel, and there the following conversation took place: Mrs. Bentley told Mr. Bentel that there was the car; and he asked her what the trouble was, and she proceeded to show him the defects of said car. Mr. Bentel said that these were due to the severe test that the factory had put the car to; and Mrs. Bentley said she did not think a reputable company like the Mercer Company would allow such defects to get by their inspectors; and also told him the car showed signs of being used pretty hard, and that she refused to accept the car under any conditions whatever. Then Mr. Bentel offered to wire the factory for a new car, and for one that would come up to the specifications. Mrs. Bentley refused this offer, saying, 'You have been dishonest with me about this car, and I am not going to give you a chance to be with another.' She asked Mr. Bentel to refund her money she had paid on the car. Mr. Bentel refused to refund the money, but told her that he would put the car in the show window and try to sell it for her, and if he could he would return the $2,600. Mrs. Bentley told him it was defendants' car, and that they had not lived up to their contract, and that she did not want anything more to do with it, excepting to get her money she had paid on it. Mrs. Bentley told Mr. Bentel that she would give him ten days to refund the money, and if he did not do so she would have to enter a suit against him for it."

We might say in passing that said statement made by Mr. Bentel (the quotation just made) remains in the record without contradiction. The statement that the defects above set forth were "due to the severe test that the factory had put the car to" in our opinion is hardly worthy of serious consideration. Had there been any conflict in the evidence, the statement being so unreasonable, the court would have been, we think, justified in disregarding it entirely.

[2] As to alleged errors of law occurring on the trial, we content ourselves with the general statement that, assuming, for the present purpose, without so holding, all of the specifications of error to be well taken, on the face of the record they show that the defendants were not prejudiced thereby. Whatever point might have been made at the time was cured by evidence furnished on cross-examination. Hill v. McCoy, 1 Cal. App. 159, 81 Pac. 1015; Kellam v. Brode, 1 Cal. App. 315, 82 Pac. 213; Bergtholdt v. Porter, 114 Cal. 681, 46 Pac. 738. The point that rulings of the court, to which exceptions 2, 3, and 4 were reserved, were error, because the questions called for mere conclusions of the witness, and not for a statement of fact, is not well taken, because this objection was not advanced in the trial court and appears in this court for the first time. Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811; People v. McCauley, 45 Cal. 146; People v. Bishop, 134 Cal. 682, 66 Pac. 976.

[3] The witness Ruddle knew about the contract of January 24, 1914; also, of the so-called lease dated May 12, 1914, and of the memorandum given to Mrs. Bentley. If therefore the making of the statement that plaintiff's Exhibit 2 was "similar to the contract" theretofore, and on January 24, 1914, made, except as to the matter of payments, the delivery of the car with the defects already referred to, and telling Mrs. Bentley that it was a new car—and many

other statements and acts not necessary to refer to further—do not constitute fraud and deceit, then we are unable to know what kind of case it would be necessary to present in order to establish that fact.

[4] The defendants' case relied almost entirely upon the testimony of the witness Ruddle. Where there was any conflict between his testimony and that of plaintiff's, upon any material point, we are of the opinion, from an examination of the record in this case, that the court was justified in resolving the conflict in favor of the plaintiff. The testimony of the witness Ruddle was very unsatisfactory. It was evasive and elusive and does not have the earmarks of the genuine ring about it. Sections 1847 and 2061, Code Civ. Proc.

[5] There is no doubt at all that, as appellants argue:

> "Where the parties to a contract for the sale of personal property do not occupy confidential relations to each other, one of them cannot predicate fraud on the statement of the other as to the law applicable to facts equally well known to both of them, nor upon statements which are but expressions of opinion."

The cases cited by appellants support that contention. But these do not apply to the case at bar. It can hardly be said that the statement that the car here referred to was a new car is one of opinion, or that plaintiff's Exhibit 2 was a "similar contract" to the one signed January 24, 1914, excepting as to payments—particularly in view of the testimony of Ruddle in that respect. In the first case cited (Rheingans v. Smith, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140), the court says:

> "Rheingans, therefore, had no inducement, or right, to rely on the statements of Smith, except as to facts of which Rheingans was ignorant, and which he had reason to believe Smith knew, and except, possibly, as to the law based on facts of which he had reason to believe Smith's knowledge was greater than his own."

This applies with great force to the facts in the case at bar.

[6] The appellants contend that there was no intention on the part of defendants to deceive. If the court is bound by the defendant's testimony that he "did not intend to deceive," then the cases cited would apply. But under the facts in this case we think they are not in point. Section 1963, Code Civ. Proc. Here the actions of the defendants speak so much louder than what they said to Mrs. Bentley, that equity will not listen to their present contention.

[7] Appellants contend that there was no claim made in the pleadings, and no evidence offered on the trial, that plaintiff's Exhibit 1 was induced by fraud; and further that, even though the court found that Exhibit 2 was obtained from Mrs. Bentley by fraud of defendants, and the cancellation and rescission of the same actually had, that this did not authorize the court in granting judgment for plaintiff. Appellants urge, in support of this claim: (1) That Mrs. Bentley examined the car; (2) that defendants in no way prevented her from making as full and complete an examination of the car as she desired; (3) that after examining same she found that the car did not comply with the contract; and (4) that after such examination, and with full knowledge of noncompliance with the contract, she accepted and used the car. There is no merit in this contention. The answer to it is that she took the car to Long Beach, relying upon what the defendants said and agreed to do, as set forth in plaintiff's Exhibit 3. At that time no examination, which can rightfully be called such, had been made. The next morning, which was the first opportunity Mrs. Bentley had to make an examination, an examination was made, and the result was the discovery that defendants had perpetrated a colossal fraud upon her, viz., that the consideration had failed, partially, if not altogether; and she did, immediately upon such discovery, what any sensible person would do under the circumstances—returned the car and demanded the return of her money. Section 1689, Civ. Code; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386. No further authorities are considered necessary to support our contention here.

It is further urged by appellants that Mrs. Bentley had waived her right to rescission by using the car after ascertaining that it failed to meet the requirements of the contract. That is a correct statement of the law, but it does not apply here. There is nothing to the point. The car was returned immediately—the same day that the discovery was made. This satisfies the statute. As to rescission, the record here shows that the requirements of the sections of the Civil Code have been fully complied with. Civ. Code, §§ 3406 and 1691; United Motor Co. v. Callander, 30 Cal. App. 41, 157 Pac. 561.

[8] Appellants contend that the allowance by the court to plaintiff of interest on payments made by Mrs. Bentley from the date upon which said payments were made is error. This point is well taken. Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432. The law awards interest on money only from the time it falls due, unless otherwise specifically provided for. Civ. Code, 1917. "Until rescission, or demand for repayment, nothing was due, and interest was not allowable." Hellman v. Merz, 112 Cal. 661, 44 Pac. 1079. The record here discloses the fact that notice of rescission was given May 14, 1914. It follows, therefore, that any interest allowed for any period on any portion of the money paid before that time was not legally a permissible charge.

We believe that the record in this case

justifies us in holding that had the trial court arrived at any other judgment than one in favor of the plaintiff, as herein stated, it would have presented one of those inexcusable miscarriages of justice which tend to bring courts into disrepute, and to shake men's faith in the administration of the law. In our opinion, with the single exception noted, the findings are fully supported by the evidence; and there are no other errors of law appearing in the record needing our consideration.

The cause is remanded, with direction to the trial court to modify the judgment by deducting from the amount recovered all sums shown by the findings to have been allowed as interest for any period prior to the 14th day of May, 1914, the date of notice of rescission; and, as so modified, the judgment shall stand affirmed.

It is so ordered.

We concur: FINLAYSON, P. J.; SLOANE, J.

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39 Cal. App. 437

GADDIS v. GRANT. (Civ. 1942.)

(District Court of Appeal, Third District, California. Jan. 23, 1919.)

1. MORTGAGES ⚷446—COMPLAINT—UNCERTAINTY AS TO AMOUNT OF PRINCIPAL AND INTEREST.

Complaint to recover amount due on promissory note, with interest, and to foreclose mortgage given to secure note, *held* not demurrable for uncertainty as to amount claimed for interest and for principal, though too much was claimed for interest, and too little for principal; aggregate amount being correct.

2. PLEADING ⚷193(1)—DEMURRER—GROUNDS —BILL OF PARTICULARS.

In view of Code Civ. Proc. § 454, requiring a party to furnish a copy of an "account" alleged, when demanded in writing by the adverse party, payments made upon promissory note, and items constituting balance due, are merely items of an account, which defendant can demand, and a demurrer for uncertainty does not lie.

3. PLEADING ⚷238(4)—AMENDMENT OF COMPLAINT—LEAVE—ABSENCE OF DEFENDANT.

Defendant in an action on a note cannot complain that in his absence the court permitted plaintiff to amend his complaint to correct a clerical error in stating the items of principal and interest, leaving unchanged the aggregate amount.

4. APPEAL AND ERROR ⚷1040(10)—REVERSAL FOR HARMLESS ERROR—OVERRULING DEMURRER.

A judgment right on the merits will not be reversed for error in overruling demurrer to the complaint for ambiguity or uncertainty, where defendant was not misled to his prejudice, and the apparent ambiguity or uncertainty consists of a statement of useless and surplus matters, and the cause of action is fairly apparent from the complaint.

5. APPEAL AND ERROR ⚷918(1)—PRESUMPTIONS FAVORING REGULARITY—SERVICE OF AMENDED COMPLAINT.

Nothing appearing to the contrary, it must be presumed on appeal that defendant was served with a copy of the amended complaint, since every intendment is in favor of the regularity of the proceedings and the validity of the judgment.

6. PLEADING ⚷238(2)—AMENDMENT TO CONFORM WITH PROOF—NOTICE AND SERVICE.

Where amendment is made to conform to proof, it is not necessary that notice be given, and not necessary that amendment be served.

7. APPEAL AND ERROR ⚷1041(2)—HARMLESS ERROR—AMENDMENT OF COMPLAINT.

Amendment of complaint on a note to correct an erroneous statement of the relative amounts of principal and interest due, leaving the aggregate amount unchanged, was harmless to defendant.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by T. B. Gaddis against William Grant. From a judgment for plaintiff, defendant appeals. Affirmed.

J. B. Zimdars and Wm. H. Bryan, both of San Francisco, for appellant.

Rowan Hardin, of Sonora, for respondent.

BURNETT, J. The action was brought to recover the amount due on a promissory note and to foreclose a mortgage given to secure the payment of the same. Defendant filed a demurrer to the complaint on the grounds:

> "That the said complaint does not state facts sufficient to constitute a cause of action," and "that said complaint is uncertain in this: That it does not appear therefrom how much money has been paid, either on account of principal or interest on said promissory note, or in what manner or how the amount of interest stated to be now due and owing on said note is calculated, or how such an amount can be due or payable."

The demurrer was overruled, and, after answer filed by defendant, the cause came on regularly for trial. There was no appearance by or on behalf of appellant at said trial, and, after the evidence on behalf of plaintiff was submitted, the court permitted him to file an amendment to his complaint to correct a clerical error in paragraph 5 thereof as to the respective items of principal and interest, changing the former from $5,500 to $6,000, and the latter from $1,274.20 to $774.20, but leaving the aggregate amount the same. The court thereupon rendered judgment for plaintiff as prayed for, and appellant has appealed from said judgment upon the judgment roll alone. He makes two points: First, that the court erred in overruling his demurrer for uncertainty; and, second, that the court should not have permitted the "filing of the amendment to the complaint without notice to defendant or service upon him." There is no merit whatever in either point, and it is quite apparent that this appeal should never have been taken.

[1, 2] There was no uncertainty as to the amount claimed and alleged for interest and for principal in said paragraph 5 of the complaint, but it did appear from the whole of the pleadings that too much was claimed for interest and too little for principal. The aggregate amount, though, as we have seen, was correct. This shows that the mistake was entirely without prejudice. Besides, the specific allegation as to principal and to interest was entirely unnecessary. It was sufficient to aver that the whole amount was owing and unpaid. The payments made upon a promissory note and the items constituting the balance due are but items of an account, which, if the defendant wants, he can demand in the form of a bill of particulars; but a demurrer for uncertainty is not the remedy. Code Civ. Proc. § 454; Long Beach, etc., v. Dodge, 135 Cal. 401, 67 Pac. 499; Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553.

[3] It may be added that, if appellant had seriously considered his point as possessing any merit, he would, no doubt, have appeared at the trial and shown that the said mistake was made in estimating the amount of the interest. However, the correction was made, notwithstanding he voluntarily absented himself, and he has no cause for complaint because it was made in his absence.

[4] The contention is too trifling for further comment; but, even if the court had committed an error in overruling the demurrer, it would be disregarded under the well-settled rule. A judgment which is right upon the merits will not be reversed for harmless error in overruling a demurrer to the complaint for ambiguity or uncertainty, where the defendant was not misled to his prejudice, and the apparent ambiguity or uncertainty consists of a statement of useless and surplus matters, and the cause of action is fairly apparent from the complaint. Alexander v. Central L. & M. Co., 104 Cal. 532, 38 Pac. 410; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Preston v. Central Cal., etc., Irr. Co., 11 Cal. App. 190, 104 Pac. 462; Krieger v. Feeny, 14 Cal. App. 538, 112 Pac. 901.

[5] There are several answers to the second contention of appellant. In the first place, it must be presumed that he was served with a copy of the amended complaint, since the contrary does not appear. On appeal, of course, every intendment is in favor of the regularity of the proceedings and of the validity of the judgment. If appellant desired to have his contention treated seriously, he should have presented an appropriate record by means of a bill of exceptions. The precise question has been adjudicated adversely to his contention in Livermore v. Webb, 56 Cal. 489; Riverside County v. Stockman, 124 Cal. 222, 56 Pac. 1027; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301; Segerstrom v. Scott, 16 Cal. App. 256, 116 Pac. 690.

[6] Besides, where an amendment is made to make the pleadings conform to the proof, it is not necessary that notice thereof be given and not necessary that such amendment be served. Hedstrom v. Union Trust Co., 7 Cal. App. 278, 94 Pac. 386; Ramboz v. Stansbury, 13 Cal. App. 649, 110 Pac. 472.

[7] Manifestly, it is true, also, that the amendment was to correct a clerical error; that it did not affect in the least the cause of action; and that it could not possibly have prejudiced appellant. Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235; Myers v. Holton, 9 Cal. App. 114, 98 Pac. 197.

In fact, as we have stated, the amendment was in reference to an entirely immaterial matter, and the mistake might have been disregarded, since the judgment was for the proper amount.

It is seldom that an appeal is presented with less of merit to recommend it.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

39 Cal. App. 517

CHOWCHILLA COLONIZATION CO. et al. v. THOMPSON et al. (Civ. 1804.)

(District Court of Appeal, Third District, California. Jan. 30, 1919.)

1. Vendor and Purchaser 🔑201 — Improvements.

A contract provision that all improvements now on or hereafter to be placed on the premises shall be the property of the vendor until performance by the vendee is valid and enforceable.

2. Vendor and Purchaser 🔑201—Wrongful Removal of Improvements—Remedy.

By purchaser's wrongful severance from the premises of improvements, consisting of house, barn, and windmill, they became personal property, for which an action of claim and delivery by the vendor would lie.

3. Replevin 🔑8(5) — Removal of Improvements by Vendee.

By violating his contract in removing from the premises improvements, consisting of a house, barn, and windmill, the purchaser forfeited his right to the further possession thereof, giving the vendor the right to immediate possession, supporting an action of claim and delivery; and rescission by the vendor, or declaring forfeited the right of the vendee to the further possession of such property, as real property, was not required as a condition precedent.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by the Chowchilla Colonization Company and others against H. H. Thompson and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

F. A. Fee, of Madera, for respondents.

BURNETT, J. On the 30th day of October, 1913, the plaintiff, Chowchilla Colonization Company, a corporation, and the defendant H. H. Thompson, entered into a written contract for the sale of real estate, which contract contained the following provision:

"All buildings and improvements now on said land, other than those belonging to present occupants, if any, or that shall hereafter be placed thereon by any party, shall become a part of the realty and shall not be removed therefrom, but shall be and remain the property of said vendor until this contract shall be fully performed and completed by said vendee."

At the time of the execution of said contract there were no improvements of any kind upon said premises. On said day said defendant paid to plaintiff, Chowchilla Colonization Company, as a part of the consideration for the purchase price of said property described in the contract, the sum of $1,020. The payments of $817.80 falling due on the 11th day of September, 1914, 1915, and 1916, and the interest thereon, were never paid.

In the following months of December and January, defendant Thompson constructed upon said premises a dwelling house, barn, and windmill as described in the complaint herein, and leveled and checked said premises and erected a pumping plant and the necessary wells to irrigate said tract of land, and in the month of January, 1914, said defendant moved upon the premises. His intention at that time was to remain permanently on the place and make his home thereon.

The complaint in the action alleges:

"That on the 17th day of March, 1917, and while the plaintiffs were the owners of said above described property, together with said dwelling house, barn, and windmill thereon situate, the said defendants entered upon said above described premises and unlawfully, wrongfully, maliciously, and without right or authority so to do, and against the will and wish of said plaintiffs, severed from said lot one (1) and removed from off the same the said two-story frame dwelling house, said frame barn, and said windmill, and ever since said 17th day of March, 1917, the said defendants have been in the unlawful and wrongful possession of said property and do now unlawfully and wrongfully detain the same to the damage and injury of plaintiffs in the sum of $1,500, the value of said property, so taken and removed as aforesaid."

The prayer of the complaint was for the possession of said house, barn, and windmill, and, in case delivery thereof could not be made, then for the value thereof and for damages in the sum of $1,000.

The findings of the court were in favor of plaintiffs, and the judgment was for the recovery of the possession of said buildings, or, in case delivery could not be had, then for their value, in the sum of $600; no additional allowance being made specifically for damages.

There is really no dispute as to the facts; the only question being as to whether the plaintiffs have pursued the appropriate remedy. The said provision of the contract, which we have quoted above, is entirely free from uncertainty, and effect should be given to it unless it can be successfully claimed that it is in violation of some provision of the statute or in contravention of public policy. No authority, however, has been cited by appellant to the effect that such provision is not enforceable, and we could with propriety dismiss that consideration without further comment. It may not be improper to recall, however, the general rule, independent of any contract made by the parties, as follows:

"Articles annexed or structures erected by a vendee of land who is in possession by virtue of his contract of purchase, but who has not yet obtained title to the premises, cannot be removed by him without the consent of the vendor, the presumption being, from his interest under his contract and expectation of acquiring absolute title that he intended the articles or structures to become a part of the land." Am. & Eng. Enc. of Law, vol. 13, p. 672.

It is equally well settled that the parties themselves may agree as to the character and ownership of the property. The principle has been set forth as follows:

"It is a well-settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their agreement, courts will enforce it." Fratt v. Whittier, 58 Cal. 132, 133 (41 Am. Rep. 251).

Furthermore:

"If the contract contains a special provision that, on default of purchaser, the vendor shall be entitled to the improvements made by the purchaser, full effect will be given to such provision, both in law and in equity." 39 Cyc. 1402.

[1] The two facts, therefore, may be deemed settled: First, that said provision consti-

tutes a valid contract and enforceable; and, second, the appellant violated it by removing said buildings from said premises. Indeed, it is admitted that he so violated his contract and that he removed them surreptitiously and at night. The only pretense of a defense to the action is, in effect, that the contract of purchase had not been rescinded by the vendor, nor had said vendor exercised its option to declare the right of appellant to the further possession of the real property forfeited. It is therefore claimed that at the time said defendant was in the rightful possession of the land by the acquiescence of the owner, although the former was in default in the payment of the installments due under said contract. Hence it is argued that the owner was not entitled to the immediate possession of the land, or of the buildings, since they were a part of the land. It is contended that the conclusion follows that the action of claim and delivery will not lie, since there is lacking an important element—the right to the immediate possession of the property.

[2, 3] We are satisfied, however, that the claim is without merit as applied to this particular case. The buildings, it must be remembered, had been separated and removed from the land, and were on the public highway at the time the action was brought. They constituted personal property, and while, technically speaking, the appellant may have been entitled to continue in possession of the land until the contract was rescinded by the owner, yet he had clearly forfeited his right to the further possession of said improvements by virtue of his violation of his agreement to permit said improvements to remain upon and to follow the ownership of said land. It appears plain, therefore, that the right to possession of the land and the right to possession of the improvements were entirely distinct and separate after said buildings were removed. It would be a strange and unjust construction of said provision in the contract to hold that appellant could violate it by removing said buildings, and continue rightfully in possession thereof, simply for the reason that, although for years in default in his payments, no action had been taken to terminate his interest in said real property. We could go further, and say that his removal of said buildings, under such circumstances, in violation of his contract, virtually amounted to an abandonment of the premises, and thereby operated as a rescission upon his part of the contract of sale. The court would have been justified in so finding, and that he had thereby waived any right to further possession of said real property. However, it is not necessary to go that far in upholding the judgment of the court, as it seems entirely clear that, by violating his contract in removing them from the land, he lost and forfeited any right to the further possession of said buildings. The right to the possession would then belong to the vendor as an incident of its ownership to said improvements under the terms of said contract.

In the opening brief of appellant only one decision is cited to uphold his contention, and that is the case of Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680. It is to be observed, however, in that case, that there was no agreement whatever in reference to the improvements. Therein the erection of the buildings formed no part of the consideration for the purchase of the land, and it appeared that the vendee had in no respect failed to comply with the requirements of the contract. In that case a writ of injunction was sought, and it is clear that no sufficient showing was made to warrant the issuance of such writ. In his closing brief appellant cites two other cases in support of his contention, to wit, the case of People's Savings Bank, etc., v. Jones, 114 Cal. 422, 46 Pac. 278, and Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; but neither of these cases involved a situation similar to that before us. In the former, the general principle as announced cannot be questioned, that "to sustain an action of claim and delivery, the plaintiff must have the right to the * * * exclusive possession of the property sought to be recovered at the time of the commencement of the action, and an after-acquired interest will not support the action."

It is to be observed that there was no agreement therein as to said improvements, and they were placed upon the land after the execution of a mortgage upon said premises. The mortgage had been foreclosed, but the time for redemption had not expired. The judgment debtor was therefore in lawful possession of the land, and by removing the buildings he did not violate any contract. The case is entirely distinct from this, although it may be added that, in so far as it holds that the question whether the said improvements constituted fixtures was immaterial, the decision is clearly in conflict with Sands v. Pfeiffer, 10 Cal. 259, wherein it was held, through Mr. Justice Field that—

> "A mortgagor, after a sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property of its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage and passes fixtures subsequently annexed by the mortgagor. By the wrongful severance from the premises, the fixtures become personal property, for the recovery of which an action of replevin will lie by the purchaser after he obtains the sheriff's deed."

Boone v. Templeman, supra, contained no such provision as is found in the contract before us. The action therein was for specific performance of a contract for the sale of land, which made time of the essence of the contract. The complaint set forth the undisturbed possession of the premises, part payment, and the offer of full payment before the institution of the action for the execution of a deed, and further stated full and sufficient facts excusing plaintiff's delay, and showing that the vendor had waived his right to demand a forfeiture by the vendee, and the court held that the complaint constituted a cause of action. It is perfectly apparent that, according to the allegations of the complaint, the vendor in that case waived the default of the vendee in failing to make his payments according to the terms of the contract, and the decision was just and equitable, in view of the willingness of the vendee to pay the whole consideration for the property. The question involved is entirely different, as we view it, from the one before us. It may be added that no claim is made herein that the vendee is willing or able to pay the consideration for said real property, nor does it appear that the decision of the lower court is in any manner unjust or inequitable.

In fact, as before indicated, it is a reasonable inference that the vendee has repudiated the contract and abandoned the premises, and has no intention whatever of carrying out his agreement. In fact, a portion of the answer of defendant Thompson in another case brought against him by the plaintiffs was introduced in evidence, in which he averred that he had rescinded said contract and offered to restore everything of value he had received under it. Such, also, is a fair inference from his conduct and from his testimony in this case.

As to any further action by plaintiffs against said defendant under said contract, we are not concerned herein, although we must assume that the court will not permit them to recover more than is just.

The judgment is affirmed.

We concur: BUCK, Presiding Judge pro tem.; HART, J.

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39 Cal. App. 489

HEROLD v. P. H. MATHEWS PAINT HOUSE. (Civ. 2568.)

(District Court of Appeal, Second District, Division 1, California. Jan. 28, 1919. Rehearing Denied by Supreme Court March 27, 1919.)

1. MASTER AND SERVANT 🔑302(2) — AUTHORITY TO ADMIT AND ESCORT VISITORS.

Employé, who took the place of defendant's store manager during the absence of the latter, *held* to have had authority to admit deceased, who came to visit her husband, working on fourth floor of store, and to place her in charge of another employé for the purpose of taking her up the elevator to her husband.

2. NEGLIGENCE 🔑32(1) — LICENSEES ON PREMISES—DUTY OF CARE.

Rule that a mere licensee cannot recover for injury due solely to unsafe condition of premises does not apply, where licensee is injured by overt act of negligence committed against him by owner of premises.

3. NEGLIGENCE 🔑136(15) — LICENSE — QUESTION FOR JURY.

In action by plaintiff employé for death of his wife, who fell into an elevator shaft while on defendant's premises to see plaintiff on business purely personal to themselves, question of defendant's negligence *held* for the jury.

4. NEGLIGENCE 🔑136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action by plaintiff employé for death of his wife, who fell into an elevator shaft while on defendant's premises to see plaintiff on business purely personal to themselves, *held*, that wife was not guilty of contributory negligence as a matter of law.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Henry Herold against the P. H. Mathews Paint House. From a judgment entered on a verdict directed for defendant, plaintiff appeals. Reversed.

E. B. Drake, of Los Angeles, for appellant.

Bradner W. Lee, Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for respondent.

CONREY, P. J. This is an action wherein the plaintiff seeks to recover damages on account of the death of his wife, Bertha C. Herold, through injuries alleged to have been caused by negligence of the defendant. By direction of the court the jury rendered a verdict in favor of the defendant. The plaintiff appeals from the judgment rendered on that verdict.

The defendant was in possession of a four-story building, upon the fourth floor of which it maintained a factory. The ground floor was used partly as a warehouse and partly as a retail store. In that part used as a warehouse, which was the rear part of the first floor, there was an elevator running from the basement to the fourth floor. This was a freight elevator, and was moved from floor to floor as the business of the defendant required. It was also customarily used by the employés of the defendant and by such other persons as were permitted to have access to the upper floors. The elevator well was guarded by a gate. In order to bring the elevator to the floor, it was necessary to raise the gate. There was sufficient light so that one could see clearly after one's eyes became accustomed to the light; but a person coming from the bright street, and going back to the portion of the store where the elevator was, would have to remain from three to five minutes before his eyes would become accustomed to the light. The defendant had near its elevator well a drop light, which was burning while defendant's stock clerk was at work, and which was usually turned off during the noon hour. This light, when burning, did not assist any person coming suddenly from the street into the storeroom; as to such person the light made a blur, as does a light in a fog, so that a person coming from the street would have to remain until his eyes became accustomed to the light. The only practical way by which a person could go from the storeroom of defendant's building to the fourth floor was by the elevator. The plaintiff was superintendent of defendant's paint factory, and his place of employment was on the fourth floor.

Pursuant to an arrangement made between the deceased and her husband, she came to see him at the defendant's place of business shortly after noon of the day of the accident. The object of her visit had no relation to the business of the defendant.

Mr. P. H. Mathews was president and general manager of defendant company. James Stone was manager of the store; that is, he was in charge of selling goods on that floor, and customarily gave orders to the other employés in the store, and sometimes in the factory and warehouse, about such things as he wanted to have done. If Mr. Stone was absent, his place was taken by William Brady, another employé of defendant. E. L. Boehme was an employé subordinate to Stone. On several occasions, prior to the day of the accident, Mrs. Herold had visited the plaintiff at the same place of business. On one of those occasions Mr. Stone took her up in the elevator, and on one or two other occasions he instructed other employés to take her up. Mr. Mathews had seen her in the store on one occasion, but it does not appear that he knew that she was taken up in the elevator. No other officer of the company knew that she had ever visited that place of business. Customers of the defendant were not usually taken up to the factory, although that was done on rare occasions.

When Mrs. Herold came into the store on the day of the accident, Mr. Mathews and Mr. Stone were absent. Mr. Brady and Mr. Boehme were in the store. Mrs. Herold asked Brady if she could see Mr. Herold. Brady answered in the affirmative, and told Boehme to take her up in the elevator. The electric light near the elevator was not burning at that time. She followed Boehme back toward the elevator. Boehme threw up the gate, and reached in and pulled on the cable, which was used to raise and lower the elevator. The elevator at that time was at a floor above. Boehme did not tell Mrs. Herold that the elevator was not there—that it was not at the level of the floor. Just as he reached for the rope, she stepped past him through the doorway and fell to the basement.

From the foregoing, which are the principal facts of the case, it must be determined whether or not the court was justified in directing a verdict in favor of the defendant. The defendant joined issue on the main allegations of the complaint relating to the transaction, and also pleaded affirmatively that Mrs. Herold was guilty of contributory negligence.

It is contended by appellant that at the time and place when his wife fell into the elevator shaft she was an invited guest of the defendant, and not there merely by license, and that whether she be regarded as a person present by invitation, or only as a licensee of defendant, yet at all events, since she was on the part of the premises to which defendant's employés had directed her to go, the plaintiff may recover for any damages resulting from her death by the active negligence, or an overt act of negligence, of the defendant, though it might be held the same was neither willful nor wanton. Respondent, on the other hand, contends that the deceased was a mere licensee upon the premises of the defendant, to whom defendant owed no other duty than refraining from inflicting wanton or intentional injury; that Mr. Brady, in granting deceased's request for permission to see her husband, and in requesting Boehme to take her in the elevator, did not impliedly or expressly invite her, either for himself or for his employer, to use the elevator, or enter the defendant's premises; that Brady did not have express, or any other, authority from the defendant to extend invitations on behalf of the defendant to strangers to use the premises of the defendant for business purely personal to themselves; that the defendant owed no duty to her, except to refrain from inflicting on her wanton or willful injury.

[1] For the purposes of the discussion we shall assume, without deciding, that throughout the transaction in question the relation between Mrs. Herold and the defendant was only that of licensee and licensor. We think that, under the facts shown by the evidence, Mr. Brady represented the defendant as the person in charge of the premises, and that his authority extended at least so far that he had the right to admit Mrs. Herold to the premises for the purpose which brought her there. In view of the fact that she could not go to her husband without using the elevator, and in view of the uses to which the elevator was put whenever visitors were allowed access to the upper floors, we think that Brady was also authorized to place Mrs. Herold in charge of another employé for the purpose of taking her up in the elevator.

[2] We readily concede that a mere licensee cannot recover, where the injuries are caused solely by reason of the unsafe condition of the premises, and without any active or overt act of negligence committed against him by the occupant or owner of the premises. That rule, however, does not apply to a case where the licensee is upon the premises of a defendant, and is injured by an overt act of negligence committed against him by the defendant. Where the injury results from such an act, the licensor is responsible. The rule was clearly stated by the First District Court of Appeal in Lucas v. Walker, 22 Cal. App. 296, 134 Pac. 374. A rehearing in that case was asked for, but was denied by the Supreme Court. In that decision (22 Cal. App. at page 302, 134 Pac. 379), the court quoted with approval from the case of Pomponio v. New York, etc., R. Co., 66 Conn. 528, 34 Atl. 491, 32 L. R. A. 530, 50 Am. St. Rep. 124, as follows:

> "But, while this is so, it is also true that the landowner must not himself, by what has been called 'his own active negligence,' injure either the licensee or the party invited, while they are upon his land. This is a duty due to both equally. Towards both, in this respect, he is bound to exercise the same amount of care. Both are upon his premises, not as wrongdoers, but by his permission, and, in respect to the duty in question, we know of no good reason why the nature and extent of it should not be the same in cases of license as in cases of invitation."

[3] In the case at bar, upon the evidence presented, we think that the plaintiff was entitled to have the question of defendant's negligence determined by the verdict of the jury, under instructions given in harmony with the rule above stated. Under that evidence the court was in error when it determined, as matter of law, that the acts of Brady and Boehme, taken together with the failure to give warning to Mrs. Herold, did not constitute negligence of an active or overt character, within the meaning of the rule above stated, and that the defendant could not be held responsible therefor. We do not agree that Boehme's failure to warn the deceased of possible danger was merely passive negligence upon his part. Although passive or negative in itself, it may reasonably be considered as part of the overt act of raising the gate, which the jury might have found, under the evidence, was done in such manner as to constitute an implied suggestion to Mrs. Herold that she might safely enter upon the elevator.

Respondent contends that the court must necessarily have concluded from the evidence that Mrs. Herold was guilty of contributory negligence directly and proximately causing the accident, and that the case is governed by the rule announced in Kauffman v. Machin Shirt Co., 167 Cal. 506, 140 Pac. 15. In that action the plaintiff sued for damages for the death of her son, caused by a fall down an elevator shaft. While acting as messenger for his employers to deliver a package to a lessee of the fourth floor of the building, the boy entered the elevator and transported himself to the fourth floor. This was in accordance with the practice of the defendant, who permitted and expected messengers and employés of customers having business in the building to use the elevator. On reaching the fourth floor, the boy found the door to the elevator shaft open and unfastened. He pushed it open about a foot, stepped into the hall, walked to the establishment of the Machin Shirt Company, and returned to the door of the elevator shaft, not more than one minute after he had emerged from the elevator. To all appearances the door and the platform were in the same condition that he had left them; but some one had moved the elevator to another floor. Believing that no change had occurred, the boy stepped into the shaft and fell. The court held that the accident was caused by his contributory negligence. There was no statement that he looked, or that, if he had looked, there was any physical reason why he could not have seen that the elevator had been moved. In the absence of any such showing, the court assumed that to look was to see, and that, if he had looked, he must have noticed the danger. The rule was applied that, while ordinarily the question of negligence is one largely of fact for the consideration of the jury, yet that where the standard of conduct required of persons under given circumstances has been plainly neglected by the person seeking relief, it then becomes a question of law.

[4] Admitting all that was determined in that decision, it does not, as matter of law, appear from the facts in the present case that Mrs. Herold was guilty of contributory negligence. Conceding, for the purposes of the argument, that she was only a licensee, the evidence shows that she was not left alone and on her own responsibility to find her way. The jury might well have found from the evidence that the acts of the defendant's employés constituted a representation to her that it was safe to enter the elevator, and might have found, also, that the condition with respect to light at that time and place was such that she might have looked with reasonable care, and yet might not have seen the danger.

We think that the allegations of the complaint were sufficient to constitute a cause of action, and that under the evidence the court was not justified in ordering the jury to return a verdict in favor of the defendant.

The judgment is reversed.

We concur: JAMES, J.; MYERS, Judge pro tem.

39 Cal. App. 538

MOORE et al. v. COOKS', WAITERS' & WAITRESSES' UNION NO. 402 et al. (Civ. 2064.)

(District Court of Appeal, Second District, Division 2, California. Jan. 30, 1919.)

1. NUISANCE ⚿3(1)—PICKETING BY TRADE UNION—"PRIVATE NUISANCE."

Picketing of plaintiffs' restaurant by defendant unions *held* an illegal interference with plaintiffs' rights and as to them a "private nuisance."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Private Nuisance.]

2. CONSPIRACY ⚿3—PICKETING.

Picketing of plaintiffs' restaurant by unions to induce plaintiffs to unionize the restaurant, by compelling the women employés to pay their dues to defendants' union, *held* a "conspiracy."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

3. TORTS ⚿10—PICKETING.

Defendant unions *held* to have no right to maintain "peaceful picketing" in front of plaintiffs' restaurant, to apprise the public that plaintiffs were operating their business in a manner deemed "unfair" by organized labor.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Suit by H. J. Moore and G. S. Moore, partners under the name of Moore's Restaurant, against the Cooks', Waiters' & Waitresses' Union No. 402 and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Henning & McGee, of San Diego, for appellants.
Hoff & Chatterson, of San Diego, for respondents.

THOMAS, J. This is an appeal from a judgment of the superior court of San Diego county to enjoin the defendants from picketing the place of business of the plaintiffs. There is no question as to the facts in the case. The appeal is upon the judgment roll alone. The matter comes to this court squarely upon the law.

It was admitted by the defendants upon the trial, and the court found, that the defendant unions established a picket of plaintiffs' business and maintained a picket patrol in front of their restaurant from the 25th day of February, 1915, until the service of the restraining order in this case on December 7, 1915. The picketing, as the court found, was, in the language of the findings, as follows:

"That the said defendant unions did thereupon establish a boycott of the plaintiffs' business, and place a picket patrol in front of plaintiffs' said place of business on or about the 25th day of February, 1915, during certain hours of each day, until the service of the restraining order in this action, to wit, on December 7, 1915. That said picket, from the 25th day of February, 1915, until early in October, 1915, wore a badge consisting of a white ribbon with the word 'Picket' printed in large black letters, and after said —— day of October, the letters were discarded and the badge consisted simply of a plain white ribbon pinned upon her clothing at or near her shoulder and running across her breast; and that at all times said picketing was maintained under conditions of publicity and public notoriety calculated and intended to give notice, and did give notice, to persons passing said place of business, or intending to patronize the same, that said place of business was under boycott, and that its patronage was opposed by organized labor. That there was but one picket at a time, and the patrol was changed twice; the second picket being a man during one day, and the other two pickets being women. That said picket patrol was maintained practically continuously from the said 25th day of February until the 7th day of December, there being an interruption of but two or three days during that time, and was maintained at the noon hours between 11 and 2 o'clock in the day, and between 5 and 7 in the evening, which were the hours of the day when the greatest number of meals were served by the plaintiffs to their customers."

[1] Ours is not a government of liberty under license, but under law. We have the right to do as we please only so long and so far as our so doing does not interfere with the rights of others. When we level up the ravines of low impulses, humble the mountains of pride, straighten the crooked places of deceit, and smooth the rough places of anger and malice and all uncharitableness, it will become so obvious that the conceded acts of defendants were an illegal interference of plaintiffs' rights, that it needs no argument to convince any God-fearing, liberty-loving, home-defending, and humanity-helping individual in this enlightened day of that fact. Such conduct, as disclosed by the record here, we think not only constituted an illegal interference with plaintiffs' rights, but became, and was, as to them, a private nuisance.

[2] The fact that the purpose for which the defendants maintained pickets, as was done here, viz. to induce plaintiffs to unionize said restaurant by compelling the women employés to pay their dues to said union, and to discharge the nonunion cook and employ a union cook in his place, does not justify maintaining a patrol in front of plaintiffs' premises as a means of carrying out their scheme, which is nothing short of a conspiracy—as the court found the fact in the case at bar to be. The admitted facts in the case, we think, disclose "a combination

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him," and "is outside of allowable competition, and is unlawful" (Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443), and against such "the law will protect the victim and punish the movers of any such combination" (Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895). We yield to no court or individual in claiming for and defending to the utmost all the legal rights of trades unions and organized labor generally, but "there is no sanctity in any of these that elevates them above the law, or which confers upon them, or any of them, rights not enjoyed by any other individual or association." Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. Justice is not, and cannot be, justice, if weighed in unequal balances. The test is, not how members of the union act toward one another, but rather how do they act toward the nonunion man?

Peaceful picketing! There is no such thing, if the term is intended to apply to the facts as they are shown to be by the record in the case at bar. We are in full accord with the doctrine enunciated in the case of Atchinson v. Gee (C. C.) 139 Fed. 582, where it is held that "there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." After an exhaustive examination of the decisions of this and other jurisdictions, we are of the opinion that the doctrine laid down by the appellate tribunals of this state is supported by the weight of authority throughout the union; but, regardless of that fact, the point involved in this case has been so often decided, and that adversely to the contentions of appellants here—as is evidenced by the following decisions: Goldberg v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; Pearce v. Stablemen's Union, supra; Berger v. Superior Court, 175 Cal. 719, 167 Pac. 143—that it would be useless to cite further authorities. In the Berger Case the Supreme Court supported the same doctrine, but refused to support the conclusion of the trial court adjudging the petitioner therein guilty of contempt, when the record did not disclose anywhere "that the person charged is one of the persons or classes enjoined, or acting as the agent or servant of or in * * * combination with them, but only that he had actual knowledge of the terms of the injunction by reason of the service of a copy thereof upon him." That this is a correct statement of the law we think is not debatable.

The court further found "that during the time of said picketing the said pickets patrolled the sidewalk in front of the plaintiffs' place of business the entire width of the restaurant, and near the outer edge of the said sidewalk," and as a conclusion of law held that "the picketing of the plaintiffs' place of business, with instructions to walk up and down the pavement in front thereof, and the patrol of said picket in accordance with said instructions upon the sidewalk in front of plaintiffs' place of business, was and is unlawful, illegal, and a trespass and illegal injury to the property rights of the plaintiffs, and an illegal restraint of trade."

[3] From what has been said here, it follows that, as appellants contend, "the only question involved in the present appeal is the right of organized labor to maintain a 'peaceful picketing' in front of plaintiffs' place of business, so that all members and friends of labor unions may know that plaintiffs are operating their business in a manner that organized labor believe to be 'unfair.'" The entire contention of defendants here is that they have a legal right so to do. We are convinced, from an examination of the record presented to us, that under the law they have no such right, and that the court acted within its jurisdiction in granting the injunction herein.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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39 Cal. App. 440

YUBA MFG. CO. v. STONE. (Civ. 1949.)

(District Court of Appeal, Third District, California. Jan. 23, 1919.)

1. EVIDENCE ⚷434(11) — REPRESENTATION INDUCING EXECUTION OF CONTRACT—WHAT CONSTITUTES.

Representation of seller's agent with reference to capacity of tractor or what it would do in the matter of driving rice threshers amounted to no more, although claimed to have been fraudulently made, than an assurance or warranty that tractor would do a certain amount of work, and, being ignored in written contract which warranted tractor to be in good working order and free from latent defects, evidence thereof was not admissible on the theory that it proved fraud inducing execution of contract and avoiding the whole thereof.

2. SALES ⚷260 — "EXPRESS WARRANTY" — WHAT CONSTITUTES.

An "express warranty" means simply an undertaking or covenant that the thing which is the subject of the contract is or is not of a certain quality or capacity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Express Warranty.]

3. Pleading ⚷8(15)—Fraudulent Representations.

The quality, as a warranty, of representation of seller's agent with reference to capacity of tractor or what it would do in the matter of driving rice threshers, would not be changed by alleging that it was fraudulently made.

4. Evidence ⚷441(8) — Parol Evidence — Warranties Not Shown by Writing.

Where the parties have reduced their agreement of sale to writing, they are conclusively presumed to have exhibited therein all the covenants and conditions as to the quality and capacity of the thing sold which are binding upon the vendor.

5. Evidence ⚷434(8)—Fraud — Relation to Matter in Contract.

To show fraud that might vitiate the apparent contract of the parties, the fraud must relate to and be connected with the agreement which is the basis of the action.

6. Trial ⚷388(2)—Findings—Necessity.

Where fraudulent representation set up by defendant buyer as grounds for rescission was immaterial so that cross-complaint failed to state a cause of action but did state a defense based upon plaintiff's breach of warranty in written contract, the only material issues were of legal cognizance, and there was no necessity for specific findings by the court.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Yuba Manufacturing Company against Edward Stone. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. A. Wetmore and M. T. Brittan, both of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondent.

BURNETT, J. The action was brought to recover the sum of $2,244.10 upon a promissory note and book account, the complaint being in two counts.

The pleadings in the case show that plaintiff sold to defendant a tractor, known as a Yuba "Ball Tread," on or about the 12th day of March, 1915, for the total sum of $3,055, and that the tractor was purchased under a written contract, which is set forth in defendant's answer and cross-complaint.

The promissory note sued upon was one of several notes given in payment of the purchase price of the tractor, and the book account was for supplies furnished for said tractor and labor performed thereon by the plaintiff. The answer and cross-complaint of defendant admits the execution of the notes but attempts to set up a defense and cause of action against plaintiff, first, for breach of the warranty contained in said contract, and, secondly, for rescission of the contract and for damages on account of fraudulent representations made by plaintiff to defendant for the purpose of inducing, and which did induce, him to purchase said tractor.

The cause was tried before a jury and a verdict rendered in favor of plaintiff for the sum of $2,070, and the appeal is taken from the judgment on a bill of exceptions.

The transcript does not purport to show the entire evidence, but the record is sufficient to present the points relied upon by appellant for a reversal.

The contentions of appellant are: First, that the court erred in refusing to allow defendant to introduce evidence of the oral representations made to him by plaintiff and its agents; and, second, that "the judgment is erroneous because it was based upon a general verdict of the jury without findings." As to the supposed erroneous ruling, the transcript shows that the defendant, after stating that he had a conversation with one Fred Johnson, an agent of plaintiff, was asked this question:

> "When he came over to your home, what conversation did you have with Mr. Johnson with reference to the purchase of this tractor?"

To this question an objection was made on the general ground and, also:

> "It does not tend to prove any issues involved in this action, and it is a manifest beginning of an attempt to contradict, change, and vary the terms of a written instrument."

After some discussion, the question was withdrawn and this question was asked:

> "Prior to the execution of this contract, which is on March 12, 1915, did the Yuba Construction Company, now known as the Yuba Manufacturing Company, or any of its agents—I will have to make it leading now I guess—make any representations to you of any kind as to what the capacity of the machine—that is, the tractor, which they were attempting to sell you—would be, or what it could do in the matter of driving rice threshers?"

It was objected to as "irrelevant, incompetent, and immaterial, and tending to alter and vary the terms of a written instrument, to wit, the contract as finally executed and set forth in the pleadings in this action." The objection was sustained by the court, and this ruling is the cause of the principal complaint of appellant.

The written contract, as appears from the pleadings, was executed on the 12th day of March, 1915, and provided for the sale and delivery by the respondent to appellant of "one Model 18 Yuba Ball Tread Tractor, with canopy and Prest-o-lite." It further appears that appellant should pay for said trac-

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for the sum of $3,055, in installments, which were to be evidenced by promissory notes, except the first payment, which was made at the time of the execution of the agreement. It was, also, provided that the property in said tractor should remain in plaintiff until the whole amount should have been paid by defendant, and that the defendant should have the right to hold and use the said tractor so long as there was no default in the payment of any of the moneys evidenced by said promissory notes.

Paragraph 5 of said written agreement provides as follows:

> "The party of the first part warrants that the said tractor when delivered will be in good working order and free from any latent defect arising from poor workmanship or the use of improper or defective materials, and agrees to correct any defects due to poor workmanship or defective materials which may develop under normal and proper use within one year from the date of delivery."

[1] This, it may be said, is the only statement in said contract and the only warranty in reference to quality, capacity, or efficiency of said tractor, and it is the contention of respondent that by offering said parol evidence of previous conversations between appellant and the agent of respondent an attempt was thereby made to add an additional warranty to that expressed in said written instrument, and that by virtue of the provisions of the Code, and, also, of the decisions of the court, such parol evidence is inadmissible. It is not disputed by appellant that an additional warranty cannot be shown to that contained in the written contract, but it is contended that the offer constituted an effort to prove fraud which operated as an inducement to the execution of said agreement, and which, if shown, would avoid the whole contract and relieve the appellant from the apparent liability on said promissory notes.

It cannot be disputed, though, that the statement claimed to have been made by respondent's agent was in reference to the capacity of said machine. It amounted to nothing more nor less than an assurance or guaranty that the tractor would do a certain amount of work. If effect were given to the declaration of the agent, respondent would be required to furnish a tractor of a certain specific and definite capacity.

[2, 3] An "express warranty" means simply an undertaking or covenant that the thing which is the subject of the contract is or is not of a certain quality or capacity. It is difficult, therefore, to resist the conclusion that appellant sought to add to the warranty contained in said written instrument. Of course, the significance of the said parol assurance was not changed by reason of the fact that it is claimed to have been fraudulently given. Whether the promise was made with or without a deceitful intent, its importance to appellant arose from the consideration that it related to the character of the tractor which was to be furnished. Its quality as a warranty would not be changed or affected in the least by alleging that the representation was fraudulently made.

[4] The rule as to warranties seems to be well settled that, where the parties have reduced their agreement of sale to writing, they are conclusively presumed to have exhibited therein all the covenants and conditions as to the quality and capacity of the thing sold, which are binding upon the vendor.

The principle that governs is stated in Benjamin on Sales (7th Ed.) p. 666, as follows:

> "If the article is sold by a formal contract, or a regular bill of sale, which is silent on the subject of warranty, no oral warranty made at the same time, or even previously, can be shown, since the writing is conclusively supposed to embody the whole contract. For the same reason, no additional warranty can be ingrafted on, or added to, one that is written."

In United Iron Works v. Outer H., etc., Co., 168 Cal. 81, 141 Pac. 917, the action was brought to recover the purchase price of a dredge constructed by the plaintiff for defendant in pursuance of the terms of a written contract calling for its construction in accordance with accompanying plans and specifications, and it was held that parol evidence of the surrounding circumstances was not admissible under section 1647 of the Civil Code or section 1860 of the Code of Civil Procedure to show the warranty by the plaintiff, not expressly embodied in the written contract, that the dredge would be capable of doing certain specified work. It was furthermore, held:

> "That where the parties have reduced to writing what purports to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous, or subsequent conversations, representations, or statements will not be received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies."

In Tockstein v. Pac. Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906, it is held:

> "A person buying or agreeing to buy personal property, the terms of which purchase or agreement to purchase are put in writing, is bound as to the terms of the contract by such writing, into which all preliminary understandings and assurances are presumed to be merged, and such

person cannot go behind such writing to avoid the agreement of purchase for the alleged breach of some oral understanding or guaranty not contained within its written terms."

It is true that in the Tockstein Case the written agreement contained upon its face the statement "that only the written representations, agreements, and guaranties contained within its terms shall be binding upon" the vendor; but such recital added nothing to the effect of the written instrument. The written instrument herein, apparently complete in itself, necessarily implies that it contains all the covenants of the parties.

In the Tockstein Case, supra, the plaintiff asserted:

> "That the inducing cause for her agreement to purchase the car in question was the representation of the salesman of the defendant that the car which would be delivered to her would be a new and perfect car and that it was guaranteed perfect in every way, and that she would have no trouble with it."

But, for the reason already stated, she was not permitted to show that this representation was made.

It must be apparent that the same rule applies whether the said oral representations be regarded as technically a "warranty" or as simply a covenant or promise. In either event it must be entirely excluded because not contained in the final written agreement of the parties. For further discussion of the principle we may refer to the carefully considered case of Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948.

[5] Manifestly, this consideration does not preclude either party from showing fraud that might vitiate the apparent contract of the parties. The fraud, however, must relate to and be connected with the agreement which is the basis of the action. Herein, as we have seen, the supposed fraudulent representation is entirely disconnected from the actual contract of the parties and cannot be considered a material element, since it was entirely ignored and superseded by the written instrument. If appellant had made a similar allegation as to any of the facts recited in said instrument, or had shown by proper averment that his signature to the contract was obtained fraudulently or that he was deceived as to the contents or that it did not contain the full intent of the parties, a different situation would, of course, be presented. The cases cited by appellant in this connection are distinguishable from the one before us.

Newman v. Smith, 77 Cal. 22, 18 Pac. 791, does state the rule to be that—

> "Fraudulent representations as to a material matter, by which a party was induced to enter into a contract to his damage, is ground for an action at law or relief in equity, notwithstanding that the contract was in writing and the representations were verbal."

However, that case involved the sale of real property, and it appeared that the fraudulent representations affected the terms of the written instrument, particularly in reference to the value of the property. In other words, by reason of the fraud of the vendee the written instrument did not fully express the intent of the parties.

In Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125, several questions of fraud were involved, all directly connected with the written contract of the parties. The principal elements upon which appellant relied, however, for damages related to the capacity of the architect and the false representation in reference to the cost of the building. These were matters not comprehended and concluded by the written instrument, and it must be apparent that they stand upon a different footing from oral representations as to the quality of a machine, where the parties have thereafter agreed in writing as to what it shall be.

The principal questions involved in Macdonald v. De Fremery, 168 Cal. 189, 142 Pac. 73, were whether a false statement in order to sustain an action of deceit must be the sole or might be only one inducement for the purchase of bank stock and whether the purchaser was justified in relying upon the representations of the directors as to the value of the stock.

In Teague v. Hall, 171 Cal. 668, 154 Pac. 851, no question arose as to adding to or varying the terms of a written contract, but the court rightly held that the action for deceit would lie for false representations as to the number of budded nursery trees made by the vendor.

In Brandt v. Krogh, 14 Cal. App. 39, 111 Pac. 275, the agreement for the sale of corporate stock was in parol and the fraudulent representations were in reference to the value of said stock.

Manifestly, the court, as far as possible, should protect an innocent party against the fraud of one seeking to take an unconscionable advantage; but in this class of cases, when the parties have deliberately reduced their contract to writing and have undertaken to set forth the character of the contrivance which is sold, and there is no mistake or fraud connected with the execution of said instrument, it is reasonable and in accordance with the law to hold that the contract shall not be avoided by reason of some false representation as to the quality of the machine, which representation the vendee has seen fit to completely ignore in the written instrument. It is true, of course, that a defrauded party cannot by the simple "device of a written instrument" be deprived of the right to prove the fraud, but it is equally true that he cannot be permitted to nullify the rule in relation to written instruments by the specious claim that he was deceived by certain oral representations.

[6] As to the other point, it is undoubtedly the rule, as claimed by appellant, that—

> "In an equity case a general verdict rendered by the jury is not determinative of the pleaded issues and a failure to find upon said issues is error requiring reversal of the judgment." Learned v. Castle, 67 Cal. 41, 7 Pac. 34; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 558, 147 Pac. 238; Holland v. Kelly, 169 Pac. 1000.

However, if we are correct in the foregoing views, the allegation as to the fraudulent misrepresentation was immaterial. The so-called cross-complaint failed to state a cause of action for affirmative relief. It did state a defense to plaintiff's complaint, for the reason that it alleged that it was not true, as warranted in the written contract, that said tractor "was in good working order and free from latent defects arising from poor workmanship or the use of improper and defective materials."

As we view it, the only material issues were, therefore, of legal cognizance, and there was no necessity for specific findings by the court.

We find no error in the record, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 402

OTT HARDWARE CO. v. HOLMBERG, City Clerk and City Auditor (two cases). (Civ. 2494, 2440.)

(District Court of Appeal, Second District, California. Feb. 27, 1918. Rehearing Denied March 30, 1918.)

MANDAMUS ⚷19 — PROCEEDINGS AGAINST CITY OFFICIALS—TERMINATION OF OFFICE AND DEATH OF DEFENDANT.

In view of Code Civ. Proc. § 385, where in a mandamus proceeding defendant, who was clerk and auditor of city, went out of office and died, action being prosecuted against him in his official capacity to enforce payment of money from city which he refused to pay, the succeeding clerk and auditor was properly substituted as defendant.

Appeals from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Two actions by the Ott Hardware Company against Miss A. C. Holmberg, as City Clerk and City Auditor of the City of Santa Barbara, substituted for Alfred Davis, as City Clerk and City Auditor of such city. From adverse orders of the court, defendant prosecutes two appeals. Affirmed.

H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellant.

B. F. Thomas, of Santa Barbara, for respondent.

JAMES, J. The controversy between the parties hereto, having run a prolonged course through the trial and appellate courts, is again here on two appeals, both taken by the defendant. As the questions involved are practically the same in both cases, the appeals may well be considered together. The first appeal, that numbered 2494, is an appeal taken from an order substituting A. C. Holmberg, city clerk and city auditor of the city of Santa Barbara, as defendant, in the place and stead of Alfred Davis, the former city clerk and auditor. The second appeal, that numbered 2440, is an appeal taken from an order directing the clerk of the superior court to collect a warrant for a sum of money drawn by the city clerk and auditor and deposited in court to await the result of a former appeal.

In December, 1909, Davis was city clerk and auditor of the city of Santa Barbara, and the city of Santa Barbara was at that time indebted in a considerable sum to Warren W. Clark. The Ott Hardware Company, having obtained a judgment in the superior court against Clark, sought to intercept this money due from the city to Clark by having filed with the city clerk and auditor, agreeable to the provisions of section 710, Code of Civil Procedure, an authenticated transcript of the judgment. Notwithstanding the filing of this transcript, the city clerk and auditor refused to follow the direction of the statute and draw his warrant payable to the court from which the transcript was issued, but did draw the warrant and delivered the same to Clark, or as directed by him. This proceeding in mandamus was then brought to compel Davis to return the warrant into court as the statute required him to do. The lower court held adversely to the petitioner's contention there, the matter was appealed to this court, and, the justices not agreeing, the cause was certified to the Supreme Court, which court later rendered its decision reversing the judgment of the trial court. See Ott Hardware Co. v. Davis, 165 Cal. 795, 134 Pac. 973. Upon the going down of the remittitur, further proceedings were had in the court below, and, agreeable to the conclusions expressed in the decision just cited, the superior court rendered its judgment, directing Davis to issue his warrant and return it to the superior court as prayed for in the petition. The defendant appealed from this judgment, and, not desiring to furnish bond, took advantage of the provisions of section 944, Code of Civil Procedure, and executed the warrant and deposited it with the clerk of the superior court to abide the judgment of the appellate court. While the appeal taken from the last-mentioned judgment was pending, Davis' term expired, and in April, 1914, he died. A. C. Holmberg was thereafter appointed to take the office held by Davis, that of city clerk and auditor of the city of Santa Barbara, and, after notice given, an order was made by the superior court substituting the said Holmberg as party defendant in this action. It is from this last order that one of the appeals now presented was taken. Following the substitution of parties so made in the superior court, a like order was made, after notice, by this court in the appeal then pending here from the judgment ordering the warrant to be issued. The last-mentioned appeal was decided in this court, the judgment being affirmed. Ott Hardware Co. v. Holmberg, 32 Cal. App. 229, 162 Pac. 911. Rehearing being denied in the Supreme Court, remittitur was transmitted to the superior court and a motion was thereafter made upon notice that the court order the clerk to collect the warrant which had been theretofore deposited in the superior court by Davis to abide the result of the appeal. This motion was granted and the second appeal now being considered here was taken from that order.

It is contended on behalf of appellant that there could be no substitution of Holmberg for Davis, because with the death of Davis or the expiration of his term the cause of action would die. Many authorities are cited, particularly from other jurisdictions, some of which tend to support this view. However, it would seem that we are not required to look beyond the statutes and decisions of our own state in order to find a complete answer to all of the contentions urged on these appeals. Section 385 of the Code of Civil Procedure provides as follows:

> "An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

This action was prosecuted against Davis in his official capacity to enforce payment from the city of money which the auditor refused to furnish for the benefit of the judgment creditor of Clark. Surely, as the city has been by the decision of the Supreme Court determined to be liable for the neglect or refusal of Davis to draw the warrant mentioned, it is no less liable because an officer acting in one of its departments has vacated the office or died. In such a case the law is not concerned with the person who may have become detached from the office, but only with the officer who is there to perform the functions which he or his predecessor has failed or refused to perform. It seems, in view of the conclusions of the Supreme Court in the main case, to be settled beyond controversy that the cause of action still exists, notwithstanding that Davis' term of office has ended and he has died. This being true, then the provisions of section 385, Code of Civil Procedure, are explicit and exact in their applicability to the situation here. The substitution of a succeeding official for one against whom mandamus had been brought has been decided to be proper practice. Ex parte Tinkum, 54 Cal. 201. See, also, Jordan v. Hubert, 54 Cal. 260. The appeal from the order substituting parties defendant we think is without merit. The appeal from the order made requiring the clerk to collect the warrant and pay the money into court for the benefit of the judgment creditor of Clark must also fall, as this appeal depends for support upon the contentions made in the first-mentioned appeal which have been hereinbefore discussed.

The order appealed from in cause numbered in this court Civil 2494 is affirmed.

The order appealed from in cause numbered in this court Civil 2440 is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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39 Cal. App. 17

CHAMBERS et al. v. FARNHAM et al.
(Civ. 2600.)

(District Court of Appeal, Second District, California. Nov. 30, 1918.)

1. New Trial ⟹128(5)—Specification of Grounds—"Finding"—"Decision."

While the statute providing for granting of new trials specifies "insufficiency of the evidence to justify the decision," the word "findings" is substantially synonymous with "decision," and specification of "findings and judgment" is sufficient; the references to the judgment being surplusage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decision; Finding.]

2. Appeal and Error ⟹137—New Trial—Notice—Sufficiency—"Transcript of the Proceedings"—"Minutes of the Court."

A notice of motion for new trial, reciting that it "will be made upon a transcript of the proceedings had at the trial," made prior to the 1915 amendments, construed to mean by the words "transcript of the proceedings" the same thing as "minutes of the court" as used in the statute then in force.

3. Appeal and Error ⟹301—New Trial—Findings—Conclusiveness.

On appeal from an order granting a new trial, a finding that a judgment introduced in evidence was pending on appeal is conclusive, where such finding was not attacked by the motion for new trial.

4. JUDGMENT 🔑663—EVIDENCE — CONCLUSIVENESS—APPEAL.

Where an action is pending upon appeal, the judgment therein is not final, and in another action is not admissible to prove facts therein recited except as to merely incidental or collaterally involved facts which are not directly in issue, and it is immaterial that no stay bond was given. Code Civ. Proc. § 1049.

5. NEW TRIAL 🔑79—GROUNDS—CONCLUSION OF LAW.

A finding that "it is not true that they wrongfully made said division or that they placed certain property beyond the reach of plaintiffs" is not a finding of fact, but a pure conclusion of law, and, even though erroneous, presents no legal ground for the granting of a new trial.

6. TRIAL 🔑397(3, 4) — FINDINGS — ISSUES — EVIDENCE.

Findings are properly not made, where no issues were framed by the pleadings to which such findings would be relevant and no evidence relevant thereto was introduced or offered by either of the parties.

7. TRIAL 🔑397(2)—FINDINGS—FAILURE TO FIND.

In a creditor's suit against directors of a corporation under Civ. Code, § 309, for corporate debts, the court's failure to find that the corporate assets were divided among its stockholders and remained subject to the payment of its debts did not render the decision against the law, where such finding would not destroy the effect of the other findings.

8. NEW TRIAL 🔑79—GROUNDS — FINDINGS.

The fact that the trial court has made a finding outside the issues does not warrant the granting of a new trial.

9. NEW TRIAL 🔑79—GROUNDS—SPECIFICATIONS—FINDINGS.

That findings of fact are insufficient to support a conclusion of law "that the defendants are entitled to the judgment," "that plaintiffs take nothing," and that the judgment "is wholly unsupported by and in conflict with the findings of fact," presents no legal ground for granting a new trial.

10. APPEAL AND ERROR 🔑1050(2)—HARMLESS ERROR—IMMATERIAL EVIDENCE.

In a creditor's action against the directors of a corporation, evidence of a director that there was no intention of defrauding plaintiffs or other creditors, where the questions of fraud or fraudulent intent were not involved, if erroneous, *held* not prejudicial.

11. APPEAL AND ERROR 🔑867(3)—PLEADING—SUFFICIENCY OF COMPLAINT.

Whether a complaint states facts sufficient to constitute a cause of action cannot be reviewed on appeal from an order granting or denying a new trial.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by B. L. Chambers and another against J. E. Farnham and others. Judgment for defendants, and, from an order granting a new trial, the defendants appeal. Order reversed.

Barstow, Beach & Rohe, of Los Angeles, for appellants.

Drew Pruitt, of Los Angeles, for respondents.

MYERS, Judge pro tem. This is an appeal by defendants from an order granting a new trial after judgment in their favor in the court below. Plaintiffs brought this action as creditors of the Belmore Land & Water Company, a corporation existing under the laws of this state, to recover the amount of their claim against said corporation from the defendants individually by reason of an alleged violation by defendants, as directors of said corporation, of the provisions of section 309, Civil Code, by dividing the capital stock of said corporation among its stockholders. Plaintiffs allege that they had entered into a contract of lease with said corporation whereby the latter undertook to construct certain dams and install certain headgates for the purpose of furnishing water for the irrigation of the lands thereby leased to plaintiffs; that said corporation, in violation of its contract, had failed to install said headgates, to the damage of the plaintiffs in the sum of $5,078.55, by reason of the failure of crops which plaintiffs had planted on said lands; that plaintiffs had instituted suit against said corporation for the recovery of said damages and recovered judgment therein, in the amount above stated, with costs, which judgment remains unpaid.

The trial court found against plaintiffs upon the allegations of breach of contract and damages resulting therefrom, but found that judgment had been recovered by them as alleged and the same remained unpaid, and that an appeal had been taken from said judgment, but no bond given to stay execution thereof. The trial court also found that pending said action the defendants had divided and distributed among themselves, in proportion to the stock held by them, all of the assets of said corporation, except one parcel of land of the value of $10,000, which parcel is still owned and held by said corporation. Thereupon judgment was entered for the defendants, and, plaintiffs' motion for a new trial having been thereafter granted by the court, this appeal is prosecuted from the order granting the same.

[1] The motion for new trial was made upon three grounds, as follows:

"(1) Insufficiency of the evidence to justify the findings and judgment; (2) that said findings and judgment are against law; (3) errors in law occurring at the trial and excepted to by the plaintiffs."

Appellants urge here that the specifications numbered 1 and 2 were insufficient to present any questions for review; citing Martin v. Matfield, 49 Cal. 42, to the effect that insufficiency of the evidence to justify the judgment is not ground of motion for new trial. Of course, the ground specified by the statute in this connection is "insufficiency of the evidence to justify the decision." We think, however, that, used in this connection, the word "findings" is substantially synonymous with "decision," and that the references to the judgment may be disregarded as surplusage.

[2] Appellants also urge that the notice was insufficient to confer jurisdiction upon the court to grant the motion, because it recited that it "will be made upon a transcript of the proceedings had at the trial." This was prior to the 1915 amendments to the Codes at a time when the law required a motion for new trial upon the grounds here involved to be made either upon a bill of exceptions or statement of the case, or the minutes of the court. In view of the policy of the law that all controversies shall, so far as practicable, be determined upon their merits, it will not be overstraining the rules of construction, we think, to construe the words "transcript of the proceedings" as meaning the same thing as "minutes of the court."

[3, 4] Upon the motion for new trial plaintiffs specified four findings as not being sufficiently supported by the evidence. The first is:

> "That the Belmore Land & Water Company is and was a corporation formed for the purpose of acquiring, holding and selling real estate, water and water rights."

The articles of incorporation, which were introduced in evidence, fully support this finding, and no other evidence whatever was introduced upon this question.

The second and third specifications attack the following findings:

> "It is not true that by reason of the failure and refusal of said company to construct said or any headgates, as proposed by the terms of said lease, plaintiffs could only irrigate about 100 acres of the 800 acres of said ranch they had sowed to barley, as mentioned in plaintiffs' said complaint." And, "it is not true that by reason of the alleged breach of said contract as aforesaid, the plaintiffs sustained damages for the year 1912, or for any time, in the sum of $5,078.85, or in any sum or amount whatever."

These two findings are determinative of the case, and, if there is any evidence in the case which would be legally sufficient to support findings in favor of the plaintiffs upon these issues, the order granting the new trial must be affirmed under the established rule with respect to conflicting evidence. The only evidence introduced or offered under these issues consisted of the judgment roll in the action by plaintiffs against the corporation. It may well be doubted whether that judgment was admissible for any purpose in this action as against these defendants. These defendants were neither parties nor privies of parties to that action. This action does not seek to charge defendants as stockholders or by reason of any contractual relationship with the corporation which was the judgment defendant. This action is seeking to enforce a liability created by law, wholly irrespective of any contractual relationship on the part of the persons liable.

But it is not necessary to determine here whether or not that judgment against the corporation would, if final, be admissible in evidence in this action against these individual defendants, because the trial court found that the judgment in question had, at the time it was received in evidence, been appealed from. That finding was not attacked by the motion for new trial and is therefore conclusive upon this court. Rauer v. Fay, 128 Cal. 523, 525, 61 Pac. 90. Section 1049, Code of Civil Procedure, provides:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."
>
> "A judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and, if the action in which the judgment is rendered is still pending necessarily the judgment is not final." In re Blythe's Estate, 99 Cal. 472, 475, 34 Pac. 108; Naftzger v. Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23.

The same rule has been uniformly applied in this state with respect to judgments which are pending upon appeal. Murray v. Green, 64 Cal. 363, 369, 28 Pac. 118; Woodbury v. Bowman, 13 Cal. 634; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Smith v. Smith, 134 Cal. 117, 119, 66 Pac. 81; Purser v. Cady, 120 Cal. 214, 218, 52 Pac. 489; Contra Costa Water Co. v. City of Oakland (C. C.) 165 Fed. 518. This rule is limited in its application by the exception that such a judgment may be received in evidence in proof of facts which are merely incidentally or collaterally involved, when such facts are not directly in issue. Greer v. Greer, 142 Cal. 519, 525, 77 Pac. 1106; Smith v. Smith, 134 Cal. 117, 66 Pac. 81; Cook v. Rice, 91 Cal. 664, 27 Pac. 1081. The case at bar clearly falls within the general rule above stated, and not within the exception. The fact that no bond was given to stay execution upon the appeal here in question is immaterial. Di Nola v. Allison, 143 Cal. 106, 112, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep.

84. The burden of proof as to these allegations was on the plaintiffs, and, no competent evidence having been produced in support thereof, it is apparent that no different finding could have been made upon these issues by the trial court.

[5] The fourth specification of insufficiency attacks the finding that—

> "It is not true that they (the directors) wrongfully made a division of the capital stock of the Belmore Land & Water Company of the value of about $175,000 among the stockholders, or that they placed said property beyond the reach of its creditors or plaintiffs."

No such finding was made by the trial court. The trial court did find the facts respecting the division of the capital stock among the stockholders and then added thereto the following paragraph:

> "It is not true that they wrongfully made said division, or that they placed said property beyond the reach of the plaintiffs."

This latter is obviously not a finding of fact, but a pure conclusion of law drawn by the trial court from the facts found; and this, even though it were erroneous, presents no legal ground for the granting of a new trial. Estate of Keating, 162 Cal. 406, 412, 122 Pac. 1079; Swift v. Occidental Mining Co., 141 Cal. 161, 167, 74 Pac. 700.

[6] Eight specifications were made of particulars wherein the decision of the court was alleged to be against law. Specifications numbered 1, 2, and 5 are directed at the failure of the court to find:

> "That said corporation was engaged in the business of acquiring, holding, and selling real estate, water, or water rights." "That any of the assets or capital stock * * * consisted of water or water rights, or of land with water rights appurtenant thereto." "That said division of assets of said corporation to its stockholders made by said directors, was made with the consent of the stockholders representing two-thirds of the capital stock thereof."

It suffices to say that no issues were framed by the pleadings to which such findings would be relevant, and no evidence was introduced or offered by either of the parties relevant thereto.

[7] Specifications numbered 3 and 4 are directed at the failure of the trial court to make "any finding of fact that could exempt the defendant directors under section 309 of the Civil Code from liability," etc.; and "any finding tending to show that the assets of said corporation divided among its stockholders by the defendant directors remained subject to the payment of the debts or liability of said corporation." It is obvious that such findings, if made, would not be findings of fact, but conclusions of law. Furthermore, if findings had been made favorable to the plaintiffs in these particulars, they would have been rendered immaterial by reason of the other findings necessarily made from which it resulted that plaintiffs here have failed to establish their status as creditors of the corporation. The rule that a failure to find upon material issues renders a decision against law is applicable only where a finding upon such issues might have the effect to countervail or destroy the effect of the other findings. Brison v. Brison, 90 Cal. 323, 328, 27 Pac. 186; Moore v. Copp, 119 Cal. 429, 436, 51 Pac. 630; Rauer v. Fay, supra.

[8] Specification numbered 6 is:

> "There was no pleading on the part of defendants authorizing and no issue made in said cause upon which to base a finding of the court that 'the Belmore Land & Water Company was a corporation formed for the purpose of acquiring, holding and selling real estate, water and water rights.'"

This is true, but the fact that the trial court has made a finding outside the issues does not warrant the granting of a motion for a new trial. Power v. Fairbanks, 146 Cal. 611, 614, 80 Pac. 1075.

[9] Specifications numbered 7 and 8 are as follows:

> "The findings of fact made by the court are wholly insufficient to support the conclusion of law made by the court, 'that the defendants are entitled to the judgment of the court that plaintiffs take nothing by this action.'" And, "the judgment rendered by the court in favor of the defendants is wholly unsupported by and in conflict with the findings of fact."

As we have already seen, these specifications do not present any legal ground for the granting of a new trial. Swift v. Occidental Mining Co., supra.

[10] There are three specifications of alleged errors in law occurring at the trial which are directed to three rulings of the court upon the admission of testimony the result of which was to permit one of the defendants to testify that in making the division of the corporate assets there was no purpose or intention of defrauding plaintiffs or other creditors. Obviously, there was no question of fraud or fraudulent intent involved in this action, and conceding these rulings to have been erroneous, nevertheless they could not possibly have been prejudicial to the plaintiffs herein.

[11] Much space has been devoted in the briefs to a discussion of the question whether or not the complaint herein states facts sufficient to constitute a cause of action. But where the appeal is from an order granting or denying a new trial, this court cannot consider that question. Rauer v. Fay, 128 Cal. 523, 525, 61 Pac. 90; Brison v. Brison, 90 Cal. 323, 327, 27 Pac. 186. That question can be reviewed only upon an appeal from the judgment.

We are not unmindful of the fact that "it is only in rare instances and upon very strong grounds that an appellate court will set aside an order granting a new trial." Nevertheless, where, as here, upon consideration of each of the grounds specified on the motion for new trial, outside of which neither the trial court nor the reviewing court may go, it clearly appears that no legal ground existed for setting aside the judgment, the order granting a new trial will be reversed. It is so ordered.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 467

FRASER v. FRASER et al. (MUNDAY, Intervener). (Civ. 1915.)

(District Court of Appeal, Third District, California. Jan. 27, 1919.)

1. CONTINUANCE 🔑49—TERMS—DISCRETION OF COURT.

Discretion of trial court *held* not abused in granting continuance upon condition of payment by movant of $120.

2. MOTIONS 🔑37—HEARING—EVIDENCE.

Plaintiff's motion to strike out, as being unsworn, statements of defendants' counsel upon hearing of motion, which statements were no more than a repetition of statements previously made without objection, was too late, when made after the finding of the court as to the terms upon which order would be allowed.

3. CONTINUANCE 🔑49—DISCRETION — PAYMENT OF COSTS.

That cost bill afterwards presented, and in part allowed, was only about half the costs fixed as a condition of continuance by the court, upon the showing made at time of application for continuance, is not sufficient to show that the court acted arbitrarily, or in abuse of its discretion, on the evidence before it at the time.

4. CONTINUANCE 🔑49—DISCRETION — PAYMENT OF COSTS.

The court is not limited to requiring a payment of the taxable costs, as a condition of postponing the trial, but may exercise a reasonable discretion for the purpose of compensating the plaintiff for the expenses incurred in preparing for trial.

5. APPEAL AND ERROR 🔑709—MOTION TO STRIKE OUT BILL OF COSTS—IMPEACHMENT OF BILL.

Order denying plaintiff's motion to strike out defendants' bill of costs cannot be impeached on appeal, where there is nothing in the record showing what, if any, papers or files were used at the hearing, or what evidence was offered or presented by either side.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Stewart Fraser against James Fraser and others, executors, in which Chalmer Munday, trustee in bankruptcy of Catherine M. Fraser, intervened. From judgment of dismissal, and from order denying his motion to strike out defendants' cost bill, plaintiff appeals. Affirmed.

Heim Goldman, of San Francisco, and Wright & Dignan, of Nevada City, for appellant.

C. F. McGlashan, of Truckee, Hennessy & Peterson, of Grass Valley, and Herrington & Clausen, of San Francisco, for respondents.

BUCK, Presiding Judge pro tem. This is an action brought to recover the sum of $15,000 upon a rejected claim for services alleged to have been rendered decedent by plaintiff's assignor. Upon the day set for the trial of the case plaintiff moved the court for a continuance upon the ground that plaintiff's assignor, the real party in interest, was unable to be present and take part in the trial. Upon a hearing had, the court granted the continuance upon the condition that there be paid to defendants the sum of $120. Plaintiff refused to comply with this condition. He also refused to introduce any testimony, "for the reason we have not any witnesses here," and "the plaintiff's principal witness and main party is unable to appear in court upon the showing made for continuance." Whereupon, upon motion of defendants, the court ordered judgment of dismissal. From this judgment plaintiff has appealed, and has also appealed from the order of the court denying his motion to strike out defendants' cost bill.

As regards the judgment, plaintiff charges that—

> "The trial court abused its discretion and exceeded its authority in its attempt to force the plaintiff to pay to the defendants a lump sum of money arbitrarily fixed by order of the court as a condition upon which the order granting a postponement would become effective."

[1] In our opinion, the record fails absolutely to substantiate this charge against the trial court. The record shows that the trial judge, after he had determined, in the exercise of a most generous discretion, to grant plaintiff's belated and ill-supported plea for a continuance, proceeded as follows:

"The Court (addressing defendants' counsel): Figure up your expenses, Mr. Peterson, and bring your witnesses here, and the reporter's expenses, and we will see what the court can do; figure up your expenses now.

"Mr. Peterson: We find the reporter's fee, and the transportation and hotel bills, and including witnesses' fees for nine witnesses for two days—the time they will be out—makes $173.52, for the witnesses and transportation, and $15 more for the reporter, making $188.52; that does not include any expenses of counsel—$188.52.

"Mr. Dignan (plaintiff's counsel): I ask that counsel give the names of the witnesses and where they come from, and state whether or not they were subpœnaed. * * * I would like to know where they are from, and what mileage claimed by each and their hotel bills, the hotel bill of each, so as to have it in the record."

In response to this request, defendants' counsel gave the names of the witnesses, and stated where they came from, and that they were all subpœnaed.

[2] Plaintiff's counsel made no examination of the witnesses, or offered any testimony or made any statements to assist the court in computing the costs; nor did he attempt to impeach or qualify the statement made by defendants' attorney. The court, after noting that two of the witnesses called "are here in attendance on this other case," and also that "the court will take off the executrix, from Truckee," stated that the motion for continuance would be granted upon the payment of $150, which amount it later reduced to $120. This amount was evidently found by the court by taking as a basis the above data furnished in open court by counsel as indicated above; and it does not appear that under the circumstances the court acted arbitrarily or abused its discretion in giving faith and credit to counsel's statements, and in computing mileage and expenses from the data furnished. After the court had fixed the amount of $120 as the proper amount to be paid as a condition to granting the continuance, plaintiff's counsel moved to strike out some of the statements made by defendants' counsel, upon the ground that they were unsworn statements. As a matter of fact, these statements were no more than a repetition of statements previously made without objection, and the motion, being made after the finding of the court, came too late.

Furthermore, as stated in the case of Murphy Mortgage Co. v. Epp, 99 Kan. 706, 162 Pac. 1170:

> "In a certain sense a lawyer is always on oath that he 'will neither do nor consent to the doing of any falsehood in court.' The weight of authority is that the omission to swear a witness must be objected to at the trial. State v. Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; City of O'Neill v. Clark, 57 Neb. 760, 764, 78 N. W. 256; Moore v. State, 96 Tenn. 209, 33 S. W. 1046; Goldsmith v. State, 32 Tex. Cr. R. 112, 22 S. W. 405."

[3] And the fact that the cost bill afterwards presented, and in part allowed, was only about one-half of the costs fixed by the court upon the showing made at the time of the continuance, is not sufficient to show that the court acted arbitrarily, or in abuse of its discretion, on the evidence before it at the time.

[4] As stated in the case of Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683:

> "The court was not limited to requiring a payment of the taxable costs as a condition of postponing the trial, but was at liberty to exercise a reasonable discretion for the purpose of compensating the plaintiff for the expenses incurred in preparing for the trial."

As regards the appeal from the order denying plaintiff's motion to strike out bill of costs:

[5] On this appeal plaintiff has furnished no bill of exceptions, nor are we furnished with any transcript of the proceedings had at the time of the making of the motion. The notice of motion stated, as the grounds upon which the proposed motion would be made, "that the said cost bill was not served and filed within the time allowed by law," and that "the motion will be based upon all the papers, records, and files in the above-entitled action." But there is nothing in the record showing what, if any, papers or files were, as a matter of fact, used at the hearing, or what evidence was offered or presented by either side. The minute order denying the motion makes no reference to any records or evidence having been used, while the formal order denying the motion to retax costs recites affirmatively that no evidence has "been offered in support of said motion."

The original minute order made by the clerk fails to show that costs were allowed defendant upon dismissal, thus conflicting with the order indicated in the reporter's transcript, and non constat but there was an amended order entered at a subsequent day by the clerk. In addition to this, there is the formal order of dismissal afterwards entered. But, as already stated, there is nothing in the record to show whether these, or any of these, or some other orders or evidence were presented at the time of the hearing. The order, therefore, cannot be impeached. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

39 Cal. App. 35

TIMMONS v. COONLEY. (Civ. 2743.)

(District Court of Appeal, Second District, California. Dec. 3, 1918.)

1. Appeal and Error 🔑74—Review—Order Denying Motion to Vacate Default.

An order denying defendant's motion to vacate a default, being an order made before judgment, is not appealable, in view of Code Civ. Proc. § 963.

2. Appeal and Error 🔑494—Perfection of Appeal.

Where no copy of the order attempted to be appealed from is in the record, the order cannot be reviewed, under Code Civ. Proc. § 951.

3. Pleading 🔑222 — Time to Answer After Overruling of Demurrer—Notice of Order.

When a demurrer to a complaint is overruled, the time given to answer runs from the service of notice of the order, and not from its date, under Code Civ. Proc. § 476, and the notice is required by section 1010 to be in writing.

4. Pleading 🔑222—Overruling Demurrer—Actual Knowledge—Waiver of Notice.

Where written notice of a decision upon a pleading is required by the statute, actual notice or knowledge of overruling demurrer is not a substitute; nevertheless the party for whose benefit the notice is required may, by facts appearing in the records, files, or minutes of the court, have waived the same.

5. Pleading 🔑222 — Overruling Demurrer—Time to Answer—Waiver by Stipulation.

Where a demurrer was overruled, and time given to answer, a stipulation allowing further time operated as a waiver of the statutory notice of a decision overruling the demurrer; but such waiver became effective on its own date, and not on the date of the overruling order.

6. Time 🔑10(2) — Sunday — Judicial Proceedings.

Where a defendant had three days in which to serve and file her answer, and the third day was Sunday, she had all of the following Monday in which to file her answer, under Code Civ. Proc. § 13.

7. Pleading 🔑222 — Overruling Demurrer—Time to Answer—Stipulation.

Where demurrer to complaint was overruled January 11th, and three days allowed for answer, which time would run from date of notice, or of waiver of notice of the overruling order, and notice was not given, but a stipulation on January 14th waived notice, defendant had three days thereafter to file answer, notwithstanding the stipulation allowed but two.

8. Landlord and Tenant 🔑290(5), 291(17) — Unlawful Detainer — Set-Off or Counterclaim—Default Judgment.

A counterclaim or cross-complaint of any kind or character is neither proper nor permissible in actions in unlawful detainer against tenant defaulting in rent, and no default judgment can be entered for failure to answer a cross-complaint therein.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by L. D. Timmons against L. E. Coonley, in which Louis M. Timmons, as administrator, was substituted upon notice of plaintiff's decease. From an order denying defendant's motion to vacate the entry of her default and permit the filing of an answer, and from a judgment entered against her, and from an order denying her motion for a default judgment against the plaintiff on her cross-complaint, defendant appeals. Judgment reversed, and cause remanded to the superior court, with directions to vacate and set aside the entry of default and permit defendant to file her answer.

Elon G. Galusha, William Freeman and A. G. Reily, all of Los Angeles, for appellant.

J. F. Clark, of Los Angeles, for respondent.

MYERS, Judge pro tem. This is an action of unlawful detainer, after default in payment of rent and the service of a three days' notice to pay rent or quit. Defendant takes this appeal, first, from an order entered January 19, 1915, denying defendant's motion to vacate the entry of her default and permit the filing of an answer; second, from the judgment entered against her January 22, 1915; third, from an order entered January 26, 1915, denying her motion for a default judgment against the plaintiff on her cross-complaint.

[1, 2] The appeal from the order denying defendant's motion to vacate the default cannot be here considered for two reasons: First. Being an order made before judgment, it was not an appealable order. Code Civ. Proc. § 963. Second. No copy of the order attempted to be appealed from is in the record. Code Civ. Proc. § 951.

[3] The judgment appealed from is a judgment by default for failure to answer after an order overruling defendant's demurrer to the complaint. The demurrer to the third amended complaint was overruled January 11, 1915, and defendant given three days to answer. No written notice thereof was served or filed and there was no express waiver of such notice. On January 14th the parties, through their attorneys, stipulated "that the defendant have to and including Saturday, January 16, 1915, in which to serve and file her answer and cross-complaint." Said stipulation was filed January 15th. On January 16th a copy of the answer and cross-complaint was served on counsel for plaintiff, but not filed. On Monday, January 18th, the clerk entered defendant's default pursuant to

an order therefor made by the presiding judge. Later, on the same day, the defendant tendered to the clerk, for filing, her answer and cross-complaint, which were refused. Thereupon, upon the same day, the defendant served and filed her notice of motion to set aside the entry of default, which motion is asserted by counsel to have been heard and denied on January 19th; but, as stated above, no such order appears in the transcript. Thereafter the judgment here appealed from was signed and filed January 21 and entered January 22, 1915.

[4] When a demurrer to a pleading is overruled and time to answer is given, the time so given runs from the service of notice of the order. Code Civ. Proc. § 476. The notice here required is a notice in writing. Code Civ. Proc. § 1010. Where written notice is required by the statute, actual notice or actual knowledge thereof is not the equivalent thereof or a substitute therefor; nevertheless the party for whose benefit the notice is so required may waive the same. As was said by the Supreme Court in Mallory v. See, 129 Cal. 356, at page 359, 61 Pac. 1123, at page 1124:

> "The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than by written notice, is insufficient in any case unless it appears, from facts thus evidenced, that written notice was waived."

See, also, Forni v. Yoell, 99 Cal. 173, 33 Pac. 887, Gardner v. Stare, 135 Cal. 118, 67 Pac. 5, and Wall v. Heald, 95 Cal. 364, 30 Pac. 551.

It is clear under these authorities that defendant's time to answer did not begin to run from the date of the overruling of the demurrer.

[5-7] Respondent contends that the signing by defendant of the written stipulation, which was thereafter filed in the case, operated as a waiver of the notice required by the statute. We think that this contention is correct. But it does not follow that the waiver thus made was retroactive and became effective as of the date of the order overruling the demurrer. The waiver became effective to take the place of the written notice required by the statute only at the time when the acts which constitute it were performed; in other words, when the stipulation was signed on January 14, 1915. The defendant then had three days from and after that time within which to serve and file her answer. The third day was Sunday, January 17th, and she therefore had all of Monday, January 18th, in which to file her answer. Code Civ. Proc. § 13. She tendered the same for filing on that day, and therefore was not in default, from which it follows that her default on that day was prematurely entered and the judgment predicated thereon erroneous. The circumstance that the time to answer, as limited by the terms of the stipulation, expired on the 16th, we deem to be immaterial, for the reason that the stipulation obviously was not intended to shorten defendant's time for answer, but was entered into by both parties upon the erroneous assumption that her time to answer would otherwise have expired on the 14th.

[8] The order denying defendant's motion for a default judgment against the plaintiff for failure to answer her cross-complaint was properly made.

> "It is the law in this state and also in other jurisdictions where unlawful detainer statutes are in terms or essentially similar to our own that a counterclaim or cross-complaint of any kind or character is neither proper nor permissible in actions in unlawful detainer." Knight v. Black, 19 Cal. App. 518, at page 527, 126 Pac. 512, at page 516, and cases there cited.

The judgment is reversed, and the case remanded to the superior court, with directions to vacate and set aside the entry of default against the defendant and to permit the defendant to file her answer herein as of date January 18, 1915.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 433

AGRICULTURAL EXTENSION CLUB OF NEVADA COUNTY v. M. HIRSCH & SON. (Civ. 2509.)

(District Court of Appeal. First District, Division 1, California. Jan. 23, 1919.)

1. Associations 🔑20(2) — Suit in Own Name.

An unincorporated association cannot sue in its own name, and when it undertakes to do so the defect may be taken advantage of on the plea that plaintiff has not legal capacity to sue.

2. Parties 🔑76(1)—Lack of Capacity to Sue—Failure to Demur—Waiver.

Under Code Civ. Proc. §§ 430, 433, 434, where fact that plaintiff was unincorporated association appeared affirmatively on face of complaint, but defendants did not urge on demurrer objection that plaintiff had not legal capacity to sue, they waived the objection.

3. Pleading 🔑376—Matters to be Proved—Admission by Answer.

Where defendants pleaded affirmatively in their answer that plaintiff was unincorporated association, composed of 100 or more members, and, as such, had not legal capacity to sue, admission was sufficient to sustain court's finding that plaintiff was such an association.

4. Principal and Agent 🔑103(1) — Purchasing Agent—Authorization by Telegram.

Where local junk man had acted as defendants' agent in forwarding waste paper to them, defendants' telegram to him, authorizing him to offer so much a ton for folded newspapers, and another amount a ton for folded magazines, was such authorization to him to act as their agent that they were bound by his acceptance of purchased paper as being properly folded and bundled.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Agricultural Extension Club of Nevada County against M. Hirsch & Son. From a judgment for plaintiff, defendants appeal. Affirmed.

Louis H. Brownstone, of San Francisco, for appellants.

Wm. B. White, of San Francisco, and R. H. Armstrong, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor for the sum of $323.95 and costs, for certain merchandise alleged to have been sold and delivered to the defendants. The facts of the case are briefly these:

The plaintiff is an unincorporated association of 100 or more persons in the county of Nevada. In the month of April, 1917, this association, in aid of some charitable object, conceived the idea of commencing a campaign for the collection of folded newspapers and folded magazines throughout Nevada county, for which, when collected, it was understood a market existed in Sacramento. The president of the association wrote to a local junk dealer, who had theretofore done some business for the defendants in that region, and asked him if he could handle the matter. He undertook to do so, and telephoned to the defendants at Sacramento, who, on April 5, 1917, sent him the following telegram:

> "T. Griffiths, Grass Valley, Cal.
>
> "We authorize you to offer sixteen dollars and fifty cents per ton for folded newspapers and twelve dollars and fifty cents per ton for folded magazines. These prices are f. o. b. Grass Valley. You can draw on us for the amount of the weight of these papers as per railroad weights. M. Hirsch & Son."

Upon the receipt of this telegram the local junk man to whom it was directed assumed control of the shipment of the papers and magazines as the same were delivered to him at the depot in the town of Grass Valley, and were by him, as consignor, shipped to the defendants as consignees; the destination of the shipment being San Francisco. The defendants claimed and alleged in their amended answer, and offered to prove at the trial, that the said newspapers and magazines were not properly folded or bundled at their point of shipment, and hence arrived at their destination in an unmarketable condition, and on that account they refused to pay for the same, whereupon this action was begun.

Upon the trial the court found against the defendants upon their several defenses, and in favor of the plaintiff for the amount of its claim.

[1] The appellants' first contention is that the court erred in not finding in the defendants' favor upon the issues presented in its answer, to the effect that the plaintiff as an unincorporated association had not the legal capacity to sue. In the plaintiff's amended complaint it affirmatively appeared upon the face thereof that the plaintiff was an unincorporated association of 100 persons, none of whom were named as plaintiffs in the action. It is a well-settled principle of pleading that an unincorporated association cannot sue in its own name. When it undertakes to do so, however, the defect is one which may be taken advantage of upon the plea that the plaintiff has not legal capacity to sue. Since this, however, is a dilatory plea, and since dilatory pleas are not favored in law, it has been uniformly held that the objection is one which must be taken advantage of at the earliest opportunity presented to the defendant or else it is waived.

[2] Section 430 of the Code of Civil Procedure makes the objection that the plaintiff has not the legal capacity to sue a ground of demurrer when it appears upon the face of the complaint. Section 433 of the same Code provides that—

> "When any of the matters enumerated in section 430 do not appear upon the face of the complaint the objection may be taken by answer."

Section 434 of said Code provides that—

> "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

Construing these several sections of the Code with special reference to the objection that the plaintiff has not legal capacity to sue, the Supreme Court has held that, when this objection does appear upon the face of the complaint, the defendant must take advantage of it by demurrer, and, if he does not do so, he waives the objection. Tingley v. Times, etc., Co., 151 Cal. 1, 89 Pac. 1097; Cal. Safe, etc., Co. v. Sierra, etc., Co., 158 Cal. 690, 112 Pac. 274, Ann. Cas. 1912A, 729. In the case at bar the fact that the plaintiff was an unincorporated association appeared affirmatively upon the face of the plaintiff's complaint. The defendants did not urge upon demurrer to said complaint the objection that the plaintiff had not the legal capacity to sue, and they must therefore be held to have waived said objection in accordance with the foregoing authorities.

[3] The appellants' next contention is that there was no evidence to sustain the finding of the trial court to the effect that the plaintiff was an unincorporated association. No evidence was needed to sustain this finding, since the defendants themselves pleaded affirmatively in their answer that the plaintiff was an unincorporated association composed of 100 or more members, and that as such it had not the legal capacity to sue. This admission alone was sufficient to sustain the finding of the court upon the subject.

[4] The appellants further contend that the evidence in the case disclosed that in the shipment of the papers and magazines in question the local junk man to whom their telegram had been directed, was acting as the agent of the plaintiff, and not as the agent of the defendants, and hence that the defendants were not bound by his acceptance of the said merchandise in the condition in which it there was at the point of shipment. This contention is, we think, without merit. The local junk man had acted as the defendants' agent in that region upon former occasions. The defendants' telegram to him was a direct authorization to act as their agent upon this occasion; nor do we think his agency was limited by the terms of said telegram to the acceptance only of newspapers and magazines which were folded in any particular way. Both he and his principals were junk men, and as such were presumably possessed of knowledge as to when merchandise of the kind in question here was in a proper state of folding or bundling for use in their peculiar trade. The plaintiff, on the other hand, could not, through its membership, be expected to possess this knowledge, and hence must be held to have been entitled to rely upon the defendants' agent for the assurance that their offered merchandise was in an acceptable condition when it was tendered for shipment at the depot in Grass Valley and was received and forwarded to the defendants without objection. We think, in short, that the evidence sufficiently shows an acceptance of the merchandise by the defendants through their agent at the point of shipment to bind them to the payment of the offered price.

This ruling disposes of the other contentions of the appellants as to the alleged errors of the court upon the admission or rejection of evidence during the trial of the cause.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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39 Cal. App. 483

HELLMAN COMMERCIAL TRUST & SAVINGS BANK v. ARMSTRONG.

(Civ. 2611.)

(District Court of Appeal, Second District, Division 1, California. Jan. 28, 1919.)

1. Assignments 🔑136—Evidence.

In an action on a note, plaintiff's ownership of the note, as assignee of the bank which formerly owned it, was sufficiently proved by plaintiff's production in evidence of an instrument, in due form, whereby the bank purported to transfer to plaintiff all of its notes and all assets of the bank.

2. Pledges 🔑19—Obligations Secured by Pledge.

A recital in a note that collateral security was pledged "for the payment of this or any other liability of mine * * * when due, or to become due, or may hereafter be contracted," was sufficient to include within the protection of the security past-due obligations, as well as the note so reciting.

3. Bills and Notes 🔑330—Defenses Available to Maker of Pledged Note.

One whose note has been wrongfully pledged by the payee thereof, who had paid no consideration therefor, is not concerned with the manner in which the notes of such pledgor were acquired by the pledgee, in the absence of a claim that the pledgor had a defense against them.

4. Bills and Notes 🔑357—Bona Fide Purchaser—Pledge.

Pledgee's interest in a negotiable note deposited as pledge *held* one of an actual holder for value of the pledged note, and not of a mere assignee for purposes of collection.

5. Bills and Notes 🔑167—Negotiability—Collateral Security.

Under Civ. Code, § 3092, the fact that a stock certificate was pledged to the payee of a note as security therefor, even if known to one to whom the note was pledged by the payee as collateral security, did not affect the negotiability of the note.

6. Bills and Notes 🔑343—Bona Fide Purchaser—Facts Putting on Inquiry.

The mere fact that H., payee of defendant's note, and pledgee of defendant's stock deposited as security for such note, had both the note and stock certificate in his possession on a date prior to the maturity of the note, when he pledged both to plaintiff for his own obligation, did not put plaintiff on inquiry concerning the contract relations between H. and defendant.

7. Bills and Notes 🔑497(2)—Burden of Proof.

When plaintiff has shown he acquired the note in suit before maturity, for value, and in the usual course of business, then, unless the evidence shows that the note was taken under circumstances creating the presumption that plaintiff knew facts impeaching its validity, the burden is upon defendant to show that plaintiff took with knowledge of defendant's equities.

8. CORPORATIONS ⚷123(19) — PLEDGE OF STOCK—BONA FIDES OF PLEDGEE.

Plaintiff pledgee, having taken certificate of stock indorsed in blank in good faith and without notice of the owner's claim, is entitled to retain it as security for the debt, although the stock stood on the books of the corporation in the name of the owner, and he had in fact pledged it, and his pledgee had wrongfully used the certificate by pledging it to plaintiff.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Hellman Commercial Trust & Savings Bank against Le Roy Armstrong. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Shankland, of Los Angeles, for appellant.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles, for respondent.

Emmet H. Wilson, of Los Angeles, amicus curiæ.

CONREY, P. J. This action was brought by respondent to recover judgment against appellant on a promissory note made and executed by appellant to one E. E. Hewlett, dated March 21, 1913, for the sum of $25,000, due nine months after date. Defendant appeals from the judgment.

The plaintiff sued as pledgee of the note, alleging that the same had been indorsed and delivered to it by Hewlett as security for certain notes executed by him. The trial court found that the consideration for the Armstrong note, as between the defendant and Hewlett, had wholly failed, and also held that that was a negotiable instrument, and that the plaintiff, as pledgee, acquired the same as an indorsee in due course.

The note in question is similar to one which came before this court in Eastman v. Sunset Park Land Co., 35 Cal. App. 628, 170 Pac. 642. In that case the negotiability of the note was attacked upon the same grounds which are presented by appellant here. On the authority of that decision, we hold that the Armstrong note was a negotiable instrument.

On May 14, 1913, Hewlett executed to plaintiff a note for $11,000. This was done in consideration of the cancellation of an unsecured $11,000 note previously executed by Hewlett to the All Night and Day Bank, which had been assigned and delivered by that payee to the plaintiff. Hewlett had executed to the All Night and Day Bank two other unsecured one-day notes, of which one was for $9,000, dated May 1, 1912, and the other was for $2,500, dated February 1, 1913, both of which had been transferred to the plaintiff. The $11,000 note, of date May 14, 1913, executed by Hewlett to the plaintiff, referred to the security given by Hewlett as follows:

"I hereby pledge to and deposit with said bank as collateral security for the payment of this or any other liability or liabilities of mine to said bank when due, or to become due, or may hereafter be contracted, the following property: Note of Le Roy Armstrong dated March 21, 1913, due 9 months, for $25,000, and certificate No. 30 for 187 shares of the capital stock of the Pacific Coast Motor Car Company, the market value of which is now —— dollars."

On May 14, 1913, when Hewlett executed the $11,000 note in favor of the plaintiff, he indorsed and delivered with it, to the plaintiff, the $25,000 note sued on in this case, together with said certificate of stock of Pacific Coast Motor Car Company. The certificate was issued to Le Roy Armstrong and bore date March 21, 1913. It carried a blank assignment, dated May 13, 1913, signed by Armstrong. The transaction of May 14, 1913, between Hewlett and the plaintiff, was conducted on the part of the plaintiff by C. R. Bell, who was the secretary of the plaintiff. He testified that he was secretary of the All Night and Day Bank from June, 1912, until it was merged with plaintiff in April, 1913, and that prior to June, 1912, he was cashier of the All Night and Day Bank. He testified that he did not distinctly remember his conversation with Mr. Hewlett at the time of the transaction of May 14, 1913. There is no evidence showing that Hewlett informed the plaintiff that the certificate of stock which he was pledging to the plaintiff was held by him in pledge or as security for the Armstrong note. There is not contained in that note, nor in the certificate of stock, nor in any document received by the plaintiff, any statement showing or indicating that the certificate of stock was held by Hewlett as security for the $25,000 note.

It was a fact, as the court correctly found from the evidence, that Hewlett held the certificate of stock only as pledgee and as security for the $25,000 note, that the stock was without value, that the consideration for the $25,000 note had wholly failed, and that as between Hewlett and Armstrong the act of Hewlett in pledging the note and certificate to the plaintiff was an act of bad faith on the part of Hewlett toward Armstrong, and was contrary to an agreement which Hewlett had made with Armstrong.

[1] Appellant claims that the evidence was insufficient to prove that the plaintiff was the owner of the notes which were found to have been assigned to the plaintiff by the All Night and Day Bank, especially in this: That there was no evidence of delivery of the instrument of assignment from the All Night and Day Bank to the plaintiff. We think that the evidence was suffi-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

cient. The plaintiff produced in evidence an instrument, in due form, whereby the All Night and Day Bank purported to transfer to the plaintiff all of its notes, etc., and all assets of the All Night and Day Bank. The evidence is sufficient to prove that this instrument, together with the notes, was in the possession of the plaintiff on and before the 14th day of May, 1913. The court did not err in overruling defendant's objection to the admission of this instrument in evidence.

[2, 3] Appellant, in his answer, denied that the hypothecation of his note to the plaintiff was made to secure the $9,000 note or the $2,500 note. His contentions in support of this denial are not only that those notes had not been transferred by the All Night and Day Bank to the plaintiff, but also that the words contained in the $25,000 note, which we have quoted, referring to the pledge, were not sufficient to constitute a hypothecation covering those two notes. The judgment rendered herein against appellant was for a sum a little less than $25,000, being the aggregate of the principal of the three notes made by Hewlett, with interest and attorney fees thereon. Appellant contends that, if he is liable at all to the plaintiff, he should not be held for anything more than the new note of $11,000 made payable to the plaintiff. In support of these contentions counsel for appellant claims that the words "when due, or to become due, or may hereafter be contracted," are not sufficient to cover past-due obligations held by the plaintiff; also that the $9,000 note and $2,500 note were not taken in the ordinary course of business, and therefore cannot be deemed secured by the pledge of the Armstrong note. We think that the words above quoted from the Armstrong note are sufficient to cover past-due obligations; also we are of opinion that appellant is not concerned with the matter or the manner in which those notes were acquired by the plaintiff, there being no claim that Hewlett had any ground of defense against them. It is only with respect to the Armstrong note that the plaintiff was obliged to show that it was taken in the ordinary course of business.

[4] Appellant next contends that the Armstrong note was transferred to plaintiff for collection only, and that by reason of the pledge agreement contained in the note made by Hewlett to plaintiff the assignment of the Armstrong note to plaintiff becomes, not a general or special indorsement, but one upon a special contract; that for these reasons plaintiff holds the Armstrong note subject to the defendant's equitable defenses. The authorities cited by appellant in support of these propositions (Hays v. Plummer, 126 Cal. 107, 58 Pac. 447, 77 Am. St. Rep. 153; First National Bank v. Golden, 19 Cal. App. 501, 126 Pac. 498) do not sustain the contention made by him. In the first-cited case the pledged note carried upon it no indorsement by the pledgor, and the plaintiff took it with actual knowledge of the circumstances out of which the defendant's equities arose. In the second case the pledged check was drawn against a savings bank, and was accompanied by a passbook, by means of which the plaintiff had notice of facts which rendered the check nonnegotiable. It is plain enough that the plaintiff, as pledgee of the Armstrong note, is not to be regarded as merely an assignee for purposes of collection. By reason of its interest as pledgee, it is an actual holder for value of the pledged note.

[5, 6] Appellant further contends that the note in controversy, at the time of its transfer to plaintiff, accompanied by the certificate of shares pledged by Armstrong to secure it, was by reason of the pledge sufficient to put the plaintiff upon inquiry as to the contract of pledge, thus binding plaintiff by all the conditions relating to that contract and the execution of the note. The bare fact that the certificate was pledged to Hewlett to secure the Armstrong note, even if known to plaintiff, did not affect the negotiability of the note. Civ. Code, § 3092. But in fact the Armstrong note and the certificate do not contain anything sufficient to carry notice that the one was pledged as security for the other. The only fact bringing them together at all is the fact that Hewlett had both documents in his possession on the 14th day of May, 1913, and delivered them at the same time to the plaintiff in pledge for his own obligation to the plaintiff. Defendant has not brought home to the plaintiff knowledge of any facts sufficient to put the plaintiff upon inquiry concerning the contract relations which at the time of the pledge made to plaintiff may have existed as between Armstrong and Hewlett. In this the case differs from the numerous authorities referred to in appellant's brief. It is not at all parallel to those instances where a note negotiable in form was pledged or otherwise transferred, together with or with notice of a mortgage securing the same, and where, on their face, the two instruments are parts of the same transaction.

[7] In the case at bar the plaintiff proved that it acquired the note in suit, before maturity, for value, and in the usual course of business. "When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities." Eames v. Crosier,

101 Cal. 260, 35 Pac. 873; Blochman Commercial & Savings Bank v. Moretti, 170 Pac. 419. Under this rule, the evidence, to which we have referred, is sufficient to justify the court in its finding that the plaintiff did not have any notice or knowledge, express or implied, of the facts on which those equities depend.

[8] Appellant takes the position that because the shares of stock, notwithstanding the blank assignment indorsed upon the certificate of stock, stood in the name of Armstrong on the books of the corporation, the bank had no right to assume that the shares belonged to Hewlett. In Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271, a blank indorsement had been made (similar to that shown in the case at bar) of a certificate of stock delivered in pledge; the shares remained in the name of the pledgor on the books of the corporation; the pledgee wrongfully used the certificate by pledging it to the defendant. Nevertheless it was held that, the bank having taken the certificate in good faith and without notice of the owner's claim, was entitled to retain it as security for the debt on account of which the certificate was received by it.

The judgment is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

39 Cal. App. 523

LAMUS v. ENGWICHT et al. (Civ. 1895.)

(District Court of Appeal, Third District, California. Jan. 30, 1919. On Rehearing, March 1, 1919.)

1. Replevin 🔑59—Pleading—Description of Property.

Complaint in claim and delivery for possession of specific shares of stock fails to state a cause of action, where it omits to mention, describe, or identify the certificate representing the shares sued for.

2. Quieting Title 🔑34(1)—Adverse Claim—Pleading.

Complaint, alleging that defendants claim some right, title, or interest in shares of stock sought to be recovered, which claim is entirely without right, does not state a cause of action under Code Civ. Proc. § 1050, authorizing action by one person against another to determine adverse claim which the latter makes against the former for money or property upon an alleged obligation.

3. Quieting Title 🔑2—To Personalty.

No action will lie to quiet title to personal property.

4. Replevin 🔑22—Parties—Joinder.

In claim and delivery for possession of specific shares of stock kept by deceased in vaults of defendant bank, executors who had never had possession of certificates, either actual or constructive, were improperly joined as parties defendant.

5. Pleading 🔑403(2)—Defects in Complaint—Cure by Answer.

Where, in claim and delivery for possession of specific shares of stock, defendant pursuant to leave granted by court, filed in lieu of original answer a disclaimer, whereby it disclaimed all interest in the subject-matter of the action, original answer could not supply or cure averments in complaint essential to statement of cause of action.

6. Pleading 🔑403(2) — Complaint — Defects—Cure by Answer.

Where, in claim and delivery for possession of specific shares of stock, complaint failed to describe or identify certificate representing shares of stock of deceased sued for, answer admitting that defendant has in its possession 43 shares of stock issued to deceased would not cure defect.

7. Pleading 🔑406(9)—Insufficient Complaint—Cure by Evidence.

In claim and delivery, failure of complaint to describe or identify certificates representing shares of stock sued for was not overcome by the introduction of evidence disclosing that stock referred to was evidenced by a certificate, inasmuch as defendants objected to allowance of any and all evidence offered upon the ground that no cause of action was stated in complaint.

8. Replevin 🔑100(1)—Findings and Judgment—Identification of Property.

Findings and judgment in claim and delivery, following averments of complaint, which did not describe or identify certificate representing shares of stock sued for, are too vague, indefinite, and uncertain to facilitate identification and seizure of property.

9. Replevin 🔑10—In Possession of Defendant—Evidence.

Although key to box containing papers sought to be recovered was given by deceased to plaintiff's minor to retain in his possession until after the former's death, defendant bank has such control over its vaults, in which the box is kept, that its possession and that of minor is joint, and claim and delivery is an appropriate action.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by N. E. Lamus, as guardian of the person and estate of George Engwicht, a minor, against Harry Engwicht and another, as executors of the last will of George Engwicht, and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

B. K. Collier, of Yreka, and Chenowith & Leininger and Carr & Kennedy, all of Redding, for appellants.

W. D. Tillotson, of Redding, for respondent.

HART, J. George Engwicht, plaintiff's minor, was adjudged to be the owner of 43 shares of the capital stock of the State Bank of Dunsmuir and was awarded the possession thereof.

Separate notices of appeal from the judgment were filed by the executors and by the bank; but, as both appeals are presented upon the same transcript and practically the same points for reversal of the judgment are urged by all the appellants, we will consider the appeals together.

As the names of the plaintiff's minor and the deceased whose estate he is suing are the same, we will herein refer to these parties as the minor and the decedent.

The facts are undisputed and are as follows: The decedent was the uncle of the minor and was, prior to his death, which occurred on the 31st day of January, 1916, the owner of considerable stock of the defendant bank, of which he had been president. The certificates representing his shares of stock, as well as other papers and securities, were kept by him in a safe deposit box in the vaults of the defendant bank. For some years prior to and at the time of his death, decedent resided at Dunsmuir, and the minor lived with his parents at Keswick, in Shasta county.

In the latter part of 1915, decedent wrote to the minor's parents, stating that he was ill and requesting that the minor, then about 19 years of age, be permitted to go to Dunsmuir to take care of him for a few weeks. The request was granted, and the minor went to Dunsmuir on the 23d day of November, 1915, and from then until the decedent died the minor stayed with his uncle, "ran errands for him, attended to his little affairs, going after his mail, packing his meals to him," until December 4, 1915, at which time a Mrs. Hattie L. Moore, of Red Bluff, came to assist in the care of the decedent. She remained until the death of decedent, and the minor continued to run errands for his uncle.

On the 5th day of January, 1916, decedent sent the minor to the State Bank of Dunsmuir to obtain his safety deposit box. The minor procured the box, took it to the house, and delivered it to the decedent with the keys. The latter called for pen, ink, and envelopes and was left alone. He retained the box for a day or two and then called the minor into the room where he was. Mrs. Moore and the minor both testified that decedent told the minor to take the box back to the bank and to keep the keys in his (the minor's) possession and not allow them out of his possession, and that in case anything should happen to him (decedent) to notify Mr. Tubbs, the tax appraiser at Yreka. The minor took the box to the bank and retained the keys.

On the day after the death of his uncle, the minor went to the bank. The vice president of the bank, the executors of the will of decedent, the attorney of the bank, and the minor examined the contents of the box. Among other papers therein was a sealed envelope, addressed to the minor, containing a certificate for 43 shares of the capital stock of the defendant bank, of the par value of $100 each indorsed: "George Engwicht." Upon the outside of the envelope was the following indorsement: "Property of George Engwicht, my nephew. To be delivered to him after my death. George Engwicht." The envelope was returned to the safe deposit box, the box was locked by the minor and placed by him in the vault, and he then locked the door and retained the keys. On July 6, 1916, demand was made on the bank for the delivery of the stock to the plaintiff. The bank refused the demand upon the ground that the same was claimed by the estate of the decedent.

The record shows that, as to the pleadings, the following proceedings took place: The complaint was filed July 17, 1916. It contained allegations of the appointment of plaintiff as guardian of the minor; the incorporation of the defendant bank; the appointment and qualification of the executors of the will of the decedent; "that on the 6th day of July, 1916, the said George Engwicht, a minor, was, and ever since said time has been, and now is, the owner and entitled to the possession of 43 shares of the capital stock of the said State Bank of Dunsmuir, which said stock was then and there, and ever since has been, and now is, in the possession of said bank;" that, on said day, demand was made by plaintiff on defendant bank for the delivery of said stock and that the bank refused to comply with said demand; that the executors claim some right, title, or interest in and to said 43 shares of stock, which claim is entirely without right. The prayer was: That said bank be required to deliver said stock to the plaintiff; that it be decreed that the executors have no right, title, or interest in or to said stock; and for judgment against the executors for costs.

On August 2, 1916, the bank and the executors filed separate answers, in which it was alleged that said shares of stock belonged to the estate of the decedent.

The cause was called for trial on the 20th day of February, 1917. At that time counsel for the bank was granted leave to strike out its answer and substitute therefor a disclaimer on the part of the bank, which was done. At the same time the executors were permitted to file an amendment to their answer, which they did. They then made a motion for judgment on the pleadings, which motion the court denied. Thereupon, plaintiff was permitted to file an amendment to the complaint, alleging the death of the decedent and the fact that his nephew is a minor. Defendants then asked permission to file a demurrer to the complaint, specifying several grounds, which was objected to by plaintiff as coming too late; it being admitted by plaintiff that the objection that the complaint does not state a cause of action can be taken advantage of at any stage of the proceedings, but an objection on other grounds cannot. The court overruled the objection, permitted the demurrer to be filed, and overruled that.

> "A gift is a transfer of personal property, made voluntarily, and without consideration." Civ. Code, § 1146.

A verbal gift is valid where the means of obtaining possession and control of the thing are given, or where, if the thing given is capable of delivery, there is an actual or symbolical delivery of the thing to the donee. Civ. Code, § 1147.

> "A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver." Civ. Code, § 1149.

There can be no doubt that the evidence presented by this record would justify these findings: That the deceased, in contemplation of death, made a gift of 43 shares of the capital stock of the defendant bank to the said minor, that said stock was represented by a certificate, and that the donor gave to the donee a key to the box containing the certificate and directed him to retain it until after his death. And from such findings the court would be justified in concluding as a matter of law that the donor gave to the donee the means for obtaining possession of the certificate, if, indeed, not the actual possession of the certificate, and that the gift of the stock constituted a donatio causa mortis. Therefore, it is with much regret that we find that we are constrained to reverse the judgment and remand the cause for another trial for reasons now to be considered.

The appellants contended at the trial, as they here contend, that the complaint does not state facts sufficient to constitute a cause of action. The point was raised by demurrer, interposed under the above-indicated circumstances, by a motion for judgment for the defendants on the pleadings, by objection to evidence on the specific ground that the complaint fails to state a cause of action, and by motion for a nonsuit on the close of plaintiff's case. Among the grounds of demurrer were those of misjoinder of parties defendant and misjoinder of causes of action.

It will be conceded, no doubt, that the action here is not in conversion, there being no allegation that the stock was converted by the bank or any claim of damages for any wrongful conversion. It is clear that, so far as the defendant bank is concerned, the action is essentially one in replevin, or, as our Code designates an action for the recovery of the possession of specific personal property, claim and delivery. The complaint alleges that, on the 6th day of July, 1916, "the said George Engwicht, a minor, was, and ever since has been and now is, the owner and entitled to the possession of 43 shares of the capital stock of the State Bank of Dunsmuir"; that on said day he demanded of said bank that it deliver the said stock to the said plaintiff, which the said bank "refused to do, and still refuses to do."

As to the defendants, executors of the last will of the deceased, it is alleged that they (said executors) "claim some right, title, or interest in and to the said 43 shares of the capital stock of the said State Bank of Dunsmuir, which claim is entirely without right."

Nowhere does the complaint refer to or describe the certificate evidencing the stock referred to therein, nor is there any other attempt to describe or identify the particular stock to recover the possession of which this action was brought.

[1] That the mere reference in the complaint in such an action to recover possession of the stock of a corporation to the stock, without describing or referring to the certificate, if any there be, representing such stock, does not state a cause of action in claim and delivery, which is a possessory action, is not only an obvious proposition but one which has been so expressly determined by the cases. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889. In these cases it is said, quoting from the syllabi in the first-named case:

> "An action of claim and delivery will not lie to recover shares of stock in a corporation, where the proceeding is not aimed at the certificate representing the shares, and it is not mentioned or described in the complaint."

In other words, where the action is for the recovery of the possession of specific shares of stock, the complaint fails to state a cause of action in claim and delivery where it omits to mention or describe or identify in some appropriate way the certificate representing the shares so sued for.

The rationale of the rule as thus stated is obvious, and it is that, since an action in replevin or claim and delivery is, in its very nature, wholly adapted to the recovery of the possession of specific personal property, the property so sought to be recovered must exist in some concrete or tangible form, capable of identification and seizure. Therefore, since "stock" in a corporation is "an incorporeal, intangible thing, and therefore incapable of identification or seizure under the writ," the proceeding must be aimed at the certificate representing the shares, if any there be. If there be no certificate of the shares, then, as stated, the action of claim and delivery obviously does not afford the proper remedy either for compelling the corporation to issue the stock to the party claiming to own it or for determining which of two or more adverse claimants of the stock is entitled to have the certificate thereof issued and delivered to him.

[2-4] As to the defendants (executors of the last will of the deceased), the complaint does not charge that they ever had, or now have, possession, either actual or constructive, of the stock. Obviously, the action of claim and delivery is not available or appropriate as against them. Nor, as against said defendants, does the complaint state a cause of action under section 1050 of the Code of Civil Procedure, which authorizes an action by "one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation." So far as the executors are concerned, the allegations of the complaint are more in the nature of or appropriate to an action to quiet title, but it is well settled that no action will lie in this state to quiet title to personal property. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Gagossian v. Arakelian, 9 Cal. App. 571, 99 Pac. 1113. Viewing, then, the action against the bank as one in claim and delivery, it is evident that the executors are not proper parties to the suit and were improperly joined. In any event, however, it is clear that the complaint does not state a cause of action of any character against the executors. It follows that since, as above shown, no cause of action in claim and delivery against the bank is stated in the complaint, the court below should have sustained both demurrers to that pleading.

[5, 6] But it is argued by the respondent that the answer of the bank supplied and so cured the pretermitted averment in the complaint essential to the statement of a cause of action in claim and delivery to recover the possession of the stock. We do not think that it can properly be so held.

The bank, as seen, was granted leave by the court to strike out its answer, originally interposed, and file in lieu thereof a disclaimer, whereby it disclaimed any and all interest in the "subject-matter of the above-entitled action." This amendment superseded and eliminated from the case as a pleading the answer previously filed by the bank. While an original complaint, superseded by an amended complaint, may be considered for some purposes—as, for instance, to determine when the action has been commenced or whether a new cause of action, different from that stated in the original complaint, has been set up in the amended complaint—yet it performs no function as a pleading in the case. We can see no purpose which a superseded answer can subserve, particularly where the amended answer sets forth a full defense to the action or where, as here, the defendant by the amended answer disclaims or renounces any interest in the subject-matter of the action. Certainly it cannot be considered for the purpose of supplying essential facts omitted from the complaint for the very obvious reason that the only live pleadings in the case are those by which the issues of fact have been framed and upon which the trial was had. It seems to us that, to permit an examination of an answer which, as a pleading, has become functus officio in the action by reason of the filing of an amended answer, for the purpose of finding some averment or admission therein which, if the answer had not been amended and so had remained as the answer, would have cured a defect in the complaint, otherwise fatal, would in practical effect be the same as attempting to cure such a defect by proving that the defendant had extrajudicially admitted the alleged curative fact. But, conceding that the original answer may be considered for the purpose suggested, yet we are still of the opinion that it could not have the effect of aiding the complaint in the statement of a cause of action, since it nowhere refers to or mentions the certificate representing the stock, although it admits that the bank has in its possession 43 shares of its capital stock, which was issued to the deceased in his lifetime. The rule requiring, in an action of claim and delivery for the recovery of the possession of shares of stock in a corporation, that the proceeding shall "be aimed at the certificate representing the stock" so sued for and that the complaint must therefore describe the stock or in some manner so refer to it as clearly to show that the certificate is the thing whose possession is thus sought, is, as has been shown, based upon the proposition that the action of claim and delivery is for the recovery of the possession of specific personal property and that, to render that form of action available, it must of necessity be shown by the complaint as well as by the proofs that the property so sued for is in a form susceptible of physical possession or capable of seizure. The answer, no less than the complaint, falls far short of disclosing that the "43 shares of stock" are represented or evidenced by a certificate or have any existence as property except in mere contemplation of the mind.

[7] Nor was the effect of the failure of the complaint to state a cause of action overcome by the introduction of evidence disclosing that the stock referred to in the plaintiff's pleading was evidenced by a certificate, inasmuch as the appellants objected to the allowance of any and all of the evidence offered by the plaintiff, including that represented by the certificate itself, upon the ground, among others, that no cause of action was stated in the complaint.

[8] It is further objected that the findings and judgment are too vague, indefinite, and uncertain to faciliate identification and seizure of the property therein referred to. This is necessarily so, since the findings and

the judgment follow the averments of the complaint and merely find and adjudge that the plaintiff is the owner of and entitled to the possession of "43 shares of the capital stock of the State Bank of Dunsmuir."

[9] We do not, however, agree with counsel for the appellants in the contention that the defendant bank has no possession of the certificate of stock which was given to the plaintiff's minor. While the evidence shows it to be true that the minor has in legal contemplation possession of the certificate, the bank nevertheless has such control over the deposit vault in which the box containing the certificate is kept as that it may prevent any person from taking from the vault any box or papers therein deposited. It is therefore correct to say that the bank and the minor have joint possession of the box and its contents, assuming, of course, that the evidence will show, as the evidence in the present record seems clearly enough to show, that the key to the box was given by the deceased to the minor to retain in his possession until after the former's death; a circumstance strongly tending to prove that the possession of the box was given over to the minor by the deceased. It follows that, as to the bank, claim and delivery is an appropriate action.

We think that, under the circumstances of this case, the plaintiff should be permitted to amend his complaint; and therefore the judgment is reversed, with a direction to the court below to allow the plaintiff, if he be so advised, to amend his complaint in accordance with the views herein expressed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT. J.

On Rehearing.

PER CURIAM. The appellants, petitioning for a rehearing of this cause, particularly object to that portion of our former opinion in which we held that the evidence as disclosed by the present record that the deceased, during his fatal illness, inclosed in an envelope certain shares of stock of the State Bank of Dunsmuir, with an indorsement on the back of said envelope that the contents thereof were the property of his nephew, to be delivered to him after the death of deceased, and thereupon placed the envelope in his (deceased's) private box and delivered the latter, with the key thereto, to his nephew, with instructions that the box be returned to the safe deposit vault in the bank, which was done by the minor, who retained in his possession the keys to the box and the vault, appeared to show a causa mortis gift of the stock to said minor. It is in the petition vigorously contended that whether the facts as developed by the evidence showed a donatio causa mortis is at least debatable, and that that proposition should not now be decided.

Upon a careful consideration of the petition, we have been persuaded that there appears to be some force in the argument of counsel upon that proposition, and that, since what was said thereon upon that question was wholly unnecessary to the decision of the principal point submitted by the appeal and discussed in the briefs, the proposition should not be decided here. Another trial might result in bringing out evidence addressed to that question not brought out at the trial already had which would more clearly disclose the legal nature of the transaction than does the evidence now before us. It is not deemed necessary, though, to grant a rehearing and thus postpone the final disposition of the case for several months. Therefore the former opinion will be and is hereby modified by striking therefrom the following language:

> " 'A gift is a transfer of personal property, made voluntarily, and without consideration.' Civ. Code, § 1146.
>
> "A verbal gift is valid where the means of obtaining possession and control of the thing are given, or where, if the thing given is capable of delivery, there is an actual or symbolical delivery of the thing to the donee. Civ. Code, § 1147.
>
> " 'A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.' Civ. Code, § 1149.
>
> "There can be no doubt that the evidence presented by this record would justify these findings: That the deceased, in contemplation of death, made a gift of 43 shares of the capital stock of the defendant bank to the said minor, that said stock was represented by a certificate, and that the donor gave to the donee a key to the box containing the certificate and directed him to retain it until after his death. And from such findings the court would be justified in concluding as a matter of law that the donor gave to the donee the means for obtaining possession of the certificate, if, indeed, not the actual possession of the certificate, and that the gift of the stock constituted a donatio causa mortis. Therefore, it is with much regret that we find that we are constrained to reverse the judgment and remand the cause for another trial for reasons now to be considered."

With the foregoing modification of the opinion, the petition for a rehearing will be and the same is hereby denied.

39 Cal. App. 471

MOCH et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2805.)

(District Court of Appeal, Second District, Division 1, California. Jan. 27, 1919.)

1. JUDGMENT 🔑570(5) — CONCLUSIVENESS —DISMISSAL—MERITS.

Whether judgment is a final adjudication on merits is to be determined, not on basis of any single word or phrase used, such as word "dismiss," but upon a consideration of entire judgment together with pleadings and findings.

2. INFANTS 🔑19—ABANDONED CHILDREN—STATUTES.

The purpose of Juvenile Court Law, § 15, is to provide machinery and prescribe procedure in which state may assume control of unfortunate children who should be removed from parental custody, but such procedure is not designed for adjudication or determination, as between parents of child, as to which one of them is entitled to its custody.

3. INFANTS 🔑19—ABANDONED CHILDREN.

The intent to abandon child is a decisive factor in proceeding under Juvenile Court Law, § 15, to declare child free from custody and control of parents; failure to provide for child for one year being only presumptive evidence of abandonment.

4. INFANTS 🔑19 — ABANDONMENT — STATUTES—PROCEEDINGS.

Proceedings under Juvenile Court Law, § 15, to declare an abandoned child free from the custody of its parents, is a special proceeding, neither criminal nor quasi criminal in its nature.

5. INFANTS 🔑19—ABANDONED CHILDREN.

Intent to abandon child being decisive factor in proceeding under Juvenile Court Laws, § 15, to declare child free from custody and control of parents, fact that parent was a ward of juvenile court, under section 6, and deprived of her liberty, is immaterial on question whether or not child was abandoned.

6. JUDGMENT 🔑570(5) — CONCLUSIVENESS —STATUS OF CHILD.

A decision, in proceeding under Juvenile Court Law, § 15, to declare infant abandoned and free from custody and control of its parents, that petition was prematurely filed in that mother of child, in accordance with section 6, was a ward of juvenile court and deprived of her liberty, was not a decision on the merits; there being no finding that there was "an intent to abandon."

7. INFANTS 🔑19 — PROCEEDINGS IN JUVENILE COURT—ORDERS APPEALABLE.

No appeals can be taken from any decision within scope of Juvenile Court Law, except from those enumerated in section 23 thereof, though Code Civ. Proc. § 963, subd. 1, provides for appeals in special proceedings.

8. MANDAMUS 🔑31—APPLICATION.

Where court, in proceeding under Juvenile Court Law, § 15, to declare an infant abandoned and free from control of its parents, dismissed proceeding for want of jurisdiction on ground that mother was a ward of juvenile court and deprived of her liberty, not passing on question of "intent to abandon," mandamus will lie to require the court to proceed with hearing and determination of status of child.

Petition by Sam Moch and Myra Moch for a peremptory writ of mandate against the Superior Court in and for the County of Los Angeles in the State of California and another. Writ ordered to issue.

Hunsaker & Britt and Le Roy M. Edwards, of Los Angeles, for petitioners.

A. J. Hill, Co. Counsel, and Vincent Morgan, Deputy Co. Counsel, both of Los Angeles, and Argabrite & Drapeau, of Ventura, for respondents.

MYERS, Judge pro tem. This is an application after notice for a peremptory writ of mandate to require the respondent, sitting as a juvenile court, to proceed with the hearing and determination of a proceeding before it under section 15 of the Juvenile Court Law (Act 1770a of Deering's General Laws, p. 747). There is no controversy as to the facts, and the matter is submitted upon the petition for the writ and general demurrer thereto.

The petitioners herein filed their petition in said juvenile court November 30, 1917, to have one Donna Spencer Lee, an infant child, declared free from the custody and control of her parents, as provided in said section 15 of said act. It was alleged that petitioners had received said child July 27, 1916, from the Children's Home Finding Society, and had ever since kept and maintained her in their home; that the father had abandoned said child, and its mother shortly after the birth of the former and had never contributed anything to its support; that on May 27, 1916, the mother, "with the intention of then and there abandoning, relinquishing and surrendering her infant child," signed and executed a written relinquishment of the child to Mrs. Porter, a probation officer, and then left said child in the care and custody of said Mrs. Porter without any provision for its support, since which time she has never contributed in any manner to the support or maintenance of said child; that said mother was, on or about October 18, 1916, committed to the State School for Girls, at Ventura, Cal., as a ward of the juvenile court, where she has since remained; that said petitioners were desirous of adopting said child, and therefore prayed for an order of court adjudging said child free and clear of the custody and control of her parents.

A citation to the parents of the child was duly issued and served, in response to which the mother, Donna Lee, appeared and filed her answer. She alleged that she had supported said child until she (the mother) was declared a ward of the juvenile court, since which time she had been unable to do so by reason of her confinement under order of that court. She admitted the execution of the written relinquishment alleged in the petition, but denied that it was with the intention of abandoning or relinquishing or surrendering said child. She alleges that it was signed and acknowledged by her without understanding of its meaning or effect, and she disavows it and asks to have it canceled.

The father, James Lee, defaulted, and a trial was had upon the allegations of the petition and answer above mentioned, and, upon evidence presented by both parties, the matter was submitted. The trial judge signed and filed "findings of fact and conclusions of law" and a "judgment." He found all of the facts which were admitted by the pleadings and, upon issues framed by the pleadings, he found certain of the probative facts, but none of the ultimate facts. He found that the written relinquishment was executed by the mother, as alleged in the petition, and that it was revoked by her at the time of filing her answer, but not prior thereto. Petitioners contend that from this probative finding the ultimate finding of "abandonment" should be deduced. But, on the other hand, the court found:

> "That said Donna Spencer Lee was, on the 15th day of February, 1916, left with Mrs. Earl Meanor by said respondent under an oral agreement to compensate said Mrs. Meanor for its care and custody and that said oral agreement has never been revoked by said respondent."

Counsel for the respondent here argue that from this latter finding we should deduce the ultimate fact that the child was never abandoned by its mother. The crucial issues in the case were the questions whether or not the relinquishment was executed by the mother with the "intention of abandoning" the child, and, if so, then, whether or not such intention persisted for a period of one year thereafter. Upon these issues the court made no finding.

In its conclusions of law and judgment:

> The court "ordered that said child, in so far as James Lee, the father, is concerned, is a person coming within the meaning of section 15 of the Juvenile Court Law, * * * and is adjudged to be free from the custody and control of said James Lee, but that said petition is prematurely filed, in so far as it applies to said respondent Donna Lee, in accordance with the provisions of section 6 of the Juvenile Court Law, in that the said Donna Lee has been a ward of the juvenile court since the 6th day of September, 1916, and has by order of this court been deprived of her liberty since that date and confined in the California School for Girls at all times since the 13th day of April, 1917, and that therefore said petition is hereby ordered dismissed, in so far as the respondent Donna Lee is concerned."

(We have not been advised by counsel nor have we succeeded in determining the relevance of said subdivision 6 to the matters here under consideration.)

Counsel for the respondent take the position that this judgment was a determination of the merits of the proceeding upon the evidence submitted to the court, and that therefore nothing remains to be done by that court which can be required to be done by a writ of mandate; and, second, that it constitutes a final judgment in a special proceeding from which an appeal is provided for by subdivision 1 of section 963, Code of Civil Procedure.

[1, 2] In considering the question whether or not this judgment was an adjudication of the merits of the controversy, it must be conceded that the use of the word "dismissed" is not determinative. The cases are not rare wherein judgments or orders purporting to be merely "dismissals" have been held to be final adjudications upon the merits. This question is to be determined, not on the basis of any single word or phrase used, but upon a consideration of the entire "judgment," together with the pleadings and the findings, in the light of the provisions, the scope, and the apparent purpose of the Juvenile Court Law. It is evident that one of the purposes of this law is to provide the machinery and prescribe the procedure by which the state may assume control of those unfortunate children who, by reason either of financial incapacity or moral unfitness of their parents, should, for their own welfare, be removed from the parental custody. Matter of Guardianship of Michels, 170 Cal. 339, 342, 149 Pac. 587. And so it named the forum and prescribed the conditions under which and the procedure by which such a child could be judicially determined to be free from the custody and control of its parents. It is equally apparent upon consideration that this forum and this procedure were not designed for adjudication and determination as between the two parents of a child as to which one of them was entitled to its custody. That which the juvenile court was here called upon to adjudicate and determine was the status of the child; whether it was a child "subject" to the parental custody and control, or "free" therefrom.

[3-6] The question here is: Has the court in this proceeding adjudicated the status of the child Donna Spencer Lee? For the purposes of this case we may assume, without deciding, that it has done so, so far as the father is concerned. With respect to the question of the parental rights of the mother, could this judgment be successfully interposed as an estoppel? We think not. The law

defines a person who should be declared free from the custody and control of his parents as one "who has been left in the care and custody of another by his parent or parents, without any provision for his support or without communication from such parent or parents for the period of one year, *with the intent to abandon such person*." The italics are ours, but it is clear that the "intent" is the decisive factor, and it has been in effect so held. In re Cordy, 169 Cal. 150, 146 Pac. 532, 534; Guardianship of Snowball, 156 Cal. 240, 104 Pac. 444; Matter of Schwartz, 171 Cal. 633, 154 Pac. 304. The allegation of the intention to abandon was the one vital allegation of the petition which was traversed by the answer, but upon that issue the court made no finding. It is apparent that this omission was intentional and that the trial judge purposely refrained from finding upon this issue because of his opinion that he was precluded from so doing, either by the circumstance that the mother was then a ward of the juvenile court, or by the fact that she was then restrained of her liberty and confined in a state institution, or by the fact that she had been so confined continuously from a point of time within less than a year after the execution of the relinquishment above referred to. Counsel have not furnished us with either reason or authority for concluding that either of these circumstances would have the effect of depriving the court of jurisdiction or authority to proceed with the hearing and determination of this matter. This was a special proceeding, neither criminal nor quasi criminal in its nature. The Juvenile Court Law contains no provision for an exception in the case of a parent so restrained. Neither do we find any provision in the Codes or general laws which either directly or by implication would render such a situation a ground for abatement of the proceeding. Neither the circumstance of the mother being adjudged a ward of the juvenile court or deprived of her liberty would have any necessary effect upon her purpose to abandon her child, if she held such purpose; nor would it prevent her from manifesting a change of such purpose if she experienced such change. The court found that, after this proceeding was instituted, the mother revoked the relinquishment theretofore executed by her. If she could revoke it then, she could have done so sooner. A failure to provide for a period of one year does not operate to constitute the child an abandoned child. It is merely "presumptive evidence of an intent to abandon." The presumption thus created could therefore be overcome by opposing evidence, and, when it is made to appear that the failure to provide was by reason of inability to do so, less evidence than under other circumstances would naturally be required to overthrow such presumption. But the crucial question, the question of the existence and of the persistence for a year of "an intent to abandon," is at all times a question of fact upon which it is the duty of the trial court in such proceeding to find. We conclude therefore that the judgment here in question is not a final judgment, and that it did not determine on the merits the issues which were presented to the court for determination.

[7] It follows, then, that the writ should issue, unless the petitioners have some other plain, speedy, and adequate remedy. In this connection the respondent contends that a right of appeal is provided by section 963, Code of Civil Procedure, subdivision 1, which provides for an appeal "from a final judgment entered in an action, or special proceeding, commenced in a superior court." While we have concluded that the judgment in question was not a final judgment in the sense of an adjudication on the merits of all the questions there submitted to the court, nevertheless it did finally dispose of that case, so far as that court was concerned; so that it must be regarded as a final judgment, so far as the question of the right of appeal is concerned. Saul v. Moscone, 16 Cal. App. 506, 118 Pac. 452; Wood v. Missouri, etc., Ry. Co., 152 Cal. 344, 347, 92 Pac. 868. This is admittedly a special proceeding of a civil nature, and, if there were no provision respecting appeals in the Juvenile Court Law itself, we should hold the provision of section 963 above quoted applicable thereto, under the authority of People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481. But that act does contain such a provision. Section 23 thereof provides:

> "Every judgment or decree of a juvenile court assuming jurisdiction and declaring any person to be a ward of the juvenile court or a person free from the custody and control of his parents may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment."

This presents an apt situation for the application of the maxim, "Expressio unius est exclusio alterius." No other conclusion may reasonably be drawn therefrom than that the Legislature did not intend thereby to provide for appeals from judgments and orders within the scope of that act other than those there enumerated. Peralta v. Castro, 15 Cal. 511; Frandzen v. County of San Diego, 101 Cal. 317, 321, 35 Pac. 897.

[8] It is our conclusion, therefore, that the court below, having jurisdiction of the subject-matter and of the parties, declined to proceed and determine the issues submitted to it upon their merits, solely because of a mistaken conception of its jurisdiction or authority in the premises, and that no appeal lies from its judgment so rendered.

"Under such circumstances, the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it." Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699.

The circumstance that the issuance of the writ prayed for will have the incidental effect of annulling (without a writ of certiorari) the judgment of dismissal is no ground for denying it. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 Pac. 978.

Let the writ issue as prayed for.

We concur: CONREY, P. J.; JAMES, J.

38 Cal. App. 1

NELLIGAN et al. v. KNUTSEN. (Civ. 1813.)

(District Court of Appeal, Third District, California. Aug. 27, 1918. Rehearing Denied by Supreme Court Sept. 27, 1918.)

APPEAL AND ERROR ⟹930(2)—PRESUMPTION—INSTRUCTIONS FOLLOWED.

Where the court by instruction told the jury in explicit terms not to regard or consider certain testimony in reaching their verdict, the presumption is that they obeyed the instruction.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

On rehearing. Rehearing denied.

For former opinion, see 175 Pac. 18.

Wm. N. Graybiel, of Turlock, and E. H. Zion, of Modesto, for appellant.

R. R. Fowler, of Turlock, and James L. Crittenden, of San Francisco, for respondents.

PER CURIAM. In his petition for a rehearing, appellant, among other points therein made, declares that, in reaching our conclusion as announced in the original opinion, we considered the testimony of Nelligan as to the price at which corn could be sold in Santa Rosa. In reply, we take occasion to say that we based our decision solely upon the proposition that the record contained sufficient evidence to support the verdict in all vital particulars growing out of the issues made and tried, and that, although we referred in our opinion to the testimony relative to the price at which corn could be sold in Santa Rosa, we attached no significance thereto so far as the verdict was concerned. That testimony was by the court taken from the jury in an instruction in which they were told in explicit terms not to regard or consider it in reaching their verdict, and the presumption is that they obeyed the instruction and disregarded the testimony.

As to the remaining grounds upon which a rehearing is asked, we are satisfied with our original opinion, and a rehearing is, therefore, denied.

39 Cal. App. 76

PEOPLE v. TOBIN. (Cr. 811.)

(District Court of Appeal, First District, California. Dec. 6, 1918.)

CRIMINAL LAW ⟹511(7)—TESTIMONY OF ACCOMPLICE—CONFESSION OF DEFENDANT.

Where the corpus delicti has been established by the testimony of an accomplice, the necessary corroboration may be furnished by the confession of the defendant.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Austin W. Tobin was convicted of the infamous crime against nature and from judgment of conviction and from order denying motion for new trial, he appeals. Judgment and order affirmed.

John F. Glover, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of the infamous crime against nature, and appeals from the judgment of conviction and from the order denying his motion for a new trial.

The record conclusively establishes the guilt of the defendant. The verdict is based upon the frank testimony of an accomplice, but which was corroborated by the equally frank confession of the defendant, made to representatives of the San Francisco police department and the United States army; nor did the defendant, although he took the witness stand, unequivocally and categorically deny the commission of the offense, but contented himself with stating that he and his particeps criminis were intoxicated at the time, and denied knowledge of the act charged. As to his confession, testified to by the officers, this remained uncontradicted.

It is settled law in this state that where the corpus delicti has been established by the testimony of an accomplice, the necessary corroboration may be furnished by the confession of the defendant. People v. Richardson, 161 Cal. 552, 120 Pac. 20; People v. Josselyn, 39 Cal. 400.

There is no merit in the further contention of the appellant that his confession was not free and voluntary. Its character in this respect was established by witnesses, and by the contents of the confession itself, which was in writing.

It is also claimed in support of the appeal that the court indulged in remarks during the course of the trial prejudicial to the rights of the defendant; but the record on appeal does not disclose any such, nor that the defendant during the trial made any objection of the character now advanced, nor any assignment of conduct prejudicial to his rights.

Finally, the contention is made by the appellant that the court erred in refusing to read to the jury section 1111 of the Penal Code with respect to the testimony of accomplices. No such instruction was requested. The defendant asked for certain instructions, which were given as requested, with the exception of the final portion of one of them. The omitted portion was to the effect that a confession alone will not sustain a conviction, and was refused by the court because the state of the evidence before the jury rendered it inapplicable. The court did instruct the jury that it is "established law that extrajudicial confessions and verbal admissions should be received with caution and viewed with distrust."

The judgment and order are affirmed.

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39 Cal. App. 479

DIAL v. HOMESTEAD LAND & BUILDING CO. et al. (Civ. 2629.)

(District Court of Appeal, First District, Division 1, California. Jan. 28, 1919.)

VENUE ⚷5(4)—CHANGE OF VENUE—"REAL ACTIONS."

An action instituted by a stockholder of a corporation to set aside a resolution fraudulently adopted, and conveyance of real estate made in pursuance thereof, was in nature of a "real action," which, under Code Civ. Proc. § 392, must be tried in the county where the real estate is situated, although an accounting, dependent upon the determination of the ownership of the land, was prayed for.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Action.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by W. H. Dial against the Homestead Land & Building Company and others. From an order changing the place of trial, plaintiff appeals. Affirmed.

W. H. Dial, J. O. Davis, of Berkeley, and J. Early Craig, of San Francisco, for appellant.

Jordan & Brann, of San Francisco, and Pardee & Pardee, of Susasville, for respondents.

RICHARDS, J. This is an appeal from an order of the superior court of the city and county of San Francisco, changing the place of trial of this action from the said city and county of San Francisco, in which the action was brought, to the county of Lassen, in which the real estate affected by the action is situated. The action was one instituted by the plaintiff as one of the stockholders of the defendant Homestead Land & Building Company, to have vacated and set aside a certain resolution of said last-named corporation, which plaintiff alleges to have been fraudulently adopted, and also to have set aside a certain conveyance of the real estate in question made by it in pursuance thereof to said defendant Bank of Lassen County, a corporation, and to obtain a decree of said court directing a reconveyance of said real estate from said Bank of Lassen County to said Homestead Land & Building Company; and also to obtain certain other equitable relief. The defendants moved for a change of place of trial of said action to the county of Lassen as the place where the real estate in question is situated. The court granted such motion.

The sole question presented upon this appeal is whether this action is in the nature of a real action which, under the provisions of section 392 of the Code of Civil Procedure, must be tried in the county where the real estate is situated.

We are of the opinion that it is such an action. The principal relief which the plaintiff seeks, as appears from the prayer of his complaint, is a reconveyance of the title to the lands in question from the defendant Bank of Lassen County to the defendant Homestead Land & Building Company. The plaintiff has thus by his own pleading and prayer for relief determined the character of this action to be one the real substance and purpose of which is to have it determined that the Homestead Land & Building Company is the equitable owner of the premises in question, and to have its legal title to the same re-established by a conveyance from the other defendant to it. The case is thus, we think, brought clearly within the principles laid down in the cases of Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820, and Bradley Bros. v. Bradley, 20 Cal. App. 1, 127 Pac. 1044. It is true that in each of these cases the question presented was that of the application of the statute of limitations and not that of the change of the place of trial; but notwithstanding this difference the question presented was the same, viz., what was the nature of the action; and hence the reasoning of those cases must be given application to the case at bar. The fact that the plaintiff in this action does not seek to establish title to the property in himself, but in the corporation of which he alleges himself to be a stockholder, is immaterial, since an action brought by a stockholder of a corporation for its benefit and to obtain remedies for it, which its governing body refuses to take legal steps to seek, is in its essence an action brought by the corporation itself. Turner v. Markham, 155 Cal. 562, 102 Pac. 272.

The final contention of the appellant herein that the action is one also involving personal property, which the plaintiff would have the right to have tried in the county of his selection, is without merit. No personal property is described in the complaint, and the accounting which the plaintiff seeks on behalf of his corporation is one to which he or it could only be entitled upon the determination that said corporation was the owner of, and was to be reinvested with the title to, the real estate. It would thus be a mere incident to the main relief sought, which as we have seen, was the recovery of the real estate.

Order affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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39 Cal. App. 462

HOLCOMB v. JUSTER et al. (Civ. 2631.)

(District Court of Appeal, First District, Division 1, California. Jan. 27, 1919.)

1. EXECUTION 🔑75—TIME FOR ISSUANCE.

Where, on February 23d, when trial court announced judgment for plaintiff, a stay of execution of ten days was granted, an execution immediately taken out, after judgment was filed on February 28th, was illegally issued.

2. APPEAL AND ERROR 🔑485(1)—RETURN OF MONEY OBTAINED BY MEANS OF ILLEGAL EXECUTION—SUPERSEDEAS.

Where, on application for writ of supersedeas, it appears that moneys in the hands of plaintiff and his attorney were obtained by means of illegal execution and levy, the moneys together with interest will be ordered returned.

Action by N. R. Holcomb against Max Juster and others. Judgment for plaintiff. On defendants' application for writ of supersedeas. Ordered that plaintiff and his attorney pay to defendants moneys obtained by means of an illegal execution and levy.

Herbert Choynski, of San Francisco, for appellants.

Arthur W. Perry and Norman A. Eisner, both of San Francisco, for respondent.

PER CURIAM. This is an application for a writ of supersedeas. The facts pertinent to the application include the following: The plaintiff sued the defendants as copartners and obtained a judgment. On February 23, 1918, the trial court announced that its judgment was in favor of the plaintiff and against the defendants, and the latter asked and were granted a stay of execution of ten days from the date of the entry of the judgment. Later the findings were prepared, signed, and filed, and a judgment was filed February 28, 1918. Immediately thereafter an execution was taken out, delivered to the sheriff, and was by him levied on funds of Mendel Topper, one of the defendants. The execution was so levied on a savings bank account of Topper in the Humboldt Savings Bank of San Francisco, and there was so collected, $817.75; and it was levied on credits owing by F. W. Woolworth Company, and there was collected from it $155. The record admits that the plaintiff and his attorney will hold and retain said moneys. The defendants did not know of said levy until March 5, 1918. They immediately applied to the trial court for relief, but their motion did not come on for hearing until March 22, 1918. In the meantime, March 13, 1918, the defendants perfected their appeal from the judgment. When the motion came on for hearing, it was resisted on the ground that jurisdiction had vested in this court. Said motion was denied April 6, 1918, "for want of jurisdiction," and thereupon this application was made.

[1, 2] It is clear that there was no instant of time when an execution could have legally issued; but, nevertheless, it appears that the writ did issue and that the plaintiff and his attorney hold said money as the fruits of such illegal issue and levy. They cannot retain the same, but must return the money to the payors of the same. Romine v. Cralle, 83 Cal. 432, 23 Pac. 525. In the present case the order of the court will be that N. R. Holcomb, the plaintiff, and Arthur W. Perry, his attorney, pay to the defendants within ten days $972.75, with interest thereon at 7 per cent. per annum from February 28, 1918.

It is so ordered.

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39 Cal. App. 458

MULCAHY v. GAGLIARDO. (Civ. 2494.)

(District Court of Appeal, First District, California, Division 1. Jan. 24, 1919.)

1. VENDOR AND PURCHASER 🔑49—PROVISION FOR SELLER'S PROCURING LOAN FOR BUYER.

Contract provision that vendor's agents, to enable buyer to finance the purchase, should procure a loan for him upon the security of the tract to be conveyed and also other land then owned by him, was performed when vendor's agents procured a person ready and willing to make the loan upon the stipulated terms, despite buyer's failure to consummate the loan, because his wife, after the contract was made. caused a homestead to be placed upon the property owned by him, and thereafter refused to execute the papers necessary to consummate the loan.

2. Vendor and Purchaser 🔑335—Breach by Buyer—Retention of Deposit.

Seller, on buyer's breach, may retain buyer's deposit to his own use.

3. Vendor and Purchaser 🔑335—Breach by Buyer—Forfeiture of Note.

Seller of land, to whom buyer gives promissory note for part of price, on buyer's breach has same right to retain note to his use that he would have had to retain any deposit of money, particularly where written agreement stipulated that buyer, on failure to perform, should forfeit deposit, so that he cannot complain of effort of seller or transferees to enforce note.

4. Bills and Notes 🔑92(6)—Note for Part of Price of Land—Consideration.

Agreement to sell lands, and detriment suffered by seller through prevention from making sale to another during life of agreement, constituted sufficient consideration for buyer's note given by buyer for part of price.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by M. F. Mulcahy against A. G. Gagliardo. From judgment for plaintiff, defendant appeals. Affirmed.

E. M. Rea and A. A. Caldwell, both of San Jose, for appellant.

C. D. Cavallaro, of San Jose, for respondent.

RICHARDS, J. This action was brought to recover judgment upon a promissory note for the sum of $1,000, and interest, payable one day after date, executed by the defendant to Rancadore & Cavala, a firm of real estate agents, and assigned by them to the plaintiff for collection.

The stipulated record on appeal embraces the pleadings, the findings, the minute orders, the judgment, and the notice of appeal. The facts of the case, as found by the court, are briefly these:

One F. S. Gomes was on May 3, 1917, and thereafter the owner of a tract of orchard land in the county of Santa Clara containing 19⅛ acres. On that date the defendant, A. G. Gagliardo, entered into a written agreement with said Gomes, through the agents of the latter, Rancadore & Cavala, for the purchase by Gagliardo of Gomes' said tract of land for the sum of $17,000, of which sum he was to pay $1,000 as a cash deposit and part payment upon the purchase price. In lieu of making said agreed payment Gagliardo gave to said Rancadore & Cavala, as the agents of Gomes, the promissory note for $1,000, which forms the basis of this action. The balance of the purchase price was by the terms of said agreement to be secured and paid to Gomes in the following manner: Rancadore & Cavala were, within a reasonable time, to secure a loan for Gagliardo in the sum of $21,500, which the latter was to secure by a mortgage or deed of trust upon the Gomes tract presently to be conveyed to him, and also upon a tract of land then owned by him containing 20 acres of land. Within a reasonable time thereafter the firm of Rancadore & Cavala found and produced a person ready and willing and able to make said loan upon the security of these two tracts of land. The title to the Gomes tract was good and sufficient for said transfer and loan. As to the title to the Gagliardo tract, however, the following difficulty arose: Gagliardo's said land was the community property of himself and wife. The latter objected to incumbering it, and in order to make good her objection caused a homestead to be placed upon the property after the date of Gagliardo's agreement with Gomes, and thereupon refused to execute the papers necessary to consummate said loan. As a consequence Gagliardo was unable to carry out his agreement with Gomes for the purchase of the latter's property, and the transaction through his failure fell through. Thereafter Gomes assigned to Rancadore & Cavala his interest in said note, and they thereupon transferred the said note to the plaintiff for collection.

The defendant's answer set forth substantially the foregoing facts, and averred that said note was without consideration, and that the same became void upon the alleged failure of the firm of Rancadore & Cavala to actually consummate the agreed loan upon the Gomes property and upon such title to his own property as he had to offer. The finding of the trial court was against the defendant upon both of these contentions, and was in favor of the plaintiff for the recovery of the full sum due upon the face of said promissory note. From the judgment entered thereon the defendant prosecutes this appeal.

[1-3] We are unable to agree with the appellant's contention as to the construction to be placed upon his agreement with Gomes and with the firm of real estate agents in respect to the loan to be secured for him upon the two properties. His authorization to the said firm of real estate agents to secure for him such a loan carried with it the necessary implication that he would furnish as to both properties a good and merchantable title for the purposes of such loan. He had, at the time he entered into the agreement, such title. All that the firm of real

estate agents had to do, therefore, under said agreement was to secure and produce a bona fide lender ready and willing and able to consummate said loan upon such sufficient title as the said Gagliardo had at the date of said agreement. Smith v. Schiele, 93 Cal. 144, 28 Pac. 857; Merriman v. Wickersham, 141 Cal. 570, 75 Pac. 180. This they did, and in so doing, so far as they were concerned, and also so far as their principal, Gomes, was concerned, the agreement on their part and on his part was fulfilled. The failure of the defendant to keep his part of said agreement, if not his fault, was at least his misfortune, in not being able to have the title to his tract of land remain good and merchantable for the purposes of the loan. The breach of the agreement was therefore his breach, from which the legal consequences of a vendee's breach of an agreement for the purchase of real estate must flow. Had the defendant, Gagliardo, deposited with Gomes, or with his agents for him, the sum of $1,000 in cash, as the written agreement apparently contemplated, his vendor, upon Gagliardo's breach of said agreement, would have had the right to retain to his own use said deposit, under the rule laid down in the leading case of Glock v. Howard, etc., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and the later decisions of the Supreme Court and of this court, adopting and approving said rule. Odd Fellows' Savings Bank v. Brander, 124 Cal. 255, 56 Pac. 1109; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363; Champion, etc., Co. v. Champion, 164 Cal. 205, 128 Pac. 315; Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Poheim v. Meyers, 9 Cal. App. 31, 98 Pac. 65. It follows, logically, that the vendor would have the same right to retain to his own use the promissory note which his vendee, Gagliardo, had deposited in lieu of cash on account of the purchase price of Gomes' land.

In this connection it may be noted that Gagliardo, by said agreement, expressly stipulated, "in the event of his failure to comply therewith, to forfeit the deposit herein paid." This being the effect and express terms of his agreement and of the breach thereof by him, he cannot now be heard to complain of the effort of Gomes or his transferees to enforce the obligation of his promissory note, to the full benefit of which Gomes became entitled upon his failure to keep his agreement for the purchase of Gomes' land.

[4] The final contention of the appellant that the note was without consideration, and therefore void, is without merit, since the agreement itself and the detriment thereby suffered by Gomes, through the prevention from making a sale of his lands to another during the life of said agreement, would constitute a sufficient consideration for the note.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

39 Cal. App. 481

PIONEER TRUCK CO. v. HAWLEY et al.

(Civ. 2784.)

(District Court of Appeal, Second District, Division 1, California. Jan. 28, 1919.)

1. Appeal and Error 🔑373(1), 411—Notice of Appeal—Undertaking.

On appeal under the alternative method provided by Code Civ. Proc. §§ 941a–941c, it was sufficient to file the notice of appeal without serving it upon respondent or his attorney and without filing any undertaking on appeal.

2. Appeal and Error 🔑373(1) — Undertaking—Stay of Proceedings.

It is only for the purpose of obtaining a stay of proceedings that an appellant must file an undertaking.

3. Appeal and Error 🔑640—Demand for Transcript—Necessity.

In view of Rule 5 (176 Pac. ix), where appellant had filed in the appellate court a typewritten clerk's transcript duly certified and containing notice of appeal and the judgment roll before respondent gave notice of motion to dismiss, the appeal will not be dismissed because of appellant's failure to make request for a clerk's transcript, or file notice of demand for such transcript within 10 days after service of notice of entry of judgment under Code Civ. Proc. § 953a.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Pioneer Truck Company against H. W. Hawley and others. From a judgment for plaintiff, defendants appeal. On motion to dismiss appeal. Motion denied.

Jensen & Jensen, of Los Angeles, for appellants.

Warren E. Libby, of San Diego, for respondent.

CONREY, P. J. [1, 2] The first ground of the motion is that the notice of appeal was not served upon respondent's attorney, and that no undertaking on appeal was filed within five days from the filing of the notice of appeal. The motion cannot be sustained upon the ground stated. Under the alternative method of taking an appeal, provided by sections 941a, 941b, and 941c, Code of Civil Procedure, it was sufficient to file the notice of appeal, without serving it upon the respondent or his attorney, and without filing any undertaking on appeal. It is only for the purpose of obtaining a stay of proceedings that an appellant must file an undertaking, which is to be done in accordance with those sections of the Code which provide for stay bonds. Chung Sing v. Southern Pac. Co., 172 Pac. 1103; Lang v. Lilley and Thurston Co., 161 Cal. 295, 119 Pac. 100.

[3] The second ground of the motion is that no request for a clerk's transcript, or notice or demand for such transcript, was filed with the clerk of the lower court within ten days after the service, on appellant's attorneys, of notice of entry of judgment; no proceeding on motion for new trial being pending. Counsel makes this contention on the theory that the provisions of section 953a, Code of Civil Procedure (referring to appellant's duty to file with the clerk a request for "a transcript of the testimony," etc., when he desires to obtain such transcript), apply to the matter of obtaining a copy of the notice of appeal and of the judgment roll. But that theory is unsound. The fact that, before respondent gave notice of motion to dismiss, appellant had filed in this court a typewritten clerk's transcript, duly certified, and containing the notice of appeal and the judgment roll, is a sufficient answer to this part of the motion. Rule 5 (176 Pac. ix). The typewritten transcript is sufficient. Beckett v. Stuart, 35 Cal. App. 796, 171 Pac. 107. By this we are not to be understood as declaring that appellant need not print in his brief, or a supplement thereto, such portions of the record as he desires to call to the attention of the court. Section 953c, Code Civ. Proc.

The motion is denied.

We concur: JAMES, J.; MYERS, Judge pro tem.

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39 Cal. App. 464

NEASHAM et al. v. YONKIN et al.
(Civ. 1894.)

(District Court of Appeal, Third District, California. Jan. 27, 1919.)

1. ESTOPPEL 🔑71—EQUITABLE ESTOPPEL—DISCLAIMER OF RIGHTS.

In an action to restrain defendants from interfering with the flow of water from springs on defendants' lands, the pleading and finding that plaintiff's predecessor induced one of defendants to take up the land as a homestead by offer to give up his right to such waters, and that plaintiffs induced defendants to forego a right to impound flood waters because of having right to such springs when supported by evidence, warranted a judgment for defendants by equitable estoppel.

2. WATERS AND WATER COURSES 🔑146—USE OF SPRINGS—ADVERSE POSSESSION.

If defendant for more than five years had peaceable, quiet, open, uninterrupted, notorious, continuous, exclusive, adverse possession of the flow of springs, she was entitled thereto.

Appeal from Superior Court, Modoc County; Clarence N. Raker, Judge.

Action by Catherine Neasham and others against Mary L. Yonkin and others. Judgment for defendants, and plaintiffs appeal. Judgment affirmed.

Jamison & Wylie, of Alturas, for appellants.

W. Lair Thompson and Snow, Bronaugh & Thompson, all of Portland, Or., for respondents.

BURNETT, J. The action was brought to restrain the defendants from interfering with the flow of waters of a certain Neasham creek and of two certain springs and for a judgment decreeing that plaintiffs are the owners of all the flow of said waters and entitled to the use of the same and that defendants have no right, title, or interest in or to the said waters or any part thereof.

Defendants answered, denying many of the allegations of the complaint and setting up two defenses, namely, that plaintiffs were estopped from claiming any interest in said waters and that defendants had acquired a title thereto by adverse possession and use.

It may be said that the controversy is really as to the ownership of the waters flowing from two certain springs, designated as Nos. 1 and 2, located on the land of said defendants.

The court found:

> "That in the year 1900 Ralph Neasham was the owner of, in possession of, and entitled to the possession of the above-described lands of plaintiffs. That in the year 1900 the said Ralph Neasham urged the defendant Mary L. Yonkin to enter under the homestead laws of the United States, and by virtue of said laws acquire title to the above-described lands of defendants, and at said time as an inducement to said defendant Mary L. Yonkin to enter said lands under said homestead laws agreed with said defendant that, if she would enter upon the said lands and acquire title thereto, he, the said Ralph Neasham, would give the said defendant the use of the waters of the above-mentioned spring No. 1 and spring No. 2; said springs being the same which plaintiffs assert the right to use in their complaint in this cause. That at said time said Ralph Neasham agreed with the said defendant that he would make no further claim to said waters of said springs or to the use thereof if defendant would enter said land. That said lands were at said time, and now are, arid and require artificial irrigation, and were valueless without water, and would not have been entered by said defendant under the homestead law without the use of the waters of said springs. That said defendant Mary L. Yonkin believed and relied upon the said statements and promises of the said Ralph Neasham, and so relying upon said statements

did, in the month of December, 1900, enter upon the said land of defendants with the intention to claim and obtain title to said lands under the homestead laws of the United States of America, and thereafter complied with said homestead laws as to residence and cultivation, and diverted and applied to the necessary irrigation of said land and to the crops growing thereon, and for domestic use and stock water thereon all of the water of said springs No. 1 and No. 2, and duly obtained patent to said lands under the homestead laws of the United States. That said defendant in reliance upon the said promise of said Ralph Neasham spent five years of her life acquiring title to said land, and expended large sums of money in improving said lands. That in the year 1902 said Ralph Neasham again assured said defendant that she had a right to the use of the waters of said springs No. 1 and No. 2, and that said Ralph Neasham had waived all claim thereto; and that said defendant could continue spending money upon and improving her said homestead and acquire title thereto with the assurance that she would not be deprived of the use of the waters of said springs. That said defendant completed her homestead residence and improvements upon said lands in reliance upon said first and said further assurances. That in the year 1903 said defendant Mary L. Yonkin undertook to secure a right to construct reservoirs upon the upper sources of the waters of Neasham creek with the intention and purpose of impounding the flood and freshet waters of said creek, but at said time the above-mentioned plaintiffs urged the defendant to desist from acquiring a right to said freshet and flood waters, and stated to defendant that their father, Ralph Neasham, had given the defendant the waters of springs No. 1 and No. 2, and that because of said gift plaintiffs had lost their right to use said waters; and that said defendant should permit plaintiffs to have said freshet waters and acquire said reservoir site. That said defendant relied upon said statements of plaintiffs that the waters of said springs belonged to her by gift from the said Ralph Neasham, and so relying upon said statements desisted from her efforts to secure said reservoir site and use of said flood waters, and had lost the rights which were acquired under her reservoir application, and has depended solely and entirely upon the waters of said springs for the necessary irrigation of her said lands, and for domestic and stock water thereon."

The court further found:

"That in the month of December, 1900, defendants entered upon the above-mentioned springs No. 1 and No. 2 and cleaned the same out, and in the irrigation season of 1901 diverted the waters of said springs to and used the same upon the above-described lands of defendants in the necessary irrigation of crops thereon, and for domestic and stock water."

It is further found that she, the said Mary L. Yonkin, continued to use said waters from said springs from the year 1901 for more than five years thereafter in a "peaceable, quiet, open, uninterrupted, notorious, continuous, exclusive (manner) and adverse to the whole world, and particularly adverse to plaintiffs in this action and their predecessors in interest, under a claim of right and title as against said plaintiffs, and each of them."

[1, 2] We have examined the record and have discovered that each of the said findings is abundantly supported by the evidence. The particular portions of the transcript wherein the evidence is found are pointed out in the brief of respondents, and we may add that appellants have filed no reply brief and have made no attempt in any manner to meet the argument made by said respondents. That an equitable estoppel was sufficiently pleaded and found cannot be disputed, no citation of authorities being required, and that either of said findings, if supported by the evidence, would warrant the judgment, is equally beyond controversy. The fact is that the case presents simply a question of conflict of evidence, and about the only surprising thing is that the appeal should have been taken at all.

The judgment is affirmed.

We concur: HART, J.; GEORGE F. BUCK, Presiding Judge pro tem.

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39 Cal. App. 512

BAIRD v. PACIFIC ELECTRIC RY. CO.

(Civ. 2868.)

(District Court of Appeal, Second District, Division 2, California. Jan. 29, 1919. Rehearing Denied by Supreme Court March 27, 1919.)

1. PLEADING 🔑291(2) — VERIFICATION — OMISSION—GENUINENESS OF RELEASE—BURDEN TO REBUT.

Where defendant, in personal injury action, set up settlement with plaintiff for all alleged damages, as shown by releases set out, and plaintiff did not file affidavit provided for by Code Civ. Proc. § 448, denying genuineness of releases, burden was on him to rebut presumption of payment raised by releases execution and genuineness of which were admitted by failure to file affidavit.

2. PLEADING 🔑291(2) — GENUINENESS OF RELEASE—FAILURE TO FILE AFFIDAVIT—ESTOPPEL TO ATTACK.

Plaintiff in personal injury action who did not file affidavit provided by Code Civ. Proc. § 448, denying genuineness or due execution of releases pleaded by defendant, was not estopped from attacking such releases by any valid defense other than such as involved their genuineness or due execution, and could controvert them by evidence of fraud, mistake, undue influence, compromise, payment, estoppel, or mental incompetency.

3. PLEADING 🔑166—NEW MATTER IN ANSWER—NECESSITY OF REPLY.

Code Civ. Proc. § 462, providing that statement of any new matter in answer in avoidance or constituting a defense on trial must be deemed controverted by opposite party, plaintiff suing for personal injuries, and met by defendant's plea of releases, was entitled to introduce, without further pleading, evidence to sustain any legitimate defense to new matter in answer.

4. Release ⚷24(2) — Validity — Contractual Capacity—Contesting Validity —Restoring Consideration.

Under Civ. Code, § 38, releases of liability for personal injuries executed by street car passenger whose injury had rendered him totally incompetent to enter into settlement were void and without effect, and no obligation of injured person to repay money advanced on settlement, as condition of controverting releases or agreements, would exist.

5. Release ⚷24(2)—Offering Evidence—Tender Back.

Though disability of street railway's injured passenger was only partial and temporary, if settlement of liability was obtained by railway by fraud and deceit as to contents of agreements and their legal effect, or if passenger in his weakened condition was induced by misrepresentations to sign releases in belief he was being paid on account, he cannot be required to tender back payments as condition of offering evidence to defeat the settlement.

6. Release ⚷53—Pleading—Right to Introduce Evidence.

In injured passenger's action against street railway, wherein railway pleaded releases, court erred in denying plaintiff privilege of introducing evidence to rebut presumption of full payment and satisfaction of demands raised by the releases, though they were not controverted by reply.

7. Jury ⚷13(8)—Right to Trial by—Action for Personal Injuries—Legal Defense.

In action against street railway for personal injuries, wherein railway set up releases whose genuineness and due execution were not denied by plaintiff pursuant to Code Civ. Proc. § 448, under section 592, plaintiff had right to jury trial, answer denying facts pleaded to show liability, and setting up contract of payment and release, a legal defense, even if equitable issue was injected into case by evidence to avoid such affirmative defense.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Albert J. Baird, an incompetent, by his guardian ad litem, Mary L. Baird, against the Pacific Electric Railway Company. From a judgment for defendant, plaintiff appeals. Reversed, and cause remanded.

E. B. Drake, of Los Angeles, for appellant.
W. R. Millar, Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for respondent.

SLOANE, J. The plaintiff appeals from a judgment that he take nothing by his action, and for costs in favor of defendant. The action is upon a complaint which states a cause of action for damages alleged to have resulted from a wrongful and forcible ejectment of plaintiff by defendant from its electric railway car. The answer denies the liability of defendant for damages, pleads contributory negligence of plaintiff, and sets up as an affirmative defense a settlement with plaintiff for all alleged damages, as shown by three separate agreements and releases, signed by the plaintiff and set out in full in the answer. Either of these releases is a complete defense to plaintiff's demand, if permitted to stand unimpeached. The plaintiff at no time filed the affidavit provided for by section 448 of the Code of Civil Procedure, and is held to have confessed the genuineness and due execution of these releases. No other averments or admissions by plaintiff as to the execution or binding effect of these releases appear in the record.

Prior to the date of trial, the plaintiff demanded a jury, which demand was by the court denied, on the ground that the issues made and presented by the pleadings were not cognizable before a jury, and presented equitable issues alone. Upon the calling of the case for trial, a witness for the plaintiff was sworn and called to the stand; but thereupon defendant's counsel objected to the introduction of any evidence for plaintiff, on the ground that it appeared from the pleadings that said plaintiff had no cause of action against defendant, and upon the failure of plaintiff to make a tender of the sums of money admitted in open court to have been received from defendant at the time of the execution and delivery of the three releases pleaded in the answer, after an adjournment from 11:30 a. m. until 2 o'clock p. m., granted to enable plaintiff to make such tender, and, the court having refused further time to procure the money for such tender, the court sustained defendant's objection to the introduction of evidence, and gave judgment for the defendant. The plaintiff alleges error of the trial court in refusing him a jury trial, and in denying the admission of any evidence for plaintiff.

[1-5] We will consider first plaintiff's right to introduce evidence, as it will be immaterial whether he had a jury or not, if he could not offer his evidence. It is clear that, under the state of the pleadings at the time the trial was called, the burden was upon plaintiff to rebut the presumption of full payment and satisfaction of his demands, raised by the releases set forth in defendant's answer, the due execution and genuineness of which were admitted by failure to file the affidavit provided by section 448 of the Code of Civil Procedure. It is equally clear that he was not estopped from attacking these releases by any valid defense, other than such

as involved the genuineness or due execution thereof. He could controvert them by evidence of fraud, mistake, undue influence, compromise, payment, estoppel, mental incompetency, and like defenses. Moore v. Copp, 119 Cal. 432, 51 Pac. 630. As has been stated, there is nothing in the pleadings to indicate what, if any, defense the plaintiff might have interposed to the admitted execution of these releases set forth in the answer. Under our system of pleading, no such showing is required. The provision of section 462 of the Code of Civil Procedure that "the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party," entitles the plaintiff to introduce, without further pleading, evidence to sustain any legitimate defense to the new matter in the answer. Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423. In this particular case the court seems to have assumed that the plaintiff was relying upon some defense which he could not be permitted to maintain without first tendering back to the defendant the money he had received in consideration of the settlement agreements. We find nothing in the record to justify such assumption. It may perhaps be inferred that mental incompetency on the part of the plaintiff would be the defense. The action here was brought for plaintiff through a guardian ad litem; the complaint alleges that by reason of injury to his skull, in his expulsion from the car, his brain and mind were permanently injured; the bill of exceptions, in stating the ground of defendant's objection to a jury trial, puts it on the ground that the action under the pleadings has become essentially an action to avoid said releases upon the ground of mental incompetency. But conceding that these facts committed the plaintiff to the defense of mental incompetency, there is nothing whatever to indicate whether he would rely upon a partial or total incompetency. If his evidence would have disclosed a total incompetency to enter into a settlement, and a continuing and permanent disability in that respect, these releases became mere "scraps of paper" (Civ. Code, § 38); and it is well settled that no obligation to repay money advanced on the settlement as a condition of controverting the agreements would exist. Or, even if the disability was only partial and temporary, and it should be shown in evidence that the settlement was obtained by fraud and deceit as to the contents of the agreements and their legal effect, or, again, if a state of facts existed where, in his weakened mental state, the plaintiff was induced by fraudulent representations to sign these releases, in the belief that he was being paid so much on account, he could not be required to tender back the payments as a condition of offering evidence to defeat the agreed settlement. Meyer v. Haas, 126 Cal. 562, 58 Pac. 1042; St. Louis, I. M. & S. Ry. Co. v. Brown, 73 Ark. 42, 83 S. W. 332, 3 Ann. Cas. 573; Mullen v. Old Colony Ry. Co., 127 Mass. 86, 34 Am. Rep. 349.

[6] Other similar conditions, consistent with the facts shown in this record, might be shown in evidence to exist; but it is unnecessary to multiply illustrations. It is sufficient if any single line of attack upon these releases was open to the plaintiff, which he might have pleaded where circumstances required it. He was entitled to the presumption that he had evidence to offer in that behalf. It is quite probable that he might have been required by the court, as a condition of being allowed to introduce evidence, to state what he expected to prove, and to show that he was relying upon a state of facts that would excuse a tender back of the money received, but nothing of the kind was demanded of or volunteered by him, so far as the record shows. Under the circumstances it was error for the court to deny plaintiff the privilege of introducing evidence.

[7] We also think plaintiff was entitled to a jury trial on the issues presented by the record. His complaint was to recover damages for injuries. Section 592 of the Code of Civil Procedure primarily gave him the right to a jury trial. The answer denied the facts pleaded to show liability, and set up a contract of payment and release, a purely legal defense. The nature of the plaintiff's attack upon the validity and binding effect of the releases was not disclosed. It might be purely a denial of the validity of the settlement because of fraud or mental incapacity to contract, which would have raised only an issue of fact for the jury. The assumption that he would seek the aid of equity in rescinding the contracts as being merely voidable finds no support in the record. And in any event, so long as the original issues in the case remained unchanged, under the allegations of the complaint and the denials of liability in the answer, it does not follow that the mere injection of an equitable issue into the case by evidence, to avoid an affirmative defense, would deprive the plaintiff of his right to a trial by jury of the legal issues raised by the pleadings. In the event that the decision of the equitable question permitted him to present the issues of his complaint, they would still have to be tried under the denials of the answer, and he would have a right to a hearing of these by a jury. If the defendant, by its answer, had admitted its liability for the damages sued for, and pleaded only the settlement, and the only issue remaining had been for equitable relief against the releases, a different question would be presented. But

as it appears from the record, no equitable issue has been presented to the court.

Judgment reversed, and cause remanded.

We concur: FINLAYSON, P. J.; THOMAS, J.

39 Cal. App. 499

PACIFIC LIGHT & POWER CORPORATION v. KAUFFMAN et al.
(Civ. 2823.)

(District Court of Appeal, Second District, Division 1, California. Jan. 29, 1919. Rehearing Denied by Supreme Court March 27, 1919.)

APPEAL AND ERROR ⚷345(1) — NOTICE OF INTENTION TO MOVE FOR NEW TRIAL—TIME.

Under Code Civ. Proc. §§ 659, 939, 941b, 956, 963, a party, after 60 days from entry of judgment has expired, cannot revive his right of appeal by subsequently giving notice of intention to move for new trial, even though there was no notice of entry of judgment.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Pacific Light & Power Corporation against Milton Kauffman and the Valencia Heights Water Company. There was a judgment for defendants, and plaintiff appeals. Motion to dismiss. Appeal dismissed.

Gibson, Dunn & Crutcher and Edward E. Bacon, all of Los Angeles, for appellant.

George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for respondents.

CONREY, P. J. On motion to dismiss appeal. The motion is made upon the grounds that the judgment appealed from is final and became final before the notice of intention to move for a new trial in the court below was served or filed, and that the appeal was not taken within the time provided by law.

The judgment was entered April 20, 1918. On the 20th day of June, 1918, the plaintiff filed a notice of intention to move for a new trial. On the 25th day of July, 1918, plaintiff filed notice of appeal from the judgment. No notice of entry of judgment was ever given. The trial in the court below was before the court without a jury. An order denying appellant's motion for a new trial was entered on the 16th day of July, 1918.

The cases in which an appeal may be taken from the superior court are those stated in section 963, Code of Civil Procedure. An amendment of that section in the year 1915 took away the right which theretofore existed to appeal from orders denying motions for new trial. By sections 939 and 941b, Code of Civil Procedure, an appeal from a judgment must be taken within 60 days from the entry of judgment. "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion." Section 956, Code of Civil Procedure, provides that upon an appeal from a judgment the court may review any order on motion for a new trial. Under section 659, Code of Civil Procedure, a party intending to move for a new trial "must, within ten days after receiving notice of the entry of the judgment, * * * file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial," etc.

The notice of intention to move for a new trial was not given until the sixty-first day after the entry of judgment. At that time the right to appeal from the judgment had expired. Counsel for appellant concede that the right of appeal was lost, save only that they contend that, under the form of an appeal from the judgment (though taken more than sixty days after entry of judgment), appellant is entitled to a review of the court's order denying the motion for new trial. If the right thus claimed can be sustained at all, such right must arise out of the fact that the notice of intention to move for a new trial was made in due time (there having been no notice of entry of the judgment), taken together with the provision of section 956 that an order on motion for new trial may be reviewed on appeal from a judgment. But it is our opinion that the Code of Civil Procedure does not authorize a party, whose right of appeal from a judgment has expired, to revive that right of appeal by subsequently giving notice of intention to move for a new trial. The phrase "if proceedings on motion for a new trial are pending" (sections 939 and 941b) refers exclusively to such proceedings pending within the period of 60 days from the entry of the judgment. This appears so plainly to be the meaning of the language used that we are unable to give it any other construction. The quotation in the brief for appellant, from the decision in Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019, does not conflict with our view of the question. The notice of intention to move for new trial, in that case, was served and filed within 60 days from the entry of the judgment, and the notice of appeal from the judgment was filed less than 30 days after the court denied the motion. It was therefore true, as stated by the Supreme Court, that—

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"If the court below had power to grant a new trial of the proceedings by which the judgment against Rowe was given, the appeal from the judgment would be in time."

Appellant's position is not improved by the decisions of the Supreme Court in Schmitt v. White, 172 Cal. 554, 158 Pac. 216, and Wilcox v. Hardisty, 171 Pac. 947. In each of those cases the proceeding to obtain a new trial had been initiated prior to August 8, 1915 (the date when the amendments of the Code of Civil Procedure, concerning the time allowed to appeal from a judgment, and concerning the right of appeal from an order made on a motion for a new trial, became effective), and therefore was pending while the right of appeal attached to an order made on such motion, independently of any appeal from the judgment. Under the circumstances noted, the statutes were construed liberally to preserve rights of appeal which otherwise would have lapsed; rights upon which the parties were entitled to rely, but which, under a strict technical construction of the amendments, they would have lost. But it is not so here. To sustain the right of the plaintiff to maintain this appeal, we would be attempting to revive a right which has been lost, and which cannot be revived without construing the statute against the direct statement of its intention. If appellant's position is correct, then there is no definite time fixed by law when a judgment will become immune from appeal, unless notice of entry of judgment be given. But the law provides that the time within which to appeal from a judgment shall run from the day of entry of the judgment. This is emphasized by the fact that, by the amendment to section 941b, Code of Civil Procedure (Stats. 1915, p. 204), the words "notice of," preceding the words "entry of judgment," were stricken out, and the section thereby harmonized with section 939.

The appeal is dismissed.

We concur: JAMES, J.; MYERS, Judge pro tem.

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39 Cal. App. 496

GEARY ST., P. & O. R. CO. v. CAMPBELL.

SAME v. ROOT et al.

(Civ. 2474.)

(District Court of Appeal, First District, Division 1, California. Jan. 29, 1919. Rehearing Denied Feb. 27, 1919; Denied by Supreme Court March 27, 1919.)

1. EVIDENCE ⚷372(6) — ANCIENT DOCUMENTS—CUSTODY.

In action by plaintiff company for unpaid subscriptions to its capital stock, where company's secretary, who was custodian of its books more than 30 years old, produced and identified them and testified that they were turned over to him in the usual course of business when he became secretary, books were properly admitted; proof being sufficient to make out prima facie proof of identity.

2. CORPORATIONS ⚷90(6) — NONPAYMENT FOR STOCK—EVIDENCE.

In action by plaintiff company to recover unpaid subscriptions to its capital stock, evidence *held* sufficient to make out a prima facie case and satisfy plaintiff's burden of showing nonpayment.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Geary Street, Park & Ocean Railroad Company, a corporation, against George Campbell, and by the same plaintiff against Jean Campbell Root and another, tried together in the lower court and consolidated on appeal. Judgment for plaintiff, and the named defendants appeal. Affirmed.

Jesse H. Steinhart, of San Francisco, for appellants.

Pillsbury, Madison & Sutro, of San Francisco, for respondent.

KERRIGAN, J. These actions were brought to recover alleged unpaid subscriptions to the capital stock of plaintiff corporation. By stipulation of counsel the actions were tried together, and it was agreed that the evidence offered and received should apply equally to both cases. The appeals are by stipulation presented upon one bill of exceptions, and have been consolidated by order of this court.

They are brought here by George Campbell Root and Jean Campbell Root from judgments rendered against them on a stock call or assessment arising as follows: The Geary Street, Park & Ocean Railroad Company was incorporated with a capitalization of $1,000,000, divided into 10,000 shares of the par value of $100 each. On the 25th day of November, 1915, the board of directors of the corporation levied an "assessment and call" upon its capital stock. The assessment was levied for the purpose of paying certain obligations of the company. It amounted to the sum of $34 a share in all, and was therefore more than 10 per cent. of the capital stock. In an exhibit attached to the complaint, the order of the board of directors levying the assessment is set forth, as are also certain recitals as to the indebtedness of the corporation, the issuance of the capital stock, and the declaration that the amount of $62.50 remains unpaid upon the original subscription to each share. The complaint further sets forth that an assessment or call for unpaid subscriptions in the sum of $34 will be required to raise the amount of indebtedness of the company. The resolution assessing the stock also appears therefrom. The complaint also shows that the directors of the company elected to waive proceedings leading up to a sale of the stock for nonpayment of the assessment, and decided to bring actions against the stockholders for the amount sued for.

At the time the assessment was levied, both defendants herein were each the owner of 50 shares of the capital stock of the company which they had inherited from their father. Upon their failure to pay the assessment these actions were brought against them by the corporation for $1,700 each.

The complaint proceeds upon the theory that the stock was never fully paid up, and it is conceded that the action is one to recover upon unpaid subscriptions. The trial court found that there had been paid upon each share of the capital stock of plaintiff the sum of $37.50, and that the remainder of the subscription, $62.50, remained unpaid. Judgment went for plaintiff, and the defendants appeal.

As grounds for reversal appellants claim that no sufficient foundation was laid for the introduction in evidence of certain books and records of the company to prove nonpayment. They further claim that, even assuming the books and records to have been properly admitted, they do not make out a case against them for the reason that they fail to show that no more than $37.50 a share was paid in by the stockholders on their stock, or that appellants or their predecessors in interest did not themselves pay the whole balance due thereon. They also claim that the amount of the assessment exceeds the debts of the corporation.

[1] The books of the company received in evidence were more than 30 years old. The secretary of the plaintiff, who had occupied that position for many years, produced them, and testified that they were turned over to him in the ordinary course of business when he became such secretary, as the books of the corporation, and he identified them as such. He was the custodian of the books and records of the company, and the evidence offered was deemed sufficient by the trial judge. Being free from suspicion of fraud, we think they were properly admitted. The proof presented was sufficient to make out a prima facie proof of identity.

From certain pages of these books it is apparent that there were eight assessments upon the stock of the corporation aggregating $37.50 a share, after which the stock was issued. The fact of issuance of the stock, it is claimed by appellant, raises the presumption of payment. Assuming this to be true, the corporation books show the contrary, for it appears therefrom that no certificates were issued until $37.50 a share had been paid after the eight assessments, at which time [it would follow, as the court found that][1] there still remained due upon the stock the sum of $62.50 a share, and that no other assessments were ever levied. The court below gave credit to this evidence, and its finding cannot be disturbed here.

[2] We are further of the opinion that this evidence was sufficient to make out a prima facie case, and that it satisfied the burden cast upon plaintiff to prove nonpayment.

That the amount of the assessment did not exceed the debts of the corporation is fully sustained by the evidence. The assessment at $34 a share amounted to $340,000 in all, and the evidence shows that the company was indebted for an amount slightly in excess of that sum.

From what we have said it follows that the judgment should be affirmed, and it is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

39 Cal. App. 448

NASON v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 2759.)

(District Court of Appeal, Second District, Division 1, California. Jan. 23, 1919. Rehearing Denied by Supreme Court March 24, 1919.)

1. EXECUTORS AND ADMINISTRATORS 🔑315 (1) — DISTRIBUTION OF PROPERTY — DISCHARGE OF ADMINISTRATOR.

Where a distribution of the property of an estate had been decreed, and the administratrix distributed the property according thereto, and nothing remains to be done, she is entitled to her discharge, under Code Civ. Proc. § 1697, although the time for appeal from the decree of distribution has not expired.

2. EXECUTORS AND ADMINISTRATORS 🔑314 (12) — DECISIONS REVIEWABLE — DISCHARGE OF ADMINISTRATOR.

The modes in which a decision may be reviewed are prescribed by statute, and as a general rule the courts are not at liberty to substitute other modes, and under Code Civ. Proc. § 963, subd. 3, from a decree discharging an administrator there is no appeal.

3. EXECUTORS AND ADMINISTRATORS 🔑315 (4)—DISCHARGE OF ADMINISTRATOR—SETTING ASIDE OF DISCHARGE.

An order granting a motion to set aside a decree of discharge of an administrator, not made under the provisions of Code Civ. Proc. § 473, authorizing relief from judgment or order taken through mistake, inadvertence, sur-

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[1] The words in brackets were added by the Supreme Court on its denial of a rehearing.

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prise, or excusable neglect, may not be affirmed as one authorized thereby.

4. Executors and Administrators 🔑314(12) — Certiorari — Inadvertence — Order Discharging Administratrix.

That an order, after distribution, discharging an administratrix, made improvidently or inadvertently, and not in the legal exercise of jurisdiction, may be set aside, does not mean that an order may be vacated because the court subsequently concludes it erred as to fact or law, and the objection that the court acted in an unauthorized mode may be reviewed by certiorari.

5. Executors and Administrators 🔑315(4)—Distribution—Setting Aside Decree—Review.

Upon review of an order setting aside a decree of discharge of an administratrix, where inadvertence was not presented in the motion or by the record, except in the order vacating the decree, it will not be presumed that the judge knew of some inadvertence justifying the order, particularly where he was not the judge who made the order vacated.

6. Executors and Administrators 🔑315(4)—Distribution—Vacation of Orders—"Order Made Out of Court."

A decree of final discharge of an administratrix, after distribution, is not an "order made out of court," without notice to the adverse party, and is not authorized by Code Civ. Proc. § 937, providing for vacation of orders.

In the matter of the settlement of final account of Mabel A. Nason, as administratrix of the estate of Cornelius Walker, deceased. From a formal order, vacating an order of discharge, Mabel A. Nason brings certiorari against the Superior Court of Los Angeles County; J. C. Rives, Judge thereof. Order annulled.

George M. Harker, O'Melveny, Millikin & Tuller, and Roy V. Reppy, all of Los Angeles, for petitioner.

Schmidt & Riggins, of Los Angeles, for respondent.

CONREY, P. J. Certiorari. By this proceeding petitioner seeks to have annulled an order vacating an order discharging Mabel A. Nason as administratrix of the estate of Cornelius Walker, deceased.

As appears from the petition, after a contest over heirship between Edwin N. Walker and E. Earle Walker (hereafter referred to for convenience as the Walker twins), and Mabel A. Nason, which contest was decided in favor of Mrs. Nason, the court settled the final account of the administratrix, and rendered a decree of distribution, awarding all of the property of the estate to Mrs. Nason. This decree was entered on the 15th day of May, 1916. On May 25th Mrs. Nason filed a receipt, made by her as distributee to herself as administratrix, for all the property distributed, and thereupon she applied for and was granted an order of discharge as administratrix of the estate.

On the 8th day of June, 1916, the Walker twins applied to Judge Wilbur in open court by motion for an order vacating the order that had been made discharging Mrs. Nason as administratrix. Notice that said motion would be made was served upon Mrs Nason; the grounds of the motion being stated in said notice as follows:

> "That said administratrix was not and is not entitled as yet to final discharge, and that the condition of the estate is such that it requires an administratrix."

No supporting affidavit was served or filed, nor at the time said motion was presented was any testimony introduced; the notice stated that the motion would be made "upon the minutes of the court." Judge Wilbur never ruled on the motion.

On March 27, 1918, pursuant to notice given, the Walker twins made a motion before Judge Rives to have the motion to vacate order of discharge restored to calendar for hearing and determination. This motion was granted by Judge Rives, and the motion to vacate the order of discharge was given consideration by him and granted. The order granting the motion describes the proceedings taken to restore to calendar the motion to vacate, and recites further that the motion was restored to calendar and was heard and argued by the attorneys for the interested parties, and that the court took the matter under submission and ordered affidavits filed, and that affidavits of Ruben F. Schmidt, George M. Harker, and A. M. Case were filed in response to said order. Said affidavits dealt solely with the question whether or not Judge Wilbur had ruled upon said motion presented on June 8, 1916. The formal order vacating order of discharge contained a number of "findings"; three of them dealing with the question of whether or not the motion to vacate was before the court and undetermined. The fourth finding was as follows:

> "That the condition of said estate on said 25th day of May, 1916, and ever since has been and now is in such a condition that it requires an administrator."

This "finding" responded to the ground urged by the Walker twins in their motion. The fifth and last fact found is outside of the issues involved in the motion, and is as follows:

> "That said discharge of said administratrix on said 25th day of May, 1916, was made inadvertently and ex parte."

[1-3] The "minutes of the court"—taking that phrase to mean the court files and records of administration—showed that the es-

tate had been disposed of by a final decree of distribution, which included a settlement of the final account of the administratrix, and that the administratrix had made delivery of the property of the estate in accordance with the decree. On that state of facts the court had made its order discharging the administratrix. This was in accordance with law, and was in accordance with the regular and ordinary practice of the superior court in the conduct of its business in the administration of estates. Section 1697, Code of Civil Procedure, provides that when an estate has been fully administered, and it is shown by the administrator that he has performed all of the acts lawfully required of him, "the court must make a judgment or decree discharging him from all liability to be incurred thereafter." It is true that, at the time when the discharge was granted, the time within which an appeal from the decree of distribution might be taken had not yet expired. But there was nothing in the record showing that an appeal had been taken, or that any stay of proceedings under the decree of distribution had been obtained. Under those circumstances an administrator who delivers the property to the distributees is acting in the performance of his duty. That duty having been performed, he is not concerned with the fact that an appeal may thereafter be taken.

In the absence of a present showing in the record of facts indicating that an administrator is necessary to represent the estate in some further proceedings connected therewith, he is then entitled to his discharge. It follows that, in the matter of the Walker estate, the "minutes of the court" were entirely wanting in any facts from which the court could derive authority to set aside the decree of discharge on the grounds stated in the notice of motion, to wit: That the administratrix was not as yet entitled to discharge, and that the condition of the estate was such that it required an administratrix. The modes in which a decision may be reviewed are prescribed by statute, and as a general rule the courts are not at liberty to substitute other modes in their places. From a decree discharging an administrator there is no appeal. Estate of Smith, 98 Cal. 636, 33 Pac. 744; Code Civ. Proc. § 963, subd. 3. The motion to set aside the decree of discharge was not made for relief, under the provisions of section 473, Code of Civil Procedure, and the order may not be affirmed as one authorized thereby. This brings us to the principal contention upon which respondent relies, which is that, as stated in the fifth "finding," the decree of discharge was inadvertently made.

[4] Where an order has been irregularly and improvidently made, that fact takes the case out of the general rule above stated. For example: If an order granting, or an order refusing, a new trial, has been improvidently made before the motion has been regularly submitted, it would be within the power of the court, and would be its duty, to set aside the order. This is based upon the fact that in such case the order was not made in the regular exercise of the jurisdiction of the court. Odd Fellows' Savings Bank v. Deuprey, 66 Cal. 168, 4 Pac. 1173. But, as stated by Mr. Justice Sloss in Robson v. Superior Court, 171 Cal. 588, 597, 154 Pac. 8, 11:

> "This does not mean that an order may be vacated because the court concludes, after making it, that it erred in matter of law or fact."

> "Such a state of things, being of rare occurrence, is not presumed, but must be affirmatively shown. The objection that the court has acted in an unauthorized mode goes to the power of the court, and hence its action may be reviewed on certiorari." Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174.

[5] In the case at bar, the fact that the decree of discharge was inadvertently made was not presented as one of the grounds of the motion to set aside that decree. No fact appeared in the record from which inadvertence of the court may be inferred. The order itself, now under review, while it states that the decree of discharge was made inadvertently and ex parte, does not indicate any particular in which the court had acted improvidently or inadvertently. Under such circumstances we cannot, from the mere assertion contained in the order, indulge in a presumption that the judge knew of some inadvertence which would justify the order. This would have been true if the judge who acted last had been the same judge who made the decree of discharge. It is even more emphatically true, when the claimed inadvertence was that of another judge.

[6] No help for respondent's case can be obtained from section 937, Code of Civil Procedure, which authorizes a judge to vacate "an order made out of court, without notice to the adverse party." A decree of final discharge of an administrator is not "an order made out of court."

The order is annulled.

We concur: JAMES, J.; MYERS, Judge pro tem.

179 Cal. 674

BOCK v. LOSEKAMP. (L. A. 4652.)

(Supreme Court of California. Feb. 6, 1919. Rehearing Denied in Bank March 8, 1919.)

1. EXECUTION 🔑250—SETTING ASIDE SALE —INADEQUACY OF PRICE.

Mere inadequacy of price, however gross, is not of itself sufficient ground to set aside sale on execution legally made; but there must, in addition, be proof of some element of fraud, unfairness, or oppression.

2. EXECUTION 🔑275(1) — PURCHASER AT SALE—DUTY TOWARD JUDGMENT DEBTOR.

Purchaser at execution sale, who is stranger to proceedings and buys in good faith, is charged with no duty toward judgment debtor, though he must examine judgment and execution to determine whether officer is authorized to make sale, but need not inquire further to ascertain if proceedings of officer and creditor have been fair toward debtor.

Department 1.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Herman Bock against G. W. Losekamp. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied in bank; Angellotti, C. J., dissenting.

Frank S. Adams, of Los Angeles, for appellant.

Goudge, Williams, Chandler & Hughes and Goudge, Robinson & Hughes, all of Los Angeles, for respondent.

SHAW, J. This is an appeal by the defendant from a judgment in favor of the plaintiff in an action to set aside an execution sale and deed of the plaintiff's real estate.

The facts are very fully set forth in the findings. A judgment in favor of W. J. Cook for costs in the sum of $15.50 was entered in the superior court. One year later an execution issued on said judgment was levied by the sheriff on the property in question, and after due notice the property was offered for sale by the sheriff in the usual manner. The defendant, who was not a party to the action, was the only bidder at the sale, and bought the property for the sum of $35.60; that being the amount of the judgment and costs. No redemption was made, and in due course the sheriff executed a deed of the property to the defendant. The plaintiff knew that judgment had gone against him on the merits in the action in which a judgment for costs was given; but he had no actual knowledge or information of the judgment for the costs, the issuance of the execution, or the sale, until after the sheriff's deed was given. Three futile demands for payment of the judgment had been made on Bock's attorneys in that action before the execution was issued, but no notice was given to them of the execution or of the sale. The property was incumbered for $220 and was worth $2,000; but the defendant believed that it was worth only $500 at the time of the sale. The court found that the consideration paid by the defendant for the property was grossly inadequate. Shortly after the issuance of the sheriff's deed, the plaintiff learned for the first time of the execution and sale, whereupon he promptly tendered to the defendant the amount paid by the defendant for the property, with interest, and brought this action to set aside the sale and deed.

The court further found that the judgment creditor, Cook, knew where the plaintiff resided and did not notify him of the sale, and that both Cook and the sheriff knew that the plaintiff did not see the published notice of the sale. This notice appeared in a newspaper published in the city of Los Angeles, but in a part thereof about 30 miles distant from the plaintiff's residence and from the property.

As to the defendant's connection with the sale, the court found that Cook's attorney was also the defendant's attorney in some other matters not connected with the sale, and that he informed the defendant, prior to the sale, that it was all right for the defendant to become a purchaser at the sale. It was further found that the defendant did not, before obtaining the sheriff's deed, communicate to the plaintiff the fact that he had purchased the lot at the sheriff's sale, nor make any effort or attempt to do so, or to find the plaintiff, nor manifest or assert during said interval any rights of ownership or interest in the property, or any part thereof, and that in that interval the defendant permitted the plaintiff to pay taxes and assessments on the property amounting in all to the sum of $43.25. It also found, however, that the judgment was entered, the execution issued, and the proceedings thereunder carried on, without any design or intent on the part of the defendant, or said Cook, or his attorney, to carry on or effect a secret sale of the plaintiff's property, or to deprive him of the same for a mere nominal sum, or in any way to defraud the plaintiff.

It is not claimed or found that there was any irregularity in the proceedings connected with the sale, or that the defendant, Losekamp, had any knowledge of the circumstances which caused the ignorance of the plaintiff concerning the judgment, execution, and sale.

[1] The case cannot be distinguished from the recent decision of this court in Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946. In that case property was sold on execution for a grossly inadequate price, on a judgment and execution of which the debtor had no actual personal knowledge, and of which no actual notice was given to him, and the purchaser was a stranger to the judgment. The facts, in other words, were in all respects essentially the same as here, with respect to the position of the defendant as an innocent purchaser and as to the inadequacy of the price. The court in bank carefully considered the question and stated the rule in this state to be that—

> "Mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage."

The subject is further discussed at considerable length in that case, and it is unnecessary here to repeat the arguments and reasoning there given. Upon this principle the defendant in this case was entitled to judgment.

[2] The respondent relies on the decision in Odell v. Cox, 151 Cal. 70, 90 Pac. 194. That case is cited and discussed in the Rauer Case, and it was there shown that it was not applicable to such cases as the one at bar. A purchaser at an execution sale, who is a stranger to the proceedings and buys in good faith, is charged with no duty toward the judgment debtor. He must at his peril examine the judgment and execution, in order to determine whether the officer is duly authorized to make the sale; but he need not inquire further into the proceedings of the officer and judgment creditor to ascertain if they have been in all respects fair toward the judgment debtor. He may rely upon the officer's authority to sell and his own good faith as to that matter. Blood v. Light, 38 Cal. 654, 99 Am. Dec. 441. The judgment should have been for the defendant.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

In Bank.

PER CURIAM. Rehearing denied.

ANGELLOTTI, C. J. (dissenting from order denying rehearing). I am unable to concur in the conclusion reached in the department opinion. It seems to me that, in connection with an admitted inadequacy of consideration so gross as "to shock the conscience," there are circumstances sufficient to fairly warrant the conclusion of the trial court that the case is governed by the equitable doctrine enunciated in such cases as Odell v. Cox, 151 Cal. 70, 90 Pac. 194. The correctness of the views expressed in that case has never been questioned. In fact, they were expressly affirmed and applied in Winbigler v. Sherman, 175 Cal. 270, 165 Pac. 943, and the doctrine of the two cases was recognized and approved in Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946; the opinion in the last-named case being subscribed by the very justices who concurred in Winbigler v. Sherman, supra.

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39 Cal. App. 640

RYAN et al. (MILLER, Intervener) v. MURPHY et al. (Civ. 2387.)

(District Court of Appeal, First District, Division 1, California. Feb. 7, 1919.)

1. Receivers 🔑35(1)—Creditor's Action—Validity of Appointment—Showing of Emergency.

In creditors' action to subject certain real property to their claims, appointment of receiver cannot be legally made without formal notice except upon a showing of great emergency.

2. Receivers 🔑47—Appointment—Sufficiency of Order—Indefiniteness.

In creditors' action to subject certain real estate to their claims, an order appointing receiver, without defining scope of receivership or describing the property to be affected thereby, was void on ground of indefiniteness.

3. Receivers 🔑21—Appointment—Validity of Order.

In creditors' action to subject certain real estate to their claims, an order appointing receiver to cover all property described in the complaints, and the rents, issues, and profits thereof, is void where, according to the creditor's own showing, it covers property greatly in excess of enough to secure the claims against the judgment debtors.

4. Receivers 🔑6—Grounds for Appointment—Conveyance by Debtor—Lis Pendens.

Where, in creditors' action to subject certain real estate to their claims, the creditors could have protected their interests in the property against future alienation by filing a lis pendens, a receiver was improperly appointed.

5. Receivers 🔑42—Appointment—Bond.

In creditors' action to subject certain real estate to their claims, an order appointing a receiver, made ex parte, without requiring any bond of the applicant, is void, being in violation of Code Civ. Proc. § 566, requiring such bond; such statute being mandatory.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by James R. Ryan and others against Herman Murphy, Ella M. Murphy, and others, in which William Miller intervened. From an order appointing a receiver, the defendant Ella M. Murphy appeals. Reversed.

E. C. Harrison and M. E. Harrison, both of San Francisco, for appellant.
Vincent Surr and Thos. W. Nowlin, both of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by the defendant Ella M. Murphy from an order appointing a receiver in a creditors' action brought to subject certain real property to their claims. The complaints of the plaintiffs and intervener allege the recovery of certain judgments by them against the defendant Herman Murphy, the husband of the appellant; that said Herman Murphy is heavily indebted and insolvent, and that executions on said judgments have been returned unsatisfied; that conveyances of two valuable parcels of land aggregating 939 acres by Murphy to his wife, and by her to others, as well as a certain deed of trust made by Murphy's predecessor in interest to certain of the defendants, were all made without adequate consideration and with intent to hinder, delay, and defraud his creditors. It is further alleged in effect that part of this land has been subdivided into lots, which are being sold on the installment plan, and the court is requested to set aside the conveyances mentioned, so that the property, or as much thereof as may be necessary, may be sold in satisfaction of plaintiffs' demand, and that the defendants account for money received as rents, issues, profits, or purchase price of the property. The answers of the defendants put in issue all of the material allegations of the complaints.

From the record it also appears that early in the proceedings plaintiffs gave notice of a motion for the appointment of a receiver for the real property, which motion after hearing was denied; that, after the evidence in the case was completed and a verdict had been returned by an advisory jury, a second motion for the appointment of a receiver was noticed, but was not in fact made. Four months later, and three months, after the cause was finally submitted for decision, the court made the order appealed from, that—

"T. W. Nowlin be and he is hereby appointed a receiver herein, with his bond fixed at the sum of $5,000."

There was no requirement of a bond from the applicant. The order also set aside the submission, and appointed said Nowlin referee for certain stated purposes.

We have not been favored with the views of plaintiffs in the case, either by briefs or oral argument.

[1] It is obvious that the receiver in this case was appointed without formal notice. Such an appointment, under the established law of this state, cannot be legally made except upon a showing of great emergency. Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561. In the present case, the appointment having been made after all the evidence pro and con was introduced, the court was in a position to know whether or not the exigencies of the case necessitated the appointment; and, while even under those circumstances notice of the application is required, still it cannot be seriously maintained that in the case at bar an attempt has been made to deprive the defendants of the management of their property without a hearing (34 Cyc. 124), to avoid which is doubtless the object of the statute. However this may be, there are more serious questions presented by the appeal, rendering unnecessary a decision on this point.

[2, 3] We are of the opinion that the order appointing the receiver was erroneous, on the ground of its indefiniteness. It makes no attempt to define the scope of the receivership, or to describe the property to be affected thereby. If it was intended that the order should cover all the real property described in the complaints, and the rents, issues, and profits thereof, it would be void for the reason that according to the plaintiffs' own showing it would cover property greatly in excess of enough to secure the claims against the judgment debtors. Nat. Bank v. Kirkby et al., 43 Fla. 394, 32 South. 881; 23 Am. & Eng. Ency. of Law, 1048. If, on the other hand, it was intended that the order should embrace less than all the property described in the complaints, then it must be held void for failure to definitely describe such property. It has been held that a failure to describe with sufficient exactness the premises covered by a receivership is sufficient ground for reversal of the order of appointment. Salisbury v. Wilcox, 128 Cal. 347, 60 Pac. 979. "An order for a receiver ought to state distinctly on the face of it over what property the receiver is appointed." 34 Cyc. 139, and cases cited; Alderson on Receivers, § 140. The order "ought to state so distinctly on the face of it over what property the receiver is appointed that a party may know what it is the officer of the court is in possession of." Crow v. Wood, 13 Beav. 271.

[4] Moreover, it may be said that the plaintiffs could (if they had not done so) have adequately protected their interest in the

property against future alienation thereof by filing a lis pendens. Thus in National Union Bank v. Riger, 38 App. Div. 123, 56 N. Y. Supp. 545, which was an action by a judgment creditor to subject certain land to his claim, it was held erroneous to appoint a receiver where there was sufficient equity in the property to satisfy the judgment. The court remarked that in such a case the creditor was adequately protected by the filing of a lis pendens.

[5] As before stated, the order was made ex parte and without requiring any bond of the applicant, and was therefore in clear violation of the provisions of section 566 of the Code of Civil Procedure, which declares that—

> In such a case "the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously or without sufficient cause. * * *"

This requirement of the section is mandatory, and where it has not been complied with the appointment is void. Davila v. Heath, 13 Cal. App. 370, 109 Pac. 893; Fischer v. Superior Court, supra; Dreyspring v. Loeb, 113 Ala. 263, 21 South. 73.

For the reasons given the order is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

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39 Cal. App. 559

FIELDING v. ILER et al. (Civ. 2704.)

(District Court of Appeal, First District, Division 2, California. Feb. 4, 1919.)

1. LIMITATION OF ACTIONS ⚷148(4)—TOLLING STATUTE—ACKNOWLEDGMENT—SUFFICIENCY.

A letter, with reference to continuing a mortgage and not taking out new papers, by one of mortgagor's vendees who assumed and agreed to pay mortgage, written in response to letter of mortgagee, *held* a sufficient acknowledgment to toll the statute of limitations as to defendant writer.

2. APPEAL AND ERROR ⚷1170(5)—REVERSAL—TECHNICAL ERRORS—VARIANCE WHICH DOES NOT MISLEAD ADVERSE PARTY.

That the only proof of allegation in complaint that defendants acknowledged "in writing said indebtedness to plaintiff and said mortgage" was a letter signed by one defendant acknowledging existence of mortgage indebtedness did not constitute a variance misleading the adverse party to his prejudice within Code Civ. Proc. § 469, and must be disregarded on appeal.

3. APPEAL AND ERROR ⚷231(3)—OBJECTIONS NOT MADE IN LOWER COURT—CONSIDERATION.

Where the only objection made in trial court to the introduction of a letter was that it was incompetent, irrelevant, and immaterial, objection of want of sufficient proof of signature is not available on appeal.

4. EVIDENCE ⚷378(2)—PROOF OF SIGNATURE—SUFFICIENCY.

Plaintiff's testimony that letter was received by her from defendant wife and was the latter's reply to the former's letter of inquiry was sufficient proof of signature of the latter in the absence of specific objection.

5. LIMITATION OF ACTIONS ⚷143(6)—MORTGAGES ⚷280(3)—ACKNOWLEDGMENT OF DEBT—"PARTY TO BE CHARGED."

The grantee in a deed of mortgaged premises, which contains a clause by which the grantee assumes and agrees to pay the mortgage indebtedness, becomes primarily liable to the mortgagee and is the "party to be charged" within Code Civ. Proc. § 360, as to acknowledgment of indebtedness by such party tolling the statute.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Party to be Charged.]

6. LIMITATION OF ACTIONS ⚷85(5)—ABSENCE FROM STATE.

Where time which elapsed between maturity of note and commencement of action to foreclose mortgage securing note was less than 4½ years, and successive absences of one of defendants from the state aggregated more than two years, action as to him was not barred under the four-year statute (Code Civ. Proc. § 337, subd. 1) in view of section 351.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Lydia W. Fielding against Evelyn M. Iler and Edward W. Anderson and wife. Judgment against Anderson and wife, and they appeal. Affirmed.

John L. McVey, of Oakland, for appellants.

L. R. Weinmann, of Alameda, for respondent.

HAVEN, J. Action for foreclosure of a mortgage given as security for the payment of a promissory note dated December 21, 1908, and payable three years after date. In July, 1909, the defendant Iler, maker of the note and mortgage, conveyed the mortgaged premises to the defendants Anderson, who are husband and wife. This conveyance contained the stipulation:

> "That the same was made subject to said mortgage which the parties of the second part therein assumed and agreed to pay."

Thereupon the defendants Anderson entered into possession of the mortgaged premises, and paid interest upon the mortgage debt to the plaintiff from the summer of 1909 until September, 1915. About the middle of December, 1915, the plaintiff wrote the defendants Anderson, calling their attention to the fact that the time was drawing near for new papers to be made out and asked them "to make up a deed of trust instead of a mortgage." Two days before the expiration of the statutory period of limitation on the original promissory note, the defendant Josephine V. Anderson wrote the following letter to plaintiff:

> "Dec. 19, 1915.
>
> "Your note of December 11th at hand and I would like to have you continue the mortgage. In regards to taking out new papers for the same that will not be necessary as I had spoken to Mr. Adams in 1913 about that as the five years of the mortgage was up then and he informed me that you would agree to extend the payment of the same every two years and I still have the same paper so that if it is all the same to you I will be to see you on either the 27th or 28th of December, more likely the 27th. With best wishes for a happy Xmas I remain
>
> "Respectfully, Josephine V. Anderson."

About December 27, 1915, defendants Anderson called upon plaintiff and offered to pay interest on the mortgage debt which plaintiff refused to accept.

This action was commenced May 10, 1916. The defendants filed a joint answer, in which they pleaded the provisions of section 337, subd. 1, Code of Civil Procedure, as a bar to the cause of action set forth in the complaint. The trial court sustained the plea of the statute of limitations in favor of the defendant Evelyn M. Iler, maker of the note, and judgment was entered in her favor, but overruled the plea as to both of the defendants Anderson, against whom judgment of foreclosure was rendered, from which they prosecute this appeal.

[1] The letter above set forth contains a distinct admission of the existence of the mortgage indebtedness. For that reason it was a sufficient acknowledgment to toll the statute of limitations as to the appellant Josephine V. Anderson. Concannon v. Smith, 134 Cal. 14, 66 Pac. 40; Foster v. Bowles, 138 Cal. 346, 351, 71 Pac. 494, 495; Worth v. Worth, 155 Cal. 599, 102 Pac. 663; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 Pac. 836, 55 Pac. 145.

In the first case above cited the Supreme Court say that such an acknowledgment "is sufficient if it shows that the writer regards or treats the indebtedness as subsisting." In the Foster Case it is said:

> "It was not necessary that respondents should promise to pay the indebtedness in order to establish a new date for the statute to commence running as to the mortgage. All that was required was a plain and distinct acknowledgment in writing of the existence of the mortgage."

In our opinion this letter meets the test laid down by the above cases, and is not a conditional promise within the rule of Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42, as claimed by appellants.

[2] The complaint alleged that the "defendants did acknowledge to plaintiff in writing said indebtedness to plaintiff and said mortgage." The only proof of this allegation was the letter signed by the one defendant, Josephine V. Anderson. Appellants claim that this constitutes a fatal variance between the allegations of the complaint and the proof. It cannot successfully be maintained, however, that the adverse party was misled to his prejudice by this variance, if any; and therefore it must be disregarded. Code Civ. Proc. § 469; Taylor v. Morris, 163 Cal. 717, 724, 127 Pac. 66.

[3, 4] Objection is made to the receipt in evidence of the letter above referred to, upon the ground that the record contains no proof that such letter was either written or signed by Mrs. Anderson. The only objection made in the trial court to the admission of this letter in evidence was that it was incompetent, irrelevant, and immaterial. Under such circumstances, the objection of want of sufficient proof of signature is not available to appellants here. Crocker v. Carpenter, 98 Cal. 418, 421, 33 Pac. 271; French v. Atlas Milling Co., 17 Cal. App. 226, 119 Pac. 203. Furthermore, the respondent testified that the letter was received by her from Mrs. Anderson and was the latter's reply to the earlier letter of inquiry. In the absence of specific objection, this is sufficient proof of the signature to the letter.

[5] The further point is made that the acknowledgment of the indebtedness by Mrs. Anderson is ineffectual because made by a stranger to the original promissory note and mortgage. This contention is without merit. The grantee in a deed of mortgaged premises, which contains a clause by which such grantee assumes and agrees to pay the mortgage indebtedness, becomes primarily liable to the mortgagee. Thereafter he is "the party to be charged," within the meaning of section 360 of the Code of Civil Procedure. Williams v. Naftzger, 103 Cal. 440, 37 Pac. 411; Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123; Lick v. Anderson, 29 Cal. App. 491, 156 Pac. 70.

[6] As to the appellant Edward W. Anderson, the court found:

> "That on divers occasions between the 21st day of December, 1911, and the 21st day of December, 1915, said defendant Edward W. Anderson did depart from and absent himself from the state of California, and that the aggregate time covered by the successive absences of said defendant from said state during said period is more than two years, to wit, is approximately two years and six months."

This finding is not attacked as being unsupported by the evidence, but it is claimed it is not sufficient to warrant a judgment against that appellant. With this we cannot agree. The time which elapsed between the maturity of the note and the commencement of the action was less than 4½ years. Successive absences from the state aggregating more than 2 years during that period warranted the conclusion that the cause of action against such appellant was not barred. Code Civ. Proc., § 351; Watt v. Wright, 66 Cal. 205, 5 Pac. 91.

Judgment affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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39 Cal. App. 608

McARTHUR v. PAXTON et al. (Civ. 2554.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

1. Exceptions, Bill of ⟹46—Proposed Bill—Time of Service—Notice of Denial of New Trial.

Relative to time for serving for settlement of proposed bill of exceptions for appeal, movants for new trial are chargeable with notice of the denial, under Code Civ. Proc. § 660, by operation of law, for want of prosecution, of their motion for new trial.

2. Exceptions, Bill of ⟹46—Proposed Bill—Service—Loss of Right.

A party failing, in the absence of extension of time, to serve an adverse party proposed bill of exceptions within 10 days after notice of denial of motion for new trial, and to present to trial judge the proposed bill of exceptions and proposed amendments thereto within 10 days after service of proposed amendments, as required by Code Civ. Proc. § 650, loses right to settlement, unless, on application under section 473, he is relieved by the trial court from the effects of such failure.

3. Appeal and Error ⟹926(1)—Presumption in Absence of Proper Record.

In the absence of proper record, correctness of rulings in admitting evidence must be assumed on appeal.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by W. T. McArthur against Marshall Paxton and another, executors of Charlotte T. Paxton, deceased. Judgment for plaintiff, and defendants appeal. Affirmed.

Victor T. Watkins, of Los Angeles, for appellants.

Goudge, Robinson & Hughes, of Los Angeles, for respondent.

SHAW, J. Action against defendants, as executors of the estate of Charlotte T. Paxton, deceased, to recover for medical services alleged to have been rendered by plaintiff to the deceased. Defendants appeal from a judgment rendered in favor of plaintiff.

The judgment roll is accompanied by a bill of exceptions exhibiting the alleged erroneous rulings of the court made in the course of the trial. This bill of exceptions was settled and allowed by the court over plaintiff's objections, which were embodied in a special bill of exceptions settled at the time.

[1] In considering the appeal, respondent insists that appellants' bill of exceptions should be disregarded for reasons disclosed by the record as follows: The judgment was entered April 12, 1917, and notice thereof served upon defendants on April 14th. Defendants served a notice of intention to move for a new trial on April 24th, which motion, for want of prosecution, was denied by operation of law on July 14th (section 660, Code Civ. Proc.), of which fact defendants must be deemed chargeable with notice (Bernschein v. Whitaker, 175 Cal. 130, 165 Pac. 523). Thirty days thereafter, to wit, on August 13th, defendants served their proposed bill of exceptions, and plaintiff, within due time reserving therein the right to object to the settlement of any bill of exceptions on the ground that the same had not been proposed within the time allowed by law, prepared and served his proposed amendments to said bill on September 1st. Though served on September 1st, the amendments, together with the proposed bill of exceptions, were not delivered by defendants to the clerk, to be presented to the judge who tried the case, until December 15th, at which time the trial judge designated December 22d as the time for the settlement of the bill.

[2] In the absence of any order extending defendants' time, plaintiff's objection to the settlement of the proposed bill of exceptions should have been sustained, for the reason that it was not served within the time allowed by law, nor was it, together with plaintiff's proposed amendments, delivered to the clerk, nor presented by defendants to the court for settlement, upon notice to plaintiff, within the time allowed by law. Indeed, there seems to have been no attempt to comply with the provisions of section 650, Code of Civil Procedure, which, in case proceedings for a new trial are pending, require, unless the time for so doing be extended, that the draft of such bill be served upon the adverse party within 10 days after notice of decision denying such motion, and, upon service of any proposed amendments thereto, such bill and amendments must, within 10 days thereafter, as provided in said section, be presented by the parties seeking the settlement of the bill to the judge who tried or heard the case, upon 5 days' notice to the adverse party, or be delivered to the clerk of the court for the judge. In the case of Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112, it is said that failure to comply with the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

requirement that the proposed bill and amendments must, within ten days after service of the proposed amendments, be presented for settlement to the judge who tried or heard the case, deprives the party of his right to have the bill settled, "unless he be relieved from the effect of such failure by the trial court under * * * section 473 of the Code of Civil Procedure, on account of 'mistake, inadvertence, surprise, or excusable neglect.'" No such application was made. To the same effect is Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535, and Smith v. Solomon, 84 Cal. 537, 24 Pac. 286. In our opinion, the court was without jurisdiction to settle the bill of exceptions, and hence the same, in considering this appeal, must be disregarded.

[3] The alleged errors to which counsel for appellants in his brief directs our attention are rulings of the court in admitting evidence. But, in the absence of any proper record exhibiting such errors, we must assume the correctness of the rulings made by the trial court. This being true, we must consider the appeal upon the judgment roll alone, and, so considered, it is not, and indeed cannot be, claimed that any error appears therefrom.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 564

BARTON v. CITY OF RICHMOND et al.

(Civ. 2731.)

(District Court of Appeal, First District, Division 2, California. Feb. 4, 1919.)

1. DISMISSAL AND NONSUIT 🔑60(1) — GROUNDS—WANT OF PROSECUTION.

Although no answer had been filed, where more than five years had elapsed between filing of demurrer to complaint and order dismissing suit for want of prosecution, trial court did not abuse its discretion in making order, though there had been no trial on issues of law raised by demurrer.

2. DISMISSAL AND NONSUIT 🔑60(1)—WANT OF PROSECUTION—STATUTE APPLICABLE.

Code Civ. Proc. § 583, as to dismissal where action is not brought to trial for five years, applies only where an answer, as distinguished from a demurrer, has been filed.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Suit by Daniel Barton against the City of Richmond and others. From an order granting a motion to dismiss for want of prosecution as to the Barber Asphalt Paving Company, plaintiff appeals. Affirmed.

Daniel Barton, of Richmond, in pro. per. Chas. A. Gray, of San Francisco, for respondent.

BRITTAIN, J. A suit for injunction to prevent the city of Richmond, a municipal corporation, from issuing certain paving bonds, and in which the Barber Asphalt Paving Company was joined as a party defendant was commenced on February 12, 1912. On March 8, 1912, the Barber Asphalt Paving Company demurred to the complaint. Stipulations to continue the hearing on the demurrer, first to March 25, 1912, then to April 15, 1912, and finally to April 29, 1912, were filed. Upon notice, and on the record of the case and affidavits filed by both parties, a motion to dismiss the action for want of prosecution, as to the Barber Asphalt Paving Company, was made on September 11, 1917, and the order granting the motion was entered.

The appellant contends that, since there had been no trial on the issue of law raised by the demurrer, the court was without jurisdiction to dismiss the action. Section 583 of the Code of Civil Procedure provides, among other things, that, if an action is not brought to trial within five years after answer filed, the action shall be dismissed upon motion. If this power to dismiss for want of prosecution exists after issue of fact is joined, in a proper case the power must also exist after issue of law has been joined. The failure of the plaintiff, within reasonable time, to obtain a ruling upon a demurrer to the complaint, offers no obstruction to a dismissal of the action for want of prosecution.

The appellant further contends that, since no answer had been filed, the court was without power, under section 583 of the Code of Civil Procedure, to dismiss the action for want of prosecution. Appellant cites the case of Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002. Mr. Justice Shaw, speaking for the Supreme Court in that case, said:

> "Section 583 applies only to the particular instance of delay in bringing the case to trial after answer filed. The court, as we have seen, has general discretionary power, without the aid of legislation, to dismiss an action for want of prosecution. This power remains in full force, affected only by the implied legislative determination of section 583 that two years' delay is not unreasonable where an answer has been filed. Where an answer has not been filed, the court's power remains, as it was before, limited only by a sound discretion."

[1, 2] (1) Where more than five years elapsed between the time of filing demurrer to the complaint and the order dismissing the suit for want of prosecution, the learned court below did not abuse its discretion. (2) Where demurrer to a complaint has not

been brought to hearing with reasonable diligence, upon motion by the defendant the court may dismiss the action for want of prosecution. (3) Section 583 of the Code of Civil Procedure applies only to cases where an answer, as distinguished from a demurrer, has been filed.

The order appealed from is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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39 Cal. App. 584

IWANAGA et al. v. HAGOPIAN et al.
(Civ. 2565.)

(District Court of Appeal, First District, Division 1, California. Feb. 5, 1919.)

1. PARTNERSHIP ⚷165 — LIABILITY — NATURE OF.

Generally, and at common law, a partnership obligation is joint, and not joint and several.

2. PARTNERSHIP ⚷219(3) — LIABILITY OF DORMANT PARTNER—JOINT LIABILITY.

The rule that a partnership liability is joint, and not joint and several, and that a judgment against less than all the partners upon partnership liability extinguishes the original claim against all, applies to dormant or silent partners, whose connection with the firm is unknown to plaintiff at time of commencement of action.

3. PARTNERSHIP ⚷219(3)—JUDGMENT—LIABILITY—DORMANT OR SILENT PARTNERS.

Under Civ. Code, § 2442, making liability of copartners joint, a judgment against less than all the partners upon a partnership liability extinguishes the original claim against all of the partners, including dormant or silent partners, whose connection with the firm at time of commencement of action was unknown to plaintiff.

4. PARTNERSHIP ⚷219(3)—PARTNERSHIP LIABILITY — ACTION AGAINST LESS THAN ALL PARTNERS—JUDGMENT.

Under Civ. Code, § 2442, making liability of copartners joint, in action against less than all the partners upon a partnership liability, the judgment extinguishes the original claim against all; the joint obligation being merged in the judgment, notwithstanding Code Civ. Proc. §§ 414, 989.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by N. Iwanaga and others against A. D. Hagopian and others. Judgment for plaintiffs, and defendants appeal. Reversed, with instructions.

C. K. Bonestell, of Fresno, for appellants.
A. M. Drew, of Fresno, for respondents.

KERRIGAN, J. This is an appeal from a judgment by default, the defendants declining to answer after order overruling their demurrer to the complaint.

From that pleading it appears that the plaintiffs had obtained a judgment against Albert D. Hagopian for work and labor performed, and that subsequently, in attempting to satisfy such judgment in proceedings supplementary to execution, they learned for the first time that Jas. D. and Baxter D. Hagopian were copartners of Albert in the enterprise upon which the plaintiffs' labor had been performed. It also appears from the complaint that the said judgment is still unsatisfied, and in this action judgment is prayed as against the copartnership and Jas. D. and Baxter D. Hagopian.

[1] Generally and at common law a partnership obligation is joint, and not joint and several. Accordingly a judgment against less than all the partners upon such a liability extinguishes the original claim against all, for the joint obligation has been merged in the judgment, and, the obligation being joint, the individual partners have not undertaken to be severally liable. 1 Freeman on Judgments, § 231; Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562; 30 Cyc. 596, 599; Bates on Law of Partnership, § 535.

[2] This rule obtains even where the partners not made defendants were dormant or silent partners, whose connection with the firm was unknown to the plaintiff when he commenced his action. 23 Cyc. 1212; Gilmore on Partnership, p. 262.

[3, 4] In some states the rigor of this common-law rule has been relaxed by statutes, which declare the obligations of copartners to be several as well as joint. But in this state the common-law rule has been expressly enacted by section 2442 of the Civil Code, which declares the liability of copartners to be joint, and we have no provision permitting several judgments to be recovered in several actions upon a joint obligation. The extent to which the common-law rule on this subject has been changed by the provisions of section 414 and section 989 of the Code of Civil Procedure is by permitting (section 414) an action brought against the joint debtors, but in which the summons has not been served on all, to proceed to judgment against those served, and (section 989) after judgment so obtained, to bring in any of the defendants not served by an order to show cause why they should not be bound by the judgment. Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323; Bailey L. Co. v. Hall, 110 Cal. 490, 42 Pac. 962; Kelly v. Bandini, 50 Cal. 530, 532. But those sections, while they doubtless remedy to some extent the inconvenience or hardship of the common-law rule, do not go so far as to reach persons not made parties to the original suit, even though such persons were dormant partners, and the plaintiff at the time of the commencement of the action was unaware of their interest. Erwin v. Scotten, 40 Ind. 389.

The defendants' demurrer to the complaint raised this point, and in overruling it we are of the opinion that the court erred. The judgment is therefore reversed, with instructions to the trial court to sustain the demurrer to the complaint.

We concur: WASTE, P. J.; RICHARDS, J.

39 Cal. App. 605

BUTTERFIELD v. UNION HOLLYWOOD WATER CO. (Civ. 2617.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

1. TAXATION ⚷764(2)—TAX DEED—UNCERTAINTY OF DESCRIPTION.

Where, as shown by the evidence, the description in a tax deed is equally applicable to different pieces of property, so that it cannot be said which it was intended to cover, the deed, owing to the uncertainty of description, is insufficient as a conveyance of the property.

2. TAXATION ⚷491—CORRECTION OF ASSESSMENT BOOK — AFFIDAVIT OF CLERK — ENFORCEMENT OF ASSESSMENT.

Tax collector had no right to enforce assessment on land by sale where assessment book, after correction by board of supervisors, and delivery to auditor by clerk of board, was not accompanied by affidavit of clerk, as required by Pol. Code, § 3682, and clerk at no time subsequent to delivery made or caused such affidavit to be attached to corrected assessment book.

3. TAXATION ⚷832 — HOLDER UNDER TAX DEED—VOLUNTARY PAYMENT OF OTHER TAXES—REIMBURSEMENT—STATUTES.

Where holder of tax deed from state paid tax not in pursuit of state's title, but as owner of property, payment was voluntary, and reimbursement cannot be had from the original owner of land under Pol. Code, § 3898, subd. 5.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by C. L. Butterfield against the Union Hollywood Water Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Earl Newmire, of Los Angeles, for appellant.

Sheldon Borden and George H. Moore, both of Los Angeles, for respondent.

SHAW, J. Action to quiet title. Judgment for defendant, from which plaintiff appeals.

[1] Plaintiff's claim of title rests upon a tax deed from the state issued for nonpayment of taxes for the year 1908, and unless it is sufficient to divest title, it is conceded the ownership of the property is, as found by the court, vested in defendant. This deed described the property as follows:

"In Los Angeles county, Rancho La Brea, 1.00 acre, Com. 31.980 chs. E. and 17.57 chs. S. of Sta. 6, Ro. La Brea, described in M-20-38."

Plaintiff called as a witness a surveyor, who undertook to identify and locate the land upon the ground. According to his testimony, he did this by running a line 31.980 chains east and 17.57 chains south from station 6, Rancho La Brea, and then, by reason of "M-20-38" found in the deed, he referred to page 38 of Minute Book 20, kept in the surveyor's office, where he found a plat of a strip of land the northeast corner of which was reached by the line which he ran from station 6 of Rancho La Brea. This strip of land, as shown by the plat, was some 75 feet in width, measured north and south, and of sufficient length, measured east and west, to constitute 2 acres, and through the center of which, extending north and south, there was a private right of way some 60 feet in width. Conceding, but not holding, that for the purpose of identifying the land described in this deed reference might be had to such unofficial document in the surveyor's office—as to which, however, we express grave doubts—nevertheless this witness admits that neither from such two-acre plat nor any data connected therewith could he identify which part of the 2-acre plat, found in Book 20-38 of the surveyor's minutes, was covered by the description in the deed, but that he arbitrarily assumed the deed referred to the east half of said strip, for no reason other than that the strip was crossed by the private road and by running the call in the deed he reached the northeast corner of said tract. Upon like arbitrary assumption it could with equal propriety be said the description referred to and covered the north half of said strip. Where, as shown by the evidence, the description in a deed is equally applicable to different pieces of property, so that it cannot be said which it was intended to cover, the description therein, owing to uncertainty, is insufficient as a conveyance of the property. Cadwalder v. Nash, 73 Cal. 43, 14 Pac. 385.

[2] Moreover, the assessment book which, after correction by the board of supervisors, was delivered to the auditor by the clerk of the board, was not accompanied by the affidavit of said clerk, as required by section 3682, Political Code; nor did the clerk at any time subsequent to such delivery, as in Miller v. County of Kern, 150 Cal. 797, 90 Pac. 119, make or cause such affidavit to be attached to said corrected assessment book. As said in Miller v. County of Kern, 137 Cal. 516, 70 Pac. 549, such act, thus shown to have been omitted, was essential to the validity of the assessment book, and in the absence of its performance the tax collector had no

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right to enforce the assessment. See Moyer v. Wilson, 166 Cal. 261, 135 Pac. 1125, and Brady v. Davis, 168 Cal. 259, 142 Pac. 45.

[3] The action was commenced on October 5, 1914, and the court, under subdivision 5 of section 3898 of the Political Code, required defendant to pay to plaintiff the sum of $64 on account of sums disbursed by plaintiff for taxes, penalties, and costs in pursuit of the state's alleged title to the property, but refused to include in such sum the amount of $15.96, paid by plaintiff on account of taxes levied against the property for the fiscal year 1914–15, and for which year there is some evidence that defendant paid the tax upon said property. However this may be, the tax of $15.96 was not paid under said subdivision 5 of section 3898 in pursuit of the state's title to said property, but was paid on account of taxes levied after plaintiff supposed he had acquired the state's title, and the payment so made was not in pursuit of the state's title, but as owner of said property. It was a voluntary payment, reimbursement for which cannot be had under section 3898.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 617

CROWN LAUNDRY & CLEANING CO. v. CAMERON. (Civ. 2523.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

EXEMPTIONS ⚷44—PROPERTY EXEMPT—AUTOMOBILE USED IN BUSINESS.

An automobile is not included within Code Civ. Proc. § 690, subd. 6, exempting certain vehicles which may be drawn by "one or two horses" from attachment levy and sale under execution.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Crown Laundry & Cleaning Company against G. E. Cameron, in which defendant's automobile was attached and defendant moved to release the attachment on the ground that the automobile was exempt from execution, and from an order granting the motion, plaintiff appeals. Order reversed.

George H. Moore and Raymond E. Hoyt, both of Los Angeles, for appellant.

Albert G. Payne, of Los Angeles, for respondent.

JAMES, J. Respondent was engaged in the business of collecting clothes and garments from patrons and returning the same after they had been laundered. In the doing of that work he used a Ford automobile continuously. Plaintiff brought its action in the superior court to recover the sum of $870 from the defendant, alleged to have accrued and to be owing upon contract. It secured a writ of attachment and caused a levy to be made on the automobile of defendant. Defendant appeared and moved to discharge the attachment, claiming that the automobile was exempt from execution. He filed an affidavit, which was not contradicted by any proof offered by the plaintiff, showing facts as to the use made of the machine in his employment, as has been stated in the foregoing, and further showing that he was a married man, having a family of a wife and four minor children, all of whom were supported solely by his labor. The court granted the motion, and the plaintiff has appealed.

The sole question presented is as to whether the automobile was exempt from execution under the provisions of subdivision 6 of section 690, Code of Civil Procedure. In that subdivision it is provided that the following property shall be exempt from execution:

> "Two horses, two oxen or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack, or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living. * * *"

Clearly it appears to us that a motor driven vehicle is not a cart, wagon, dray, truck, coupe, hack, or carriage, as those terms are used in the section. The section plainly says that such exempt vehicles are vehicles which may be drawn by "one or two horses." If the Legislature intended that a motor vehicle should be exempt from attachment, we think that it would have so declared in plain terms, and that for the courts to add to the statute any articles not enumerated would in effect be judicial legislation. Counsel for respondent cites an Iowa case (Lames v. Armstrong et al., 162 Iowa, 327, 144 N. W. 1, 49 L. R. A. [N. S.] 691, Ann. Cas. 1916B, 511), in which it was held there that an automobile was exempt under the terms of the Iowa statute. It is sufficient to say that the statute there considered contained the general term, "or other vehicle," which makes it quite different from the California law. The decision, to our mind, is not applicable. While it is the established policy of the law to construe liberally the exemption statute, such construction cannot go to the extent of adding articles which the Legislature has omitted to include. As said in Stanton v. French, 91 Cal. 276, 27 Pac. 657, 25 Am. St. Rep 174:

> "In the list of property allowed peddlers by statute as exempt from execution, we find no

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

article answering in name or use to a bread box, and a debtor's claims are limited by the words of the statute."

The order appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 630

CAPPLER v. COWAN et al. (Civ. 2624.)

(District Court of Appeal, First District, Division 1, California. Feb. 6, 1919.)

1. Deeds 🔑208(3)—Delivery—Evidence—Possession by Grantee.

Evidence that a signed and acknowledged deed, conveying land from daughter to mother, was found among mother's effects upon her death was evidence tending to show that the deed had been delivered.

2. Deeds 🔑208(1)—Delivery—Evidence.

In an action to cancel deed conveying property from daughter to mother and found among mother's effects upon her death, evidence *held* to justify finding that deed had never been delivered.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Kate G. Cappler against Mary A. Cowan and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Thos. H. Laine and Jesse H. Evans, both of San Francisco (Chas. S. Wheeler, Jr., of San Francisco, of counsel), for appellant.

Arthur H. Barendt, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff, quieting her title to a certain lot of land situated in San Francisco and canceling a deed through which Mary A. Cowan, defendant and appellant, claims to deraign title to said lot.

In regard to the facts of the case, the testimony of the plaintiff showed: That in the year 1899, just prior to the making of the deed sought in this suit to be canceled, she had suffered several severe attacks of "heart failure," and, fearing that a recurrence of such attacks might prove fatal, concluded to make arrangements for the disposition of what little property she owned. That desiring to avoid the expense and delay necessarily incident to the orderly probate of her estate, she executed a bill of sale of some mining stock, indorsed the certificate thereof, and executed the above-mentioned deed in favor of her mother, with whom she was then living, and placed these papers in an envelope, upon which she wrote: "To be delivered to Mrs. Mary A. McElwee [the name of her mother] immediately after my death. Kate G. McElwee." That the execution of these documents and the placing of them in the envelope as described was done upon the advice of a notary public, before whom the execution of the deed had been acknowledged, and who was a friend of the plaintiff and her mother. That she placed the sealed envelope containing said documents in a drawer in a cabinet in their home in which were kept all her papers and those of her mother while they were living together. That she explained to her mother what she had done, and that her mother understood that the property was to be hers only in the event of plaintiff's death. That no delivery of the documents was ever made. That in the year 1903 she married, and was absent from California during four years. That upon leaving she placed the sealed envelope in her trunk, which she kept at her mother's home, and explained to her sister (the appellant) that in the event of her death she had made provision for their mother in the manner above described. That while she was absent from California the deed, through the occurrence of a fire, had come into her mother's and appellant's possession. That upon her return to the state, being much improved in health, she at one time concluded to destroy the documents, and they were handed to her for that purpose by her sister, but later, upon reflecting that her mother might still survive her, she decided not to destroy the papers. That thereupon she placed them in her trunk, and did not see the deed again until it was produced by the appellant in court. That prior thereto, however, in May, 1916, and just after the rendition of a judgment unfavorable to the appellant in an action involving this identical lot, she discovered that the deed had been placed of record, and thereupon commenced this action.

[1, 2] The single question in the case is that of the delivery of the deed. It is doubtless true that, the document, having been signed and acknowledged by the plaintiff, the finding of it, as testified to by the appellant, among her mother's effects upon her death, would be evidence tending to show its delivery; but we think that the trial court was entirely justified in its conclusion that such evidence was wholly overcome by the testimony introduced by the plaintiff. It is undisputed that the deed was one of gift, and it is not probable under all the circumstances of the case that the plaintiff intended to part with the title to the property while she yet lived, for if she had, and her mother had died before her, the property would have formed a part of her mother's estate, and others besides the plaintiff entitled to share in its distribution. The trial judge, who had before him the handwriting

of the indorsement on the bill of sale and the envelope, observed at the conclusion of the trial that they appeared, not only to be in the handwriting of the plaintiff, but also to have been made with the same pen and ink and at the same time. As to this observation the appellant states that it may be entirely correct, and also that the certificate of stock was inclosed in the envelope to be delivered as directed thereon, but argues—no doubt correctly—that it does not follow that the deed was placed in the envelope with the bill of sale. Notwithstanding this, however, we think the fact that the bill of sale and deed were made at about the same time lends strong support of the testimony of the plaintiff as to her intentions at that time and what she did to carry them into effect. Other circumstances tending to corroborate the plaintiff's testimony, if corroboration were necessary, as contended by appellant, are that the plaintiff from the time she made the deed paid the taxes on the property either from rentals received from it or from other funds belonging to her; that she always claimed to own the property, and her title thereto was not questioned by the appellant, or any one else, until litigation over a boundary line between it and adjoining land or some similar litigation between the parties, was decided adversely to the appellant, and at that time, as before stated, this old deed suddenly appeared of record.

It follows from what we have said that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

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39 Cal. App. 633

PEOPLE v. STORKE. (Cr. 640.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1919.)

1. INDICTMENT AND INFORMATION 🔑122(2)—SETTING ASIDE INFORMATION—GROUNDS.

Where a defendant charged with criminal libel was committed for use of words, "Come out in the open, ye hypocrites," an information should not have been set aside from mere fact that it set forth the entire libelous article, it not being alleged in information that any statement contained therein other than that for which defendant was committed constituted a public offense.

2. CRIMINAL LAW 🔑213—COMMITMENT—SUFFICIENCY OF COMPLAINT.

Under Pen. Code, §§ 812, 813, 872, it is duty of a magistrate, even though a complaint fails to charge a public offense, to commit defendant for any offense shown upon examination to have been committed, provided there be sufficient cause to believe him guilty thereof, where accused fails to attack complaint as insufficient to justify issue of warrant of arrest.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

From an order setting aside an information charging C. A. Storke with the offense of libel, the People appeal. Reversed.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., E. W. Squier, Dist. Atty., and G. H. Gould, Deputy Dist. Atty., both of Santa Barbara, for the People.

W. J. Ford, of Los Angeles, for respondent.

SHAW, J. This is an appeal by the people from an order of court setting aside an information filed, charging defendant with the offense of libel, upon the ground that he had not been properly committed by a magistrate.

The complaint upon which the warrant for the arrest of defendant was issued set forth a part of an editorial article which defendant published in a newspaper, wherein of and concerning the complaining witness, F. H. Lingham, it was said:

> "These patriots (meaning the said W. R. Edwardes and F. H. Lingham) have not the odor of 'Lunnun City' (meaning the city of London, England), out of their clothes yet, and would to-day deny the Government (meaning the Government of the United States of America) that protects them, if a dollar balance was on the side of betrayal," which article so published, "in so far as it states that the said F. H. Lingham would deny the government if profit would result to him from such betrayal, is false and untrue, and was published by said defendant willfully and with a malicious intent to injure said F. H. Lingham."

At the hearing before the magistrate the entire article, only a part of which was set forth in the complaint, was offered in evidence, from which it appeared that in referring to Lingham and Edwardes the defendant therein used language as follows: "Come out in the open, ye hypocrites." Thereupon, although the said language was not set forth in the complaint and no charge of libel based thereon, the magistrate, upon the evidence adduced at the hearing, made an order as follows: "It appearing to me that the offense of libel in publishing of and concerning F. H. Lingham at the time and in the manner alleged in the annexed complaint the following libelous words: 'Come out in the open, ye hypocrites,' meaning W. R. Edwardes and F. H. Lingham—has been committed, and that there is sufficient cause to believe that the defendant, C. A. Storke, named in the annexed complaint is guilty thereof, I order that he be held to answer to same, and committed to the sheriff of the county of Santa Barbara." In due time an information was filed charging defendant with the offense for which he was committed and wherein the entire article which contained the alleged libelous language was incorporated.

[1] In support of the order made respondent insists: First, that the magistrate was without jurisdiction to commit defendant because the complaint upon which the warrant of arrest was issued did not state facts which, if true, constituted a public offense; second, that the magistrate had no jurisdiction to commit defendant for an offense different from that charged in the complaint, unless included in the offense so charged; and, third, that the district attorney had no right to incorporate in the information other matters contained in the article, regardless of whether or not they constituted an offense, since defendant was not committed for anything other than the use of the words, "Come out in the open, ye hypocrites." As to this last contention, suffice it to say that, while the entire article is set forth in the information, it is not alleged that any statement contained herein, other than that for which defendant was committed, constituted a public offense; hence the only offense charged in the information was that for which defendant was committed.

[2] The first and second points may be treated together. Under sections 811, 812, and 813, Penal Code, a magistrate has no jurisdiction to issue a warrant of arrest without evidence in the form of a complaint, affidavit, or deposition tending at least to show the guilt of the party named in the warrant; and, if a warrant be issued in the absence of such evidence, the petitioner may, under appropriate proceedings, be discharged. Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619. Section 872, Penal Code, provides that when an accused, in accordance with a warrant so issued upon an affidavit or complaint, is brought before the magistrate, and it appears from the examination that a public offense has been committed and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make an order, signed by him, to the following effect:

> "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same."

It appears from this provision that when the accused fails to attack the complaint as insufficient to justify the issuance of the warrant of arrest, and an examination is had, wherein the facts specified, namely, that an offense has been committed and sufficient cause exists to believe defendant guilty thereof, it is the duty of the magistrate, *even though the complaint concededly fails to charge a public offense,* to commit the defendant for "*any offense*" upon said examination shown to have been committed, provided there be sufficient cause to believe him guilty thereof.

In support of his contention respondent cites People v. Christian, 101 Cal. 471, 35 Pac. 1043, People v. Howard, 111 Cal. 655, 44 Pac. 342, and People v. Hudson, 35 Cal. App. 234, 169 Pac. 719. But, in so far as the two former cases sustain his contention, they have been directly overruled in the later case of People v. Lee Look, 143 Cal. 216, 76 Pac. 1028, wherein the question was almost identical with that presented in the instant case, and which was decided by the Supreme Court in bank. In that case the motion to set aside the information was based upon the claim that the affidavit or complaint upon which the warrant of arrest was issued by the committing magistrate was defective, in that it did not contain a charge of any crime, although it purported to charge the crime of murder. In discussing the point, the court said:

> "It is contended that the facts stated do not constitute a legal definition of murder; but, *assuming that to be so* [italics ours] the appellant could have availed himself of the defect only while he was held under the warrant of arrest founded on the affidavit. And then the objection to the document would have been, not that it was defective as a pleading, but that it did not contain sufficient evidence to justify a warrant of arrest."

And in discussing a like question in People v. Staples, 91 Cal. 23, 27 Pac. 523, also a bank case, the court said:

> "Even if the offense charged in the information was, as claimed, *totally different from that laid in the complaint* [italics ours], it would not affect the sufficiency of the information, since, as we have seen, the information does not depend on the complaint, but upon the commitment, and it does not appear that the order of commitment differed in any respect from the information. * * * It is the duty of the magistrate to hold the defendant to answer for the offense proved, whatever may have been the offense charged"—citing People v. Wheeler, 73 Cal. 255, 14 Pac. 796.

And in People v. Velarde, 59 Cal. 457, the court said:

> "The object of the statute in providing for the issuance of a warrant, is, that the defendant may be brought before the committing magistrate, and when he is once there, and an examination of the case is had in pursuance of the terms of the statute, and the defendant is held to answer, a foundation is laid for the filing of an information by the district attorney. The regularity of the proceeding by information did not therefore depend in any manner upon the affidavit on which the warrant of arrest was issued, and had no connection with it."

While it may appear illogical to hold that a commitment made upon a preliminary examination, following a warrant of arrest upon a complaint that states no offense, is a valid act, nevertheless, the statute and cases cited seem to be determinative of the question, and must be deemed controlling upon this court.

The case of People v. Hudson, 35 Cal. App. 234, 169 Pac. 719, cited by respondent, is not applicable to the facts involved in the instant case. The contention there made by the people, as appellant, was that the information should embrace an offense disclosed by the testimony taken before the magistrate, and not follow the commitment, as to which the court, upon the authority of People v. Nogiri, 142 Cal. 596, 76 Pac. 490, decided adversely to appellant, and in doing so quoted an extract (repudiated in the Lee Look Case) from People v. Christian, supra, wherein it was held that where an information charges a defendant with an offense different from that charged in the complaint upon which he was examined, or not included therein, he has had no examination for that offense, and is entitled to have the information set aside upon the ground that he has been illegally committed. The attention of the court was not directed to the Lee Look Case, wherein the court overruled what was said in the Christian Case upon this point.

What we have said renders it unnecessary to determine whether or not the complaint stated a public offense; neither are we concerned with the question as to whether or not probable cause existed for committing defendant. Suffice it to say that the information followed and was based upon the commitment, and, in our opinion, the court erred in holding that before the filing thereof the defendant had not been legally committed by a magistrate.

The order is reversed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 570

LOUCKS v. MORLEY. (Civ. 2869.)

(District Court of Appeal, Second District, Division 2, California. Feb. 4, 1919.)

1. SALES 🔑274—RESTAURANT—WARRANTIES OF FITNESS OF FOOD FURNISHED.

In the absence of statute, a restaurant keeper is not liable on ground of implied warranty of fitness of food furnished by him.

2. SALES 🔑274—IMPLIED WARRANTIES—STATUTES—"SALE FOR DOMESTIC USE."

Where a customer is furnished food in a restaurant for immediate consumption, transaction is not a "sale for domestic use," and there is no implied warranty of the fitness of the food for consumption, under Civ. Code, § 1775.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Robert G. Loucks against G. F. Morley. From a judgment in favor of defendant, and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Robert G. Loucks, of Los Angeles, in pro. per.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for respondent.

THOMAS, J. This is an action brought to recover damages for the breach of an implied warranty, under section 1775 of the Civil Code of the state of California, for alleged poisoning of plaintiff by reason of his having eaten rice pudding as a part of his meal at the restaurant of defendant, and because of the sickness caused thereby, and his subsequent inability for a long period to practice his profession as an attorney at law.

From the record in this case it appears: That on the 14th day of August, 1911, plaintiff went to the restaurant of said defendant, at about noon of said day, and became the guest of said defendant at said restaurant, and then and there, as such guest, bought and paid for and ate his noonday meal, which consisted of one order each of ham and egg sandwich, rice pudding and tea. That said meal was furnished to said plaintiff by said defendant as a guest at said restaurant, and not otherwise. That about 6½ hours after plaintiff had eaten his said meal, as aforesaid, he became ill, at said time being taken with cramps and an attack of dysentery, which was followed by a continuation of said illness, accompanied by vomiting. That the plaintiff was thereafter seriously ill for a period of 30 days, during which time he was wholly incapacitated for work, or attending to the duties of his profession, and that thereafter, as the result of said illness, he was partially incapacitated for a period of about 6 months, during which time he was intermittently able to attend to his duties about one-third of the time. That since the expiration of said 6 months plaintiff has at times suffered from the effects of said illness, by reason of nervousness and at times loss of memory. It is not alleged or shown that plaintiff made his home at the restaurant, or that he was aught but a casual customer for this one instance only. Defendant contends that section 1775 of the Civil Code does not apply here; that his legal obligation to plaintiff and to the public generally was fully observed by his use of ordinary care in the business; in other words, he says that he was not guilty of negligence.

So far as material here, it is alleged in the complaint, and denied in the answer, that "said defendant did then and there impliedly warrant that all the food, provisions, and meals served at said restaurant and lunchroom were pure, sound and wholesome." The record here consists only of the transcript and appellant's opening brief. The court found, among other things, as follows:

> "That the illness of said plaintiff was caused by eating the said rice pudding, and because of some deleterious condition of said pudding, the nature of which this court is unable to find, from the evidence in this case."

The court further found as follows:

> "That the defendant did not, at said place, at said or any time, sell provisions or food or meals, except only in the regular course of his restaurant business, and to the guests of the restaurant, same being used as meals for the consumption of the guests as such in said restaurant. That the defendant did not sell provisions for human consumption except and only as above stated. That the defendant did not, then and there, or at any other time or place, impliedly or otherwise, warrant that all or any of the food, provisions, and meals served in said restaurant and lunchroom were pure, sound, and wholesome. That said defendant exercised great care in the preparation of the meals to be served to his guests at said restaurant, and particularly * * * in the selection of the ingredients from which the food served to his guests at said restaurant, as aforesaid, was made up and compounded; * * * in the keeping of said restaurant clean, and in all respects fit and proper as a place for the preparation of, keeping, and serving of meals to guests in a restaurant; * * * in the selection of ingredients from which the rice pudding referred to in plaintiff's complaint was made. That said rice pudding was made from rice, milk, eggs, and cornstarch, all of which were of the best quality. That after the said ingredients were put together, the said pudding was boiled and cooked in a very hot oven, the heat being more than sufficient to destroy any and all germs or bacteria from which ptomaine poisoning could or might result. That immediately after being cooked the said rice pudding was taken and put in a closed, tight, clean, refrigerating box, where the temperature of same was reduced to a very low degree, said pudding remaining in said box at all times up to and within not to exceed 20 minutes of the time when same was served to the guests of the restaurant, including plaintiff. That the room in which all meals were kept, served, and consumed was thoroughly ventilated, the air being withdrawn therefrom by powerful fans, and expelled outside the building, and that in so far as it was possible so to do, the said air was kept pure and wholesome, and that at no time was the temperature of said room allowed to become sufficiently high to permit of the propagation, breeding, or spreading of ptomaine bacteria or germs, or such as would produce ptomaine poisoning. That said defendant was not negligent in any respect in the conduct, management, or operation of his said restaurant, or in the selection of, or the preparation of, food to be served to his guests, and particularly in the selection of the ingredients from which said rice pudding was compounded, and was not negligent in the preparing, cooking, keeping, or serving of said rice pudding."

The said findings are fully sustained by the evidence. It is apparent from the record that defendant's restaurant was clean and sanitary, and that defendant here was absolutely free from any negligence. There was no lack of ordinary care whatever in the handling or sale of the said meal so sold, or any portion thereof. We are therefore confronted with the question—and, indeed, the appellant here so contends—as to whether the sale of the said meal by defendant to plaintiff, under these circumstances, would carry with it an implied warranty of fitness, under section 1775 of the Civil Code. If there is such an implied warranty, it is obvious that there is no legal requirement on the part of plaintiff either to allege or prove negligence; and, indeed, in this case there is no allegation or pretended proof of either an express warranty of quality, or of knowledge on the part of defendant of the unwholesome or deleterious character of the said rice pudding so served, or of any of its ingredients, or, as has already been stated, of defendant's negligence in the premises.

It would seem, from an examination of the authorities in this state, that we are treading virgin soil, for apparently no case involving the issues here presented has ever reached an appellate tribunal in California. While quite a number of common-law cases will be found wherein it is held that a dealer in foods, selling directly to consumers for family use in their own homes, is liable on an implied warranty, as, for instance, butchers selling meat to customers for consumption at home, of which cases Wideman v. Keller, 171 Ill. 93, 49 N. E. 210, is an illustration, there is a surprising dearth of authorities respecting the liability of restaurant keepers on an implied warranty of the fitness of the food furnished by them to their customers. No case, by a court of last resort, has been called to our attention in which it has been held that a restaurant keeper is liable on an implied warranty. Of cases arising under the common law, wherein the liability of restaurant keepers or caterers is involved, we find the following four: Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; Crocker v. Baltimore Dairy Lunch Co., 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884; Pantaze v. West, 7 Ala. App. 599, 61 South. 42; Doyle v. Fuerst & Kraemer, 129 La. 838, 56 South. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913B, 1110. In all of these cases the right of action was based on negligence.

Aside from Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B, 481, Ann. Cas. 1916D, 917, we know of no case, in a court of last resort, in which an attempt was made to recover upon the strength of an implied warranty for harmful consequences resulting from unwholesome food or drink supplied by the keeper of a restaurant. In this Connecticut case, and likewise in Valeri v. Pullman Co. (D. C.) 218 Fed. 519, it was held that there is no implied warranty of the quality of food furnished by a restaurant keeper to a customer for immediate consumption on the restaurant premises. In this Connecticut case, and likewise the federal court case, the court held that the transaction between a restaurant keeper and his customer is one for the rendition of service, and not a sale; the court in the Connecticut case saying that "the true essence of the transaction is service in the satisfaction of a human need or desire—ministry to a bodily want." The reasons given by these courts for holding that the transaction is not a sale but the rendition of service, are summed up in the language of Professor Beale, as follows:

> "As an innkeeper does not lease his rooms, so he does not sell the food he supplies to his guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of the food supplied to him; nor can he claim a certain portion of the food as his own, to be handed over to another in case he chooses not to consume it himself. The title to food never passes, as a result of an ordinary transaction of supplying food to a guest; or, as it was quaintly put in one old case, 'He does not sell but utters his provisions.'" Beale on Innkeepers and Hotels, § 169.

There are many cases, some of which are cited by appellant here, that have grown out of the sale of provisions by a dealer engaged in selling food for family use, such as butchers, pastry venders, and the like; but these cases are clearly not in point. Of the common-law cases, wherein it is held that, in the absence of negligence, a restaurant keeper is not liable for ill health resulting from the unwholesomeness of food furnished by him, Sheffer v. Willoughby, supra, is perhaps the leading case. In discussing that case the court uses the following language:

> "In the first of the cited cases the obligations of a restaurant keeper are discussed, and a statement made of the law which very plainly means, and has been generally understood to mean, that the only remedy for the consequences of eating unwholesome food supplied by an innkeeper or restaurant keeper in the regular course of his business is one for lack of due care."

Plaintiff here cites a well-considered Massachusetts case, viz., Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076, as supporting his contention here. We have examined that case carefully, and fail utterly to find any comfort therein for plaintiff. Just one quotation from said case will probably suffice, in support of the statement just made. It is as follows:

> "The decisions on the question now before us in the United States, outside of Massachusetts, are not many, and they do not deal with the question at length. There is much in these opinions in conflict with what is now the settled law in England. So far as decisions go, however, there is but one in conflict with that rule. That is the decision in Hoover v. Peters, 18 Mich. 51. In that case it was held that in the sale of food for immediate domestic consumption there is an implied warranty that it is fit to be eaten, although the sale was made by one not a dealer. That is not law in Massachusetts. Howard v. Emerson, supra [110 Mass. 320, 14 Am. Rep. 608]; Giroux v. Stedman, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538. No cases are cited in the opinion, and there is a dissenting opinion by Christiancy, J., on the ground that to make out a liability in a sale of provisions the vendor must be a dealer, or it must be proved that the defendant knew the provisions to be unsound. * * * It is enough to dispose of this case to say that the plaintiff did not sustain the burden of proof on that issue. * * * Whatever may be the rule in respect to caterers in serving meals, there is no case in which it has been held that in the sale of provisions by a dealer the test of his liability is negligence. If the selection is left to the dealer, due care by him is no defense. He is liable for latent unsoundness that could not be discovered. Wallis v. Russell, supra. And see as to due care in the sale by a dealer of chattels not articles of food, Randall v. Newson, L. R. 2, Q. B. Div. 102. As due care is no defense when the dealer makes the selection, so there is no liability for negligence when a dealer offers several articles of food for sale from which the buyer is to make his own selection. In offering these several articles he impliedly represents that he believes all of them to be fit for food. That is the extent of his liability; no question of negligence is involved. The implied representation of soundness apart, there is no liability on a vendor of food to be selected by the buyer because he did not procure and offer for sale better food than he procured and offered for sale."

A restaurant has been defined as "a public eating place." In the same case it was held that "a restaurant keeper is not, according to ordinary usage, either a merchant or a manufacturer. The fact is that both the sale and the manufacture of foods are minor incidents to the keeping of a restaurant." "It cannot be denied that the eating of food by a customer at a restaurant, in the regular course of business, involves a sale of the food eaten. The price of the food alone is usually not specified, but it is included in a lump sum with the charge for service and use of dishes, chair, and table. It is nevertheless a sale of the food consumed, within the technical definition of that term." San Francisco v. Larsen, 165 Cal. 179, 131 Pac. 366.

If, in the absence of any negligence whatever, a restaurant keeper is liable on the ground of implied warranty of the fitness of food furnished by him, such liability can arise only by reason of said section 1775. Our attention has not been called to any other Code section that gives the right of recovery in the absence of negligence. In some of the common-law cases it is said that where a "manufacturer" or "dealer" contracts to supply an article for a particular purpose, there is an implied warranty that the article is reasonably fit for that purpose. Under the principle as thus stated, it has been held by the English courts, and by courts of certain sister states, that a dealer engaged in the business of selling food for family consumption is liable if the food be not reasonably fit for that purpose. (In this connection see the English cases cited in Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 15 L. R. A. [N. S.] 484, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076.) In this state, however, the principle does not extend to "dealers," but is restricted to "manufacturers." It is provided in section 1769 of the Civil Code that "one who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect not disclosed to the buyer, arising from the process of manufacture; and also that neither he nor his agent in such manufacture has knowingly used improper materials therein," and in section 1770 that "one who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose." A restaurant keeper, even though, by mixing ingredients and cooking them, he produces a different article, is not a "manufacturer" in any true sense of the word. New Orleans v. Mannessier, 32 La. Ann. 1075, 26 Cyc. 521, 522; Correio v. Lynch, 65 Cal. 273, 3 Pac. 898. Unless, therefore, an implied warranty in favor of appellant arises under said section 1775, there is no other Code section that aids him, and the judgment and order must be affirmed.

This brings us to the real question in the case: What is the scope and meaning of section 1775? As we have shown, it was held in the Merrill and Valeri Cases—88 Conn. 314, 91 Atl. 533, L. R. A. 1915B, 481, Ann. Cas. 1916D, 917, and (D. C.) 218 Fed. 519—that where a customer is furnished food in a restaurant for immediate consumption the transaction is not a sale but a rendition of service, and that, for this reason, there can be no implied warranty. Aside from this, there is, in our opinion, a stronger ground for holding that no implied warranty on the part of a restaurant keeper arises under Code section 1775. The implied warranty that arises under that section is confined to those who make a business of selling provisions "for domestic use." "Domestic" means "belonging to the house or household; concerning or relating to the home or family." Stand. Dict. The word itself, in its derivation from "domus," a house, suggests its inherent purport. Thus it has been held that servants employed in a hotel are not "domestic" servants. Cook v. Dodge, 6 La. Ann. 275. The "domestic" use of water means the use to which water is applied by the family, or for family use, and includes all use to which water is applied around the home, including the watering of animals there; but it does not include the temporary quenching of the thirst of men or animals at drinking places maintained by the city in public places. Water Supply Co. v. Albuquerque, 17 N. M. 326, 128 Pac. 77, 43 L. R. A. (N. S.) 439. It is the place where the food is eaten or drunk, rather than the fact that it is food or drink, that determines whether its use is a "domestic" use or not. For these reasons we are of the opinion that defendant was not "one who makes a business of selling provisions for domestic use," and that, therefore, section 1775 of the Civil Code is not applicable.

Appellant has cited certain decisions of the New York Supreme Court, criticized by Judge Hand in Valeri v. Pullman Co., supra. These are not decisions by a court of last resort, and we agree with all that Judge Hand says of them. Of the decisions of courts of last resort, cited by appellant, some will be found to be cases where the plaintiff relied upon and alleged negligence, as, for instance, Doyle v. Fuerst & Kraemer, supra, where the court said of defendants' evidence that it "falls short of showing even ordinary care"; others are cases where the defendant sold food to the plaintiff for family or domestic use, as Parks v. Yost Pie Co., 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C, 179, where the defendant was a wholesale maker of pies, who had sold some of its products to a retail concern, which, in turn, sold the pie to Parks as suitable food for himself and family, to be consumed at home. We are satisfied, therefore, that the overwhelming weight of authority, both in England and America, supports our present conclusion, viz., that in such cases as are supported by the facts under consideration here, that "there is no implied warranty of the quality of food furnished by a restaurant keeper to a customer for immediate consumption, since the transaction does not constitute a sale but a rendition of service."

There is, however, another aspect to this case which has not been touched, so far as the record in this case discloses, but which, in view of what we believe to be the importance of this decision, we feel should be touched upon, and that is, that the plaintiff here having elected to rely upon an alleged implied warranty under section 1775 of the Civil Code, that we are confronted, therefore, with the question: "What is the measure of damages in such case?" This question is answered by section 3313 of the Civil Code. The court found "that prior to the time of being taken ill, as aforesaid, plaintiff's average gross income from his profession as an attorney at law was $400 per month; that no evidence whatsoever was introduced or offered as to what his average, or any, income was after the 14th day of August, 1911; and this court is not able to find what amount, if anything, plaintiff was able to and did earn in his profession subsequent to the 14th day of August, 1914." The court further found that "no evidence whatsoever was offered or introduced of the value of said rice pudding at the time at which plaintiff bought his said meal, or of its actual value at said time, or at any time; and no evidence whatsoever was introduced showing, or tending to show, the difference or excess, if any, of the value of said rice pudding over what it would have been at said time had the same been absolutely pure, wholesome and not deleterious; and no evidence whatsoever was introduced of any loss or damage incurred in any effort, in good faith, to use said pudding for the purposes for which it was purchased; and no evidence whatsoever was introduced of what would or might be a fair, or any compensation for any loss incurred by the plaintiff in any effort whatsoever to use said pudding for the purposes for which the same was sold to him." The court further found as a fact "that plaintiff was not damaged by defendant in any sum whatsoever."

Assuming—although in this case we hold to the contrary—that there is an implied warranty on the part of a restaurant keeper, under the exact state of facts presented here, still, in the absence of evidence, as disclosed by the findings just quoted, from which the trial court could arrive at any conclusion as to the measure of damages, we are of the opinion that the trial court was helpless to do anything other than to enter judgment in favor of defendant, as was done in this case.

Judgment and order affirmed.

FINLAYSON, P. J., and SLOANE, J. [1, 2] We concur in the judgment for the reason that, in the absence of any showing of negligence, the only ground upon which defendant can possibly be held liable is that of an implied warranty of the purity and quality of the food dispensed by it. The only implied warranty that might be invoked as applicable to the transaction, under the law of California, is that declared in section 1775 of the Civil Code, which applies alone to "one who makes a business of selling provisions for domestic use." The complaint does not allege, and the facts do not show, that the defendant was engaged in the business of selling provisions for "domestic use." or that the transaction in question was a sale for "domestic use." The defendant is a restaurant keeper who dispenses food to be consumed by customers in his place of business, and such was the transaction here complained of. Under a strict and accurate definition, the term "domestic use" does not apply to such sales.

The statute in question, as well as the common-law doctrine on which it is based, lays down a severe rule, which makes the dealer responsible for the consequence of any deleterious quality in his wares, no matter how free from negligence or fault he may be. It ought not to be extended, by judicial implication or construction, beyond its strict legal meaning. If it be said that it is unreasonable to distinguish between a sale of food by a restaurant keeper to be consumed on his own premises and the sale of food by a dealer to be taken home and eaten in the domestic environment of the purchaser, the answer must be found in the maxim "ita lex scripta est"; and one shown to be free from negligence, as was the case here, ought not to be held liable on an implied warranty, unless he is clearly within the letter and meaning of the law as written.

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39 Cal. App. 583

BLYTHE v. LAMBERTH. (Civ. 2336.)

(District Court of Appeal, Second District, Division 1, California. Feb. 4, 1919.)

1. MORTGAGES 🔑375—FORECLOSURE—DEFICIENCY—ACTION ON NOTE.

Holder of trust deed given to secure a lien upon real property, after exhausting the remedy by sale and finding that a deficiency exists, may proceed by action to recover the balance due upon the promissory note.

2. COSTS 🔑263—APPEAL—FRIVOLOUS APPEAL.

Where appeal was without merit and appeared to have been taken for purpose of delay, *held* that respondent recover from appellant the sum of $100 as damages.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Margaret E. Blythe against Robert N. Lamberth. Judgment for plaintiff and defendant appeals. Affirmed.

E. B. Coil and D. H. McDonald, both of Los Angeles, for appellant.

R. W. Richardson, of Los Angeles, for respondent.

JAMES, J. This is an appeal from the judgment. The sole contention made is that the holder of a trust deed given to secure a lien upon real property, after exhausting the remedy by sale and finding that a deficiency exists, may not proceed by action to recover the balance due upon the promissory note. This point was directly decided, long before this appeal was taken, against the contention here urged. Sacramento Bank v. Copsey, 133 Cal. 663, 66 Pac. 8, 205, 85 Am. St. Rep. 242; Kraft Co. v. Bryan, 140 Cal. 73, 73 Pac. 745.

[1, 2] The appeal is without the slightest merit, and should not have been taken. The judgment appealed from is affirmed, and, it appearing that the appeal was made for delay, it is ordered that the respondent have and recover from the appellant the sum of $100 as damages.

We concur: CONREY, P. J.; SHAW, J.

39 Cal. App. 643

HOME REAL ESTATE CO. v. WINNANTS et al. (Civ. 2623.)

(District Court of Appeal, Second District, Division 1, California. Feb. 7, 1919.)

1. DISMISSAL AND NONSUIT ⟹5—VOLUNTARY DISMISSAL.

Where an order sustaining a demurrer gave plaintiff ten days within which to amend, plaintiff had a right to dismiss his action at any time before expiration of ten days, and a court's order, attempting to vacate such a dismissal and a judgment following such order against plaintiff for the costs, are void and of no effect, under Code Civ. Proc. § 581.

2. APPEAL AND ERROR ⟹153—MATTERS REVIEWABLE—VOLUNTARY DISMISSAL OF ACTION.

Where there was a voluntary dismissal of action following the sustaining of a demurrer, plaintiff cannot ask, on an appeal from an order vacating such dismissal, that ruling of lower court on demurrer be reviewed; it being decided that order vacating dismissal was void.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Home Real Estate Company against W. L. Winnants and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Chas. L. Benoist, of Los Angeles, for appellant.

Charles H. Mattingly, of Los Angeles, for respondents.

C. M. Mooslin, of Los Angeles, amicus curiæ.

JAMES, J. Plaintiff has taken this appeal from a judgment rendered against it, entered after the sustaining of a demurrer to the complaint. The judgment, in so far as it required money to be paid to the defendants, was only for a few dollars as costs incurred by the defendants.

[1] Plaintiff's first contention is that this judgment was erroneously entered because it had, prior to the date of the judgment, dismissed its action. This claim arises because of the following situation, as shown by the record: Defendants' demurrer to plaintiff's second amended complaint was sustained and notice of that ruling was given on May 4, 1915. In the order sustaining the demurrer ten days was allowed to the plaintiff to amend. On May 11th, within the ten days mentioned, plaintiff filed with the clerk of the court an order requiring the dismissal of the action. The court later entered an order vacating the dismissal, and on May 18, 1915, rendered the judgment from which the appeal is taken. Appellant's contention is that it had a right to dismiss its action at any time before the final judgment, and that the court's order attempting to vacate such dismissal and the judgment following that order are void and of no effect. In this contention we think that the appellant is right. In Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091, the court adopts the following quotation from a Texas decision (Scherff v. Missouri Pacific Ry. Co., 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828), as correctly stating the law as applied to the California Code provision (section 581, Code Civ. Proc.):

> "When a general demurrer to a petition is sustained, and the plaintiff declines to amend, he practically confesses that he has alleged in his pleading every fact he is prepared to prove in support of his action. Therefore, in such a case, nothing remains to be done except to render judgment for the defendant. Since the defendant by his demurrer has admitted all the facts of the plaintiff's case, we see no reason why the judgment should not be regarded as a conclusive determination of the litigation on its merits. So, also, if the plaintiff takes leave to amend, but fails to do so, and judgment is rendered against him for that reason, it is as if he had declined to amend in the first instance. But, when he takes leave to amend, he virtually asserts that he has not set up his whole case in his petition; and, although the judgment is that his petition does not show a cause of action, yet the leave to amend takes from the judgment that quality of finality which is necessary to make it an estoppel, and thus 'sets the matter at large.'"

In this case leave was not denied to the plaintiff to amend its complaint, and its time had not elapsed to make an amendment before it filed with the clerk its order requiring that a dismissal be made. Under the decision above mentioned it would seem in that situation that the case was left open, leaving to the plaintiff the option either to dismiss, amend, or allow its time to expire and judgment to be entered. If it had filed within the ten days any sort of an amendment to its complaint, it is not disputed that it immediately might have required a dismissal to be entered under the permission of section 581, Code of Civil Procedure; and why the same right to dismiss did not exist without the filing of that amendment, up to the time that the ten days expired, we are not able to understand. The only costs that the plaintiff was required to pay as a condition to the dismissal was such costs as the clerk might properly exact for entering the dismissal, and not the costs which might have accrued to the defendants. Such costs could be claimed only by the presenting of a cost bill in due time. (Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299.)

[2] The demurrer to the second amended complaint brought into question the matter of the liability of a vendee in possession under an executory contract of sale to pay special assessments levied against the property, where the contract imposed no condition of payment upon him. The appellant must concede that by a voluntary dismissal of the action it has put itself in a position where it cannot ask that the ruling of the court on the demurrer be here reviewed. This dismissal we deem to have been regularly made, and conclude that the judgment subsequently entered by the court was made without authority. The latter judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 628

SNYDER v. DEDERICHS. (Civ. 2350.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

LIMITATION OF ACTIONS 🔑149(1)—REVIVAL OF DEBT — UNCONDITIONAL PROMISE—STATUTE.

Debtor's letter to wife of creditor, who had told wife that if she could collect money she could have it for her expenses, wherein debtor referred to money which he got from the husband, but without unconditional promise to pay it, stating if he succeeded in collecting money promised he would send an amount, *held* not such an unconditional recognition of obligation as to take debt out of statute of limitations, which had run, under Code Civ. Proc. § 360.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Emma Snyder against Joseph Dederichs. From a judgment for defendant, plaintiff appeals. Affirmed.

M. E. Wilson, of Salt Lake City, Utah, and J. H. Ryckman, of Los Angeles, for appellant.

Ingall W. Bull, of Los Angeles, for respondent.

SHAW, J. The complaint set forth a cause of action based upon an indebtedness which it is alleged defendant, after the statute of limitations had run against the same, in writing acknowledged and promised to pay, thus taking the case out of the operation of the statute.

Upon such issue the court found adversely to plaintiff and gave judgment for defendant, from which the former, claiming such finding is not supported by the evidence, appeals.

Section 360, Code of Civil Procedure, provides:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

Since recovery upon the original promise to pay by defendant was concededly barred, it devolved upon plaintiff to establish facts bringing the case within the operation of the statute quoted. To do this, plaintiff offered in evidence a letter addressed by her to defendant, wherein she referred to a loan of $750 made several years before to defendant by her husband, who advised her, she said, that if defendant was able to meet the obligation she could use the money for her living expenses, and wherein she said:

> "I am very badly in need of funds, and trust you will make an effort to pay at least part of the amount."

In reply to this letter defendant wrote plaintiff:

> "Your letter received in regard to the money I did get from Willard. * * * Still if I would make money, and see my way through, I would send you some money, and I will the first chance that I make something I will help you. * * * I loaned a party some money which he promised sure by next month I would get $300 of it. Should I succeed in this I will send you sure $150 or $200 of this. At the present time I cannot do anything on account I have not it. I know, Mrs. Snyder, the disposition how you feel, and I hope Willard makes some money soon. He has been working hard always the same as I and you know if I got it I would help you, but it is impossible to do so at the present time."

The case of Powell v. Petch, 166 Cal. 329, 136 Pac. 55, wherein a number of authorities are cited, is authority for the statement that the written acknowledgment of a debt, within the contemplation of section 360 of the Code of Civil Procedure, sufficient to take the case out of the operation of the statute of limitations, must be a distinct, unqualified, unconditional recognition of the obligation for which the person making such admission is liable. Tested by this rule, it is clear that there is nothing contained in the letter which can be construed as an unconditional promise on the part of defendant to pay the outlawed debt. While it is true the writer refers to money which he got from plaintiff's husband, there is no unconditional promise to pay the same. On the contrary, he says it is impossible to pay at the present time, but if he succeeds in collecting money promised him he will send her $150 or $200. The case is very similar to that of Van Buskirk v. Kuhns, 164 Cal. 472, 129 Pac. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932, where the promise was to pay when able to do so. It does not appear that any of the conditions upon which defendant promised to pay, if his language can be construed as a promise, ever happened. Plaintiff's right of action must be measured by the promise made, and, since it is not alleged nor shown that the condition upon which the promise was made was fulfilled, it cannot be claimed that such promise extended the time to sue upon the original obligation. At most, it was a substituted conditional promise and not a renewal of the outlawed original promise upon which the obligation was based. See Curtis v. City of Sacramento, 70 Cal. 412, 11 Pac. 748; Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42.

Appellant has cited a number of authorities from other states, some of which appear to be inconsistent with the views expressed. However that may be, we feel compelled to follow the decisions of the Supreme Court of this state touching like questions.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

39 Cal. App. 590

ROSS v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al. (Civ. 2943.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

1. Breach of the Peace ⚷19—Security to Keep Peace—Power of Magistrate.

The magistrate, in a proceeding under Pen. Code, pt. 2, tit. 1, c. 3 (sections 701–714), entitled "Security to Keep the Peace," has no power other than given in the chapter, which is merely to discharge the person complained of, or order him to give undertaking to keep the peace and, if he does not give it, to commit him.

2. Breach of the Peace ⚷21—Security to Keep Peace—Review of Magistrate.

Pen. Code, pt. 2, tit. 1, c. 3 (sections 701–714), entitled "Security to Keep the Peace," making no provision for appeal from order of the magistrate, the superior court acts in excess of jurisdiction in entertaining appeal, and also, assuming the order to be subject of appeal, in making a new order without trial de novo.

Petition of J. Edgar Ross for writ of review against the Superior Court in and for the County of Imperial, and Franklin J. Cole, Judge of said court, to review an order on appeal from a magistrate in proceeding under Pen. Code, §§ 701–714. Order vacated and annulled.

Emmet H. Wilson, of Los Angeles, for petitioner.

SHAW, J. Certiorari. Upon an information filed in the recorder's court of the city of Brawley, Imperial county, charging petitioner with threats made to do great bodily harm against one Roy Mitchell and others, a warrant was issued by virtue of which said Ross was arrested and taken before the magistrate, and, upon the charge being controverted, testimony was adduced in relation thereto, as a result of which the magistrate made an order requiring the petitioner, Ross, to "pay a fine of three hundred dollars and invest the same in United States Liberty Loan bonds of the fourth issue, and be imprisoned in the city jail for a period of 90 days, but that, upon your paying your fine as stated and turning same over to your faithful little wife, the jail sentence will then be remitted." Thereupon defendant filed a purported notice of appeal to the superior court of Imperial county. A statement prepared and presented by such appellant was settled and allowed, which, together with the transcript, was filed in the superior court. Upon the matter coming on to be heard, the superior court, without taking any evidence and apparently basing its action upon the statement alone, made an order vacating and setting aside the order made by the recorder's court, and ordered that defendant (petitioner here) be required to give a peace bond in the sum of $500, to remain in force six months from and after October 8, 1918.

[1] The proceeding was one initiated under chapter 3 (sections 701 to 714, both inclusive), of the Penal Code, entitled "Security to Keep the Peace." Section 706 provides that, if just reason to fear the commission of the offense is found to exist, the person complained of may be required to enter into an undertaking to keep the peace towards the people of this state, and particularly the informer, which undertaking shall be binding for six months. And section 707 provides that, if such undertaking is given, the party informed against must be discharged, and, upon failure to give it, the magistrate must commit him to prison, specifying therein the omission to give the undertaking. The magistrate in such a proceeding has no power other than that given in said chapter 3. While such absurd order is not attacked in this proceeding, we may say the magistrate had no power to require Ross to invest $300 in

bonds of the Fourth Liberty Loan and give them to "his faithful little wife."

[2] The order complained of here is that made by the superior court which, on a purported appeal being taken, vacated the same and, without any trial and basing its action solely and alone upon a statement of the case, made a different order. If it was a case properly appealable, then, since it was upon questions of law and it appearing from the record presented to the superior court that the order made was erroneous, it would be the duty of the court to grant a trial de novo. It would have no power to render a new judgment based upon a statement of the case the purpose of which is merely to illustrate the errors of law complained of. But chapter 3, under which the proceeding was had before the magistrate, makes no provision for an appeal in such cases; and in Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703, it is said:

> "The magistrate's determination that there is just reason to fear the commission of the offense justifies his order in putting the accused person under bonds to keep the peace, and, in the event of his failure to give the required bonds, then to order him committed to jail. From this order no appeal lies. * * * His conclusion is, so far as the defendant is concerned, a final determination upon the merits of the controversy. * * *"

Hence it follows that the superior court acted in excess of its jurisdiction: First, in entertaining the appeal at all; and, second, assuming the order to be the subject of appeal, in making the order complained of without a trial de novo. From the foregoing it is manifest that the order made by the magistrate was wholly unauthorized, since he had no power to make any order other than one requiring Ross to give an undertaking to keep the peace towards the people of this state and particularly towards the party filing the information. Should the magistrate attempt to enforce it, petitioner would be entitled to some appropriate remedy for his protection against such unwarranted action.

The order under review is vacated and annulled.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 638

SIPLE v. KNAPP. (Civ. 2482.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1919.)

1. PLEADING ⚿182 — ANSWER PLEADING BILL OF SALE—FAILURE TO DENY GENUINENESS—EFFECT.

In an action in claim and delivery for possession of an automobile, where defendant's answer set up a bill of sale signed by plaintiff by an agent and plaintiff did not, as required by Code Civ. Proc. § 448, serve or file an affidavit of denial, such failure constituted an admission of its genuineness and due execution, including the authority of the agent to sign plaintiff's bill of sale, and precluded contrary evidence.

2. PLEADING ⚿172—FAILURE TO REPLY IN TIME—RELIEF FROM INADVERTENCE.

Where plaintiff moved for relief under Code Civ. Proc. § 473, from his failure to serve or file an affidavit denying the genuineness of a bill of sale set forth in answer as required by section 448, there must appear some inadvertence, neglect, or mistake of an excusable kind, and the court had discretion to deny relief.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by R. A. Siple against E. W. Knapp. Judgment for defendant, and plaintiff appeals. Affirmed.

W. T. Sprowls and Tom C. Thornton, both of Los Angeles, for appellant.

John J. Craig and John L. Fleming, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment rendered in favor of defendant. The judgment roll is presented, together with a bill of exceptions, showing the proceedings had in the case.

[1] Plaintiff sued in claim and delivery to recover possession of an automobile or its value. Defendant answered, denying the ownership of the plaintiff or his right to the possession of the machine, and affirmatively alleged that the defendant had purchased for a valuable consideration the automobile from the plaintiff and had received a bill of sale, which was set out in hæc verba in the answer. This bill of sale recited that the plaintiff had sold to defendant the automobile, and was signed: "R. A. Siple, by W. C. Bingham." The plaintiff did not, as is required by section 448, Code of Civil Procedure, serve or file an affidavit denying the genuineness and due execution of the bill of sale. At the trial he offered to show that the bill of sale was executed by Bingham without plaintiff's authority, whereupon the defendant objected to the testimony on the ground that the failure to deny the instrument constituted an admission of its genuineness and due execution. The court sustained the objection. Plaintiff was allowed time to present a motion for a relief under section 473, Code of Civil Procedure, which motion was thereafter presented and denied, and the judgment followed in favor of the defendant. We think the judgment must be affirmed. The bill of sale purported to be executed by the plaintiff and the authority of the agent to so execute it, we think, was included within the admission resulting upon

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the failure of the plaintiff to file an affidavit in denial thereof. In Moore v. Copp, 119 Cal. 429, 51 Pac. 630, it is said:

> "Where the defendant has pleaded a written instrument in defense (not by way of cross-complaint), and the plaintiff has not served and filed an affidavit denying the instrument and has offered no evidence controverting it on any ground, the instrument is to be deemed admitted and must be taken for what it appears on its face to be. But the plaintiff may controvert the instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel and the like defenses, under section 462 of the Code of Civil Procedure. In short, he may by evidence controvert the instrument upon any and all grounds, except that he cannot controvert its due execution nor its genuineness."

The provisions of section 448, Code of Civil Procedure, are very plain.

[2] In order that the motion for relief under section 473 should have been granted, it was necessary that it should be made to appear that there was some inadvertence, neglect, or mistake of an excusable kind. The court had discretion in determining that matter and had discretion to conclude that, under the affidavits presented by the plaintiff, no excusable circumstances were shown. A consideration of the facts shown in the affidavits does not indicate that that discretion was abused.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

39 Cal. App. 658

ROSS et al. v. PACIFIC ELECTRIC RY. CO. (Civ. 2627.)

(District Court of Appeal, Second District, Division 1, California. Feb. 8, 1919.)

STREET RAILROADS ⟹117(21) — INJURY TO PERSON BETWEEN TRACKS—CONTRIBUTORY NEGLIGENCE.

Where, in daytime, a passenger, after alighting from a street car, walked around its rear, and was injured by being struck by the projecting step of a passing car on the other track, while in a space between the tracks wide enough to permit a clearage of 43 inches between passing cars, she was guilty of contributory negligence as a matter of law, and a nonsuit was properly granted.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Florence Ross and husband against the Pacific Electric Railway Company, a corporation. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. W. Hocker, Eugene E. Morris, and Robert E. Austin, all of Los Angeles, for appellants.

Frank Karr, W. R. Millar, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for respondent.

SHAW, J. Action by husband and wife to recover damages sustained by the wife for personal injuries alleged to have been caused by defendant's negligent operation of an electric street car.

Plaintiffs appeal from a judgment in favor of defendant, entered upon an order of court granting the latter's motion for a nonsuit made at the close of plaintiffs' evidence.

Defendant was the owner of a double-track electric railway line which crossed North Avenue 59 on a street in Los Angeles known as Pasadena avenue, and over which latter street it operated cars for the transportation of passengers. At the time of the accident in which plaintiff sustained the injuries complained of, she, in the daytime, as a passenger on one of defendant's out-bound cars, operated easterly over the southerly track, was returning from the city of Los Angeles to her home on Avenue 59. When the car on which she was traveling reached Avenue 58, she indicated her desire to get off at Avenue 59, at which point defendant's cars operated in either direction were stopped only upon signals given by passengers that they wished to get on or off its cars at such place. The car was accordingly stopped at the usual stopping place for passengers getting off at said point, and plaintiff alighted on the southerly side of the southerly track, upon which the car was being operated, and walked slowly around the rear of the car, sufficiently near the same to touch it with her hand, intending to cross the northerly or opposite track, which it was necessary to do in order to reach her home north of Pasadena avenue on Avenue 59. When she reached a point in the space separating the two tracks, a car traveling westerly on the northerly track passed, the projecting step of which struck her, knocking her down and causing the injuries which are made the subject of the action. The evidence tends to show that, in passing the car from which plaintiff alighted, the west-bound car on the northerly track gave no warning of its approach or proximity. That its failure so to do constituted negligence on the part of the defendant is conceded.

The order granting defendant's motion for nonsuit was based upon the conclusion of the court that the evidence conclusively established the fact that plaintiff was guilty of contributory negligence which was the direct and proximate cause of the injury received by her. The space between the inner lines of defendant's car tracks was 6 feet and 7 inches, and the overhang of the cars when passing each other reduced this space to 3-

feet and 7 inches; that is, overhang of each car was 18 inches. It thus appears that after plaintiff had reached a point corresponding with the edge of the overhang of the car from which she had alighted there was a space of at least 43 inches between that and the steps of the passing car, which constituted a zone of safety from which, as appears from the evidence, she had an unobstructed view for a distance of several hundred feet easterly, and from which point the slightest look or glance by her would have disclosed the proximity of the moving car which was such that rendered it impossible to step forward without colliding therewith; and yet she, with full knowledge that the cars were accustomed to pass each other in the manner shown (save that it was the duty of the motorman to ring the bell when passing), left the zone of safety occupied by her and stepped so near the car then passing immediately in front of her that she was struck by the projecting step. The accident occurred in the daytime. She was familiar with the tracks and conditions of traffic thereon, and there was no congestion of travel upon the street; indeed, so far as shown, she was the only person on that part of the thoroughfare, and hence was not, as in the case of Hammond v. Pacific Electric Ry. Co., 32 Cal. App. 756, 164 Pac. 50, misled or induced by the acts of others, in crossing in front of the car from which she had made her exit, to hazard a like undertaking in the rear thereof at night. It is obvious from her testimony that had she observed the slightest precaution for her own safety the accident would not have occurred. Brown v. Pacific Electric Ry. Co., 167 Cal. 199, 138 Pac. 1005. The case presented is not that of a person who undertakes to cross a railway track in front of an approaching car and, owing to an error of judgment as to its distance or speed mistakes his ability to do so, sustains an injury from a collision therewith, in which case the question as to whether or not he is negligent is one for the jury, as in the case of Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 Pac. 677; but the facts presented are similar to those involved in the case of Brown v. Pacific Electric Ry. Co., supra. We concede the general rule invoked by appellants, and as to which there are few exceptions, that the question of negligence is one to be determined by the jury, taking into consideration all the circumstances of the case, and this rule prevails even though there be no conflict as to the facts, if persons of rational minds might, from inferences drawn from the evidence, reach different conclusions thereon. Where, however, as said in Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 Pac. 1109, "the standard of conduct required of persons under given circumstances is so obvious as to be applicable to all persons under such circumstances" that there can be but one rational conclusion drawn therefrom, a question of law is presented. Many of the authorities cited by appellants, not only from this but other states, involve questions as what constituted negligence on the part of the defendants therein, a fact which is conceded to have been affirmatively established in the instant case. Our intention, however, is directed to no case, either in this or other jurisdictions, which sustains the right of a plaintiff to recover for the negligence of a defendant where it is made to appear that the plaintiff neglected to use reasonable or ordinary care for his own safety, the exercise of which would have prevented the injury. As disclosed by the record, it affirmatively and conclusively appears that plaintiff's injury was due to the absence of ordinary care and the want of the exercise of the slightest precaution for her own safety, except for which the accident would not have occurred.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 599

LARIMER v. DE MOTTE et al. (three cases). (Civ. 2722–2724.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

Extradition ⚿40—Expense and Charges—Returned Fugitive—"Placed on Trial."

Pen. Code, § 1557, as amended in 1913, providing that the state shall not pay the expenses of any agent employed to bring back a fugitive from justice from another state, where the "fugitive returned is not placed on trial," means failure to prosecute in cases where the fugitive is returned, and therefore does not relieve the state from liability for the expense of an agent bringing back a fugitive who is let to bail, escapes, and is never brought to trial.

Appeals from Superior Court, Los Angeles County; Grant Jackson, Judge.

Three actions by David S. Larimer against Marshall De Motte and others, as Members of the State Board of Control, and the State Board of Control. From an order in each case granting a writ of mandate commanding respondents to audit and allow petitioner's claim against the state, respondents appeal. Orders affirmed.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for appellants.

A. J. Hill, County Counsel, and David R. Faries, Deputy County Counsel, both of Los Angeles, for respondent.

SHAW, J. These appeals involve like questions, namely, whether the state is chargeable with the expense incurred by an agent thereof who, acting under a requisition issued by the Governor, was authorized to receive in custody a fugitive from justice found in a sister state and return him to this state for trial.

It appears in each case that after his arrest the fugitive sued out a writ of habeas corpus in the court of the state where he was apprehended and by such court was released on bail. Pending the hearing of the writ, he made his escape, by reason of which fact the state's agent was unable to return him to this state for trial.

In each of the cases the appeal is from an order granting a peremptory writ of mandate commanding the board of control to audit and allow the claim against the state for the expenditures made by petitioner's assignor in performance of the duties imposed upon him as such agent under the requisition issued by the chief executive.

The solution of the question depends solely upon the interpretation of section 1557, Penal Code, the meaning of which, to our minds, is not open to controversy. As it stood prior to 1913, it read as follows:

> "When the Governor of this state, in the exercise of the authority conferred by section 2, article 4 of the Constitution of the United States, or by the laws of this state, demands from the executive authority of any state of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state or foreign government, the accounts of the person employed * * * to bring back such fugitive must be audited by the board of control and paid out of the state treasury."

In 1913 the section was amended by adding thereto the following:

> "Provided, however, that the state shall not pay the expenses of any such person so employed where the fugitive returned is not placed on trial, but such expense shall be a charge upon the county asking the requisition."

As the law stood prior to the amendment, appellants concede petitioner would be entitled to the allowance, but contend that the intent of the Legislature was to "place a restriction on the use of extradition process by a county so as to require the county to pay the expenses incurred in connection therewith if the extradition papers are secured where the charge is not made in good faith or is not prosecuted." No claim is made that the charge preferred was not made in good faith. The word "returned" seems to have been employed ex industria by the Legislature, and we know of no rule of interpretation which, in construing the amendment, would justify the court in denying to it any effect. Unless so rejected, and construing the language used according to its plain import, it is perfectly clear that by the amendment the Legislature intended the failure to prosecute, in order to relieve the state from the expense of extradition, should be restricted to those cases where the fugitive is returned. Had the Legislature, as claimed by appellants, intended the enactment to apply to cases of the character here involved, it could easily have omitted the word "returned," or said, "unless the fugitive be returned and placed on trial." The language of the statute is clear and explicit. It admits of no interpretation other than the one adopted by the trial court, which was according to the plain import of the language used.

The order in each of the above cases is affirmed.

We concur: CONREY, P. J.; JAMES, J.

39 Cal. App. 646

COVEL v. PRICE. (Civ. 2061.)

(District Court of Appeal, Second District, Division 2, California. Feb. 7, 1919.)

MUNICIPAL CORPORATIONS ⟹706(5)—USE OF STREETS — AUTOMOBILE COLLISION — SUFFICIENCY OF EVIDENCE.

In action for injuries sustained in automobile collision at street intersection, evidence, showing that plaintiff's automobile had the right of way, and that defendant was driving at an excessive rate of speed for the time and place, *held* to sustain finding that collision was caused by defendant's negligence.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Marie Covel against Samuel H. Price. Judgment for plaintiff, and defendant appeals. Affirmed.

Dorn & Parker, of San Diego, for appellant.

Clarence Harden, of San Diego, for respondent.

SLOANE, J. Defendant has appealed from a judgment awarding damages against him for an automobile collision. The appeal is taken under the alternative method, and on the sole ground of insufficiency of the evidence. Appellant has failed to print in his brief, or in a supplement thereto, the portion of the record which he desires to call to the attention of the court, as required by section 953c of the Code of Civil Procedure. We have read the transcript of the evidence, however, and fail to find in it any comfort for appellant.

The evidence is conflicting, as it usually is in an automobile accident case, but the weight of it is unquestionably with the plaintiff. The plaintiff and his witnesses substantially agreed in testifying that the automobile in which plaintiff was riding reached the street intersection first, driving at about 12 miles per hour; that defendant was approaching from the left, at a speed of from 30 to 35 miles per hour, and ran in front of the machine in which plaintiff was a passenger, skidded and stopped, and was, in consequence, then run into by plaintiff's machine with the resultant injury to plaintiff. If the court accepted plaintiff's version of the facts, which it apparently did, showing that plaintiff's automobile had the right of way, and that defendant was going at an excessive rate of speed for the time and place, the conclusion as to defendant's negligence as the cause of the accident was amply sustained.

The judgment is affirmed.

We concur: FINLAYSON, P. J., and THOMAS, J.

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39 Cal. App. 586

PEOPLE v. SEELEY. (Cr. 638.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

1. Homicide ⚷97 — Unlawful Arrest — Defense of Another.

One may not resort to a deadly weapon to prevent a policeman from an unlawful search of a mere friend.

2. Homicide ⚷96(1)—Unlawful Arrest—Resistance—Deadly Weapon.

Although one may resist an illegal arrest, he is not entitled to resort to a deadly weapon from the mere fact that an arrest is illegal.

3. Criminal Law ⚷829(1)—Requested Instructions.

Requested instructions covered by given instructions were properly refused.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Carl Seeley was convicted of assault with intent to commit murder, and he appeals. Affirmed.

Guy Eddie and Chas. R. Morfoot, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. Appeal from the judgment of imprisonment following conviction upon a charge of assault with intent to commit murder.

By the information filed by the district attorney, this appellant, in the first count thereof, is charged with having murdered Dale Finnegar; in the second count he was charged with having, on the same day, committed the assault with intent to murder D. C. Huling, who was a police officer. The jury returned a verdict of not guilty as to the charge of murder. Both charges grew out of an occurrence participated in by Huling the police officer, Finnegar, the deceased, and Seeley, the defendant. Seeley and Finnegar were, at the time charged, of the respective ages of 19 and 18 years. Finnegar having been killed, the only two eyewitnesses to the affray who appeared at the trial were Huling, the officer, and the defendant. The officer testified that at about 11 o'clock on a night in April, 1918, he was traversing his beat in the lower part of the city of Los Angeles, and at the moment was on his way to a signal box located near by, for the purpose of "reporting in" to headquarters. On one of the streets included within his beat was a bakery operated by persons known to the officer. Huling testified that as he approached this bakery he noticed two men standing near the same, and that he immediately set about to observe them; that he approached on the opposite side of the street, where it was dark, in the meantime observing that one of the men had entered the bakery and the other had walked some 20 feet up the street, where he stopped. The officer was clothed in his official uniform, with a star, all of which apparel, we may note here, the appellant admitted in his testimony he had observed before the trouble began. Huling testified that he approached the man on the sidewalk, that being Finnegar, and asked him where he was from, how old he was, and his name; that Finnegar told him he was 18 years old and was from Long Beach, and also stated, in response to the officer's question, the direction from which he had come; Finnegar took a return ticket to Long Beach from his pocket, which he showed; that at this time the defendant came hurriedly out of the bakery and was about to pass the officer and the other man without stopping, and that he (the police officer) called to him, "Just a minute, young fellow;" that the defendant was then asked whether he was from Long Beach, too, and he replied, "Yes," and stated his age to be 19 years. The officer then testified as follows:

"I asked him his age, and he said, 'Nineteen years of age.' Then I said, 'Have you boys any guns on you?' I believe those are the words I used. They didn't answer that question, and I proceeded to search this Finnegar, the dead boy. I put my hand on the side of his coat pocket. I felt the revolver in his pocket. I just put my hand on his pocket when the defendant here, he pulled a gun from his right pocket, and he says, 'You turn him loose,' pointing in the direction of Finnegar, and I said, 'Don't be a fool, kid.' I said, 'Drop that gun and throw up your hands.' Of course, he didn't do it. I continued to take this gun off of Finnegar. Just as I got the gun—well, before I had taken the gun from Finnegar's pockets, this boy was just like a prize fighter, jumping this way, and this way, trying to shoot me in the sides. Of course, I caught Finnegar in the back of the coat collar and held him right in between me and the defendant, and he was getting so close to me, just as I had taken the gun out of Finnegar's pocket, that I called to him again, just as I got the gun clear, and I said, 'If you don't drop that gun and throw up your hands, I will shoot your brains out.' Well, he didn't stop. He kept bucking around there, and I snapped the gun a couple of times on him. The gun failed to fire; and, while my hand was extended in front of Finnegar, he shot me through this arm here. I grabbed Finnegar by the coat collar like that, and jerked him down like this. Then I crouched like this, Finnegar between us; so the defendant jumped from that side to the other, and of course I kept out of his way. I felt perfectly confident I could best him, but when he was getting so close, coming up too close, that he could shoot around—I couldn't get my gun, and I couldn't have this gun loose in this man's pocket, because he could put his hand in his own pocket and shoot me out through his coat pocket, so I thought it best to take the gun from his hands. So I extended my hand like that, snapped the gun a couple of times, telling him even the second time to throw up his hands; but he shot me while I was in that position, just about like that, and the bullet went through there and here, and struck me here, and out through my side like that. I fell on the ground—on the sidewalk."

The officer further testified that, after he had fallen to the ground, the appellant continued to shoot, and that he (the officer) was unable to get his own "gun" from his pocket, because his hand seemed paralyzed from a shot, and that while he was lying on the ground the appellant shot him several times more; that he (the witness) finally succeeded in drawing his weapon and supporting it over his arms; whereupon the appellant ran away, the witness firing several shots which failed to take effect. It seems that the officer was wounded in four or five places by the bullets fired by the appellant. Some one of the bullets, apparently one from the gun of appellant, killed Finnegar; hence the double charge as made by the information. The appellant, after his arrest, made a statement to the officers, which was introduced in evidence, in substance generally corroborative of the narrative given by the police officer. However, at the trial he made a different statement as to the occurrence, in which he declared that he did not attempt to shoot the officer until the latter had knocked him down and was upon him on the sidewalk. He admitted at the trial that he fired six shots in rapid succession at the officer. He did not contend in his testimony that the officer had attempted to search him, but declared that the latter had jumped upon him and thrown him to the sidewalk, and that he (the appellant) had then used his weapon to defend himself.

[1-3] The court instructed the jury very fully as to the right of self-defense, and the extent to which a person may go in protecting himself against an unlawful assault, and also advised the jury as to the circumstances under which an officer is justified in making an arrest. The court further advised the jury that "an officer who acts without proper authority stands on the same footing as any person who is not an officer." The case presented, under the testimony and instructions, was one involving the question as to whether the act of the defendant in wounding the police officer was one committed in necessary self-defense. None of the instructions as given is made the subject of objection on the part of appellant, although error is assigned because of the refusal to give quite a number of the instructions proposed on behalf of the defense. The first instruction so offered was to advise the jury that it was unlawful for an officer to search a person, unless he had first lawfully placed him under arrest. As before indicated, the evidence on neither side tended to show that any attempt was being made by the officer to search this appellant. This appellant had no such relation with Finnegar as would entitle him to resort to a deadly weapon to protect Finnegar from an unlawful search, if such it was. The instruction as to the right of an officer to search persons found carrying concealed weapons was properly refused. Instructions intended to advise the jury that, where an unlawful arrest was attempted to be made, any force necessary to prevent its accomplishment was justifiable, did not correctly state the law, and were therefore properly refused. People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064. Other instructions refused, which related to the law of self-defense and which contained correct statements of the rights involved in that defense, were properly refused because the court, in other instructions given, had very fully advised the jury upon that matter. The whole case as presented by the complete record is such as to impress us with the conviction that the verdict and judgment are fully supported and should be affirmed.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; SHAW, J.

39 Cal. App. 610

BRANAGH v. CHICAGO BONDING & SURETY CO. et al. (Civ. 2549.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

1. Time 🔑10(4)—Excluding Last Day—Limitations.

Action on bond given by highway contractor under Deering's Gen. Laws 1915, act 2895, requiring action thereon to be brought within six months after filing of claim, may be brought on the succeeding day after the expiration of such six-month period, where day on which period expired was a holiday, in view of Civ. Code, § 10.

2. Appeal and Error 🔑907(2)—Review—Presumptions.

In action on highway contractor's bond under Deering's Gen. Laws 1915, act 2895, for hay furnished the contractor, it will be presumed, on appeal from judgment for plaintiff, where record does not contain evidence, that it was used by contractor in performance of his contract.

3. Highways 🔑113(5)—Construction—Action on Bond—Pleading.

In action on highway contractor's bond, under Deering's Gen. Laws 1915, act 2895, complaint alleging that "during the course of said work or improvement plaintiff furnished certain supplies, to wit, hay," to the contractor "for the performance of the work or improvements by them contracted to be done," was not subject to general demurrer.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by William Branagh against the Chicago Bonding & Surety Company and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

James Alva Watt, Rolla Bishop Watt, and Watt, Miller, Thornton & Watt, all of San Francisco, for appellant.

McNabb & Hodge, of San Bernardino, for respondent.

SHAW, J. Action against Chicago Bonding & Surety Company as surety upon a bond alleged to have been given "in accordance with the requirements of an act of the Legislature of the state of California," by the Hudson-Johnson Construction Company, to which, as contractor, certain public highway work was awarded. Judgment went for plaintiff and against the surety company, which appeals therefrom on the judgment roll.

[1] To the complaint said defendant interposed a general demurrer, which was overruled. In addition to this alleged erroneous ruling, appellant claims that the action upon the bond was not commenced within six months after the filing of the verified claim with the California highway commission, by which the contractor was employed. There is absolutely nothing in the record disclosing whether or not the bond was given pursuant to the provisions of act 2895, General Laws 1915, page 1467, wherein it is provided that—

> "At any time within six months after the filing of such claim, the person, company or corporation filing the same may commence an action against the sureties on the bond."

Assuming, however, that it was so given, the claim was filed on April 12, 1915; so that the six months expired on October 12, 1915, and the complaint was not filed until the following day. But October 12th was a holiday, and section 10, Civil Code, provides that—

> "The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

In Diggins v. Hartshorne, 108 Cal. 165, 41 Pac. 287, the court said:

> "The statute required the person to whom the contract was awarded to enter into the contract within ten days after the award. The award to Buckman was made November 17th, but, as the 27th of November was Thanksgiving Day, he had the whole of the next day in which to enter into the contract."

So here the last day of the six months within which plaintiff was entitled to commence his action being a holiday, he had all of the succeeding day within which to commence the same.

The complaint alleged—

> "That during the course of said work or improvement in said contract provided, plaintiff furnished certain supplies, to wit, hay, to said Hudson-Johnson Construction Company, in the county of San Bernardino, and so furnished said Hudson-Johnson Construction Company for the performance of the work or improvements by them contracted to be done."

Appellant insists that this allegation is insufficient in stating a cause of action within the terms of the bond which, as alleged, was—

> "made to inure to the benefit of any and all persons, companies and corporations who performed work or labor of any kind on or furnished materials or supplies for the performance of the said work contracted to be done."

[2, 3] Appellant's argument is based upon the claim that a grain dealer, who furnishes feed for horses used in the performance of such work, is not entitled to recover therefor upon the bond. Conceding this to be true, it cannot avail appellant, for the reason there is nothing in the record even tending to show that the hay was so used, or how it constituted supplies used in the performance of the work. Nevertheless it is so alleged, and since the case was tried and judgment rendered

against defendant, we must, in the absence of the evidence, assume that it was satisfactorily made to appear to the court that, however used, it was in the performance of the work called for by the contract. While conceding the complaint defective in several respects, the objections based thereon did not render it subject to the general demurrer interposed.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

39 Cal. App. 542

WARREN et al. v. ELLIS. (Civ. 2601.)

(District Court of Appeal, First District, Division 1, California. Jan. 31, 1919. Rehearing Denied March 1, 1919; Denied by Supreme Court March 31, 1919.)

1. Executors and Administrators 🔑315(6) — Decree of Distribution — Conclusiveness.

Decree of distribution, after petition for distribution has been properly filed, and the hearing properly set and notice duly given as provided by law, is conclusive in subsequent action to vacate and set aside certain judgments and decrees, previously made, in the matter of the estate, and to vacate a judgment recovered against administrator of estate by defendant.

2. Executors and Administrators 🔑315(6) — Decree of Distribution — Jurisdiction of Court.

Where petition for distribution is filed by administrator, and the hearing is properly set and notice duly given, as provided by law, the probate court acquired jurisdiction over all persons for the purpose of determining their rights to any portion of the estate.

3. Courts 🔑198 — Probate Court — Jurisdiction.

The jurisdiction of the probate court is jurisdiction in rem; the res being the estate of the decedent, which is to be answered and distributed with regard to rights of creditors, devisees, legatees, and all the world.

4. Courts 🔑1—"Jurisdiction."

"Jurisdiction" is the power to hear and determine.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

5. Judgment 🔑501—Collateral Attack—Jurisdiction—Error of Judgment.

Jurisdiction existing, mere error of judgment will not vitiate the decree of the court.

6. Executors and Administrators 🔑315(6) — Decree of Distribution — Conclusiveness.

Decree of distribution, rendered after petition for distribution has been properly filed, and the hearing properly set and notice duly given as provided by law, is conclusive in subsequent proceeding by persons claiming to be heirs to have their rights in estate determined, under Code Civ. Proc. § 1664.

7. Executors and Administrators 🔑315(4) —Decree of Distribution—Vacation—Extrinsic Fraud.

Decree of distribution, having become final, can be vacated only on the ground of extrinsic fraud.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by John Warren and others against Marie Ella Ellis. Judgment for defendant, and plaintiffs appeal. Affirmed.

Charles L. Brown and Clarence E. Todd, both of San Francisco (Tirey L. Ford, of San Francisco, of counsel), for appellants.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment entered upon an order sustaining defendant's demurrer to the plaintiffs' second amended complaint without leave to amend.

The action was instituted by plaintiffs, claiming to be the heirs at law of one Mabel Moulton, deceased, for the purpose of recovering a judgment vacating and setting aside certain judgments and decrees previously made in the matter of said estate, and also vacating a certain judgment made and entered in an action theretofore commenced and prosecuted to final judgment by defendant herein against the administrator thereof. The amended complaint sets forth the circumstances under which the various decrees and judgments were rendered. It appears therefrom that on the 17th day of May, 1909, Mabel Moulton, a resident of San Francisco, died intestate. On the 1st day of June, 1909, M. J. Hynes, the then public administrator of the city and county of San Francisco, was appointed administrator of her estate. About two years thereafter and on the 18th day of April, 1911, the respondent herein, Marie Ella Ellis, brought a suit in equity in the superior court against the administrator for the purpose of enforcing specific performance of a certain contract claimed to have been entered into between herself and Mabel Moulton, deceased, whereby said Mabel Moulton agreed to make a will devising and bequeathing her entire estate to respondent in consideration of certain personal services to be, and which were claimed to have been, thereafter rendered.

In this suit in equity the respondent herein was the sole plaintiff, and the administrator was sole defendant. In the complaint it was alleged that the deceased left her surviving no heirs or next of kin. Thereafter, and on December 3, 1912, about three years after the decedent's death, the administrator filed an answer to the complaint in which all the material averments of plaintiff's complaint were specifically denied. Subsequent to the filing of the complaint in this action the respondent herein had also instituted proceedings under section 1664 of the Code of Civil Procedure, claiming that she was entitled to the distribution of the estate of said deceased. Thereafter she filed a complaint under these proceedings setting forth her claim of ownership and interest in the estate. This complaint was in substance identical with her suit in equity against the administrator. The representative of the estate filed his answer thereto, and the default of all persons except respondent herein, the administrator, and one other person was entered.

About this time the state of California, upon relation of its Attorney General, filed a complaint in intervention, denying the allegations of the complaint, and alleging that deceased had died intestate, and he claimed an escheat. A compromise was had between the parties. The equity suit then came on regularly for trial, and judgment was given for plaintiff by which it was decreed that the administrator held certain property which was described in the decree and which constituted a portion of the estate of Mabel Moulton, deceased, in trust for the plaintiff therein, who was adjudged to be the owner and entitled to the possession thereof. The trial of this action was had and the judgment rendered pursuant to an order by the lower court authorizing a compromise and settlement of the claim of respondent herein. The order of compromise was based upon a petition filed by the administrator and joined in by respondent and by the state of California, acting through A. B. Nye, its then controller, and U. S. Webb, its Attorney General. This petition was regularly set for hearing, and the order was made directing the litigation to be settled, and the decree above mentioned followed. At the same time judgment was entered in favor of Marie Ella Ellis, respondent herein, in the section 1664 proceeding instituted by her, wherein it was adjudged that the property mentioned in the compromise agreement be distributed to her, and the residue of the estate, consisting of the sum of $6,763.35, and all other property not known, was decreed to have escheated to the state.

What evidence was taken in the equity suit or in the section 1664 proceedings does not appear in this action. Both decrees were filed in June, 1913, and no appeal has ever been prosecuted from either of them, and they have long since become final. Shortly after the entry of these decrees the administrator filed his petition, praying for final distribution in the estate, and thereafter on July 17th of the same year his petition was heard and determined by the court, and a decree of final distribution was made and entered September 2, 1913.

In this decree the judgment in the suit in equity to enforce the agreement to make a will is referred to as being "duly given and made," and the decree likewise specifically refers to the judgment in the proceedings under section 1664, Code of Civil Procedure, which is also therein found to have been "duly given and made." It is further found that Mabel Moulton left her surviving no known heirs or next of kin, and that the real and personal property previously adjudged to belong to Marie Ella Ellis "be and the same is hereby distributed to Marie Ella Ellis," and that the residue of the estate, consisting of the sum of $6,763.35 and all other property not now known, is declared to have escheated to the state. No appeal was ever prosecuted from this decree, and it, too, has long since become final.

The first notice or knowledge had by plaintiffs, or either of them, so it is alleged in their complaint, of any of the decrees and judgments above enumerated was in the month of May, 1914. The original complaint herein was filed on the 8th day of May, 1914. On the 27th day of May of the same year appellants herein, in the matter of the estate of Mabel Moulton, deceased, served and filed a written notice of motion for an order setting aside the judgment made and entered in the proceedings instituted under section 1664, Code of Civil Procedure. The motion was made upon the claim that the judgment was erroneous and void, and that it was taken through mistake, inadvertence, and excusable neglect. The affidavit upon the motion alleged that appellants were the heirs of Mabel Moulton, deceased. On the same date appellants also served and filed their notice of motion for an order to vacate and set aside the decree of final distribution. This notice was likewise accompanied by an affidavit containing statements practically identical with those made on the motion to set aside the judgment in the section 1664 proceedings. These motions were both denied.

As grounds for reversal of the order sustaining the demurrer to the complaint appellants contend:

(1) That the decree in the equitable suit brought by this respondent against the public administrator is of no legal effect, because of the absence of necessary parties defendant.

(2) That the decree in the section 1664 proceedings is void for the reason that it was beyond the power of the court to render such a decree in that proceeding.

(3) That the decree of final distribution does not constitute an estoppel respecting the issues raised by the complaint herein, for the reason that such issues were neither presented nor determined in the proceeding on final distribution.

Respondent, on the other hand, relies upon all of the orders and decrees had in the various proceedings.

[1] It is manifest that, if respondent has deraigned title to the property she holds under any of these decrees, appellants are not entitled to the relief here sought and the judgment must be affirmed. As we are of the opinion that appellants are concluded by the decree of distribution, no useful purpose can follow a discussion of the force or effect of the other decrees, and we will confine our consideration to that decree alone.

[2, 3] The petition for distribution was filed by the administrator of the estate. Its hearing was properly set and notice duly given as provided by law. This is conceded. By the giving of the notice directed by statute the entire world was called before the court, and the court acquired jurisdiction over all persons for the purpose of determining their rights to any portion of the estate. The jurisdiction of the probate court is a jurisdiction in rem; the res being the estate of the decedent which is to be administered and distributed, with regard to the rights of creditors, devisees, legatees and all the world. William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323.

[4-6] The question to be considered upon an application for a decree of distribution is whether the court has authority to determine and dispose of the application. Jurisdiction is the power to hear and determine, and it does not depend upon the correctness of the decision made. Jurisdiction existing, mere error of judgment will not vitiate the decree of the court. If error exists, it may be corrected on appeal. Nor does the fact that the error appears on the face of the record alter the fact. Here the validity of the suit in equity and the judgment in the section 1664 proceedings, under which respondent claimed title, were directly passed upon on the hearing for distribution; and, whether erroneous or not, the decree based thereon is binding upon the whole world, and therefore conclusive upon appellants with the same force and effect as though their claims had been presented and disallowed. Goad v. Montgomery, 119 Cal. 558, 51 Pac. 681, 63 Am. St. Rep. 145; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Estate of Moore, 96 Cal. 523, 31 Pac. 584; Estate of Learned, 156 Cal. 309, 104 Pac. 315; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565.

[7] The decree having become final, it could only be vacated because of extrinsic fraud. No such question is here presented. There must be some end of litigation. The complaint herein contains no allegation of fraud authorizing the interposition of a court of equity in the obtaining of the decree here sought to be set aside, but seeks merely to assail the validity of the judgments on which it is based, and it does not show any ground for relief in equity against the judgment, and the demurrer thereto was rightfully sustained.

This being so, the judgment appealed from should be and it is hereby affirmed.

We concur: WASTE, P. J; RICHARDS, J.

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39 Cal. App. 534

BROOKE v. GLIDE et al. (Civ. 1939.)

(District Court of Appeal, Third District, California. Jan. 30, 1919. Rehearing Denied by Supreme Court March 31, 1919.)

1. PARTNERSHIP ⚷161—INDIVIDUAL LIABILITY OF PARTNER—CONTRACTS.

Where one of two partners signed a contract to pay a real estate broker a commission on sale of land which partners held as tenants in common, signing such contract in name of partnership, he thereby bound himself individually, where he had no authority to bind his partner; presumption as to joint and several liability created by Civ. Code, § 1659, and not that established by section 1431, controlling.

2. JUDGMENT ⚷238—PLEADING—JOINT AND SEVERAL OBLIGATIONS.

Where a contract is joint and several, so far as parties and pleadings are concerned, the rule is the same under Code Civ. Proc. § 578, as it is where the obligation consists of a tort, and the obligation is joint as well as several, and judgment may be rendered against one of the contractors alone.

3. EVIDENCE ⚷208(1) — ADMISSIONS IN PLEADING—ADMISSIBILITY.

A defendant, who admitted in his answer that he "in form executed the agreement" set up in the complaint, cannot complain of its introduction in evidence.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Morris Brooke against J. H. Glide and T. S. Glide, a copartnership doing business under the name and style of Glide Bros., and such persons individually. From a judgment in favor of plaintiff, the first-named individual appeals. Affirmed.

A. M. Seymour, of Sacramento, and Arthur C. Huston, of Woodland, for appellant.

Downey, Pullen & Downey, of Sacramento, for respondent.

BUCK, Presiding Judge pro tem. This is an action against defendants, individually and as copartners, to recover a broker's commission alleged to have been earned by plaintiff under a contract of employment entered into between defendants and each of them with plaintiff. Upon a trial of the case judg-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ment was given in favor of the plaintiff and against the defendant J. H. Glide alone. From this judgment defendant J. H. Glide has appealed.

In each of three counts it is alleged that defendants, J. H. Glide and Thornton S. Glide, were partners doing business under the name of Glide Bros., and that "defendants and each of them" employed plaintiff to sell the property in question. The third count alleges that the "plaintiff and said defendants and each of said defendants entered into a written contract for the payment of a commission to plaintiff for the sale of" the ranch known as the Wilcox Ranch. This contract is set out in full, and is signed "Glide Bros., by J. H. Glide." It is also alleged that "said J. H. Glide was duly authorized to make said contract on behalf of Glide Bros." The answer of defendants denies that defendants, or each or any of them, employed plaintiff to assist defendants, or any or either of them, in selling the property in question; and denies that the said J. H. Glide was authorized to make this contract on behalf of the defendants, or any or either of them, or on behalf of Glide Bros., or that he was the agent of Glide Bros. to make this contract. Defendants, however, admit that "J. H. Glide in form executed the agreement in question by signing the same as follows: 'Glide Bros., by J. H. Glide,'" and also admit that the Wilcox Ranch was owned by the defendant J. H. Glide and the defendant Thornton S. Glide as tenants in common. The court finds that the defendants were copartners, and finds that the defendant J. H. Glide signed the contract in question without any authorization from the copartnership or from his codefendant. But finds that the Wilcox Ranch referred to in the complaint was owned by defendants J. H. Glide and T. S. Glide as tenants in common, and that upon the signing of the contract plaintiff "performed all the conditions, covenants, stipulations and agreements in said contract on his part to be performed"; and the defendant J. H. Glide, having upon demand refused to pay the commission in the sum of two thousand dollars, is liable for the payment thereof to the plaintiff.

Appellant claims that this judgment is erroneous for the reason, as he claims, that the obligation sued upon is the joint obligation of the defendants, whereas the finding relates simply to a several obligation of the defendant J. H. Glide. He also claims that the contract "does not support a recovery against J. H. Glide individually, because it is a joint contract and contains nothing creating any several liability."

[1] But the contract (assuming its entire validity) was not, as appellant contends, a joint contract so far as J. H. Glide was concerned. But, so far as he was concerned, it was a joint and several contract. For it was alleged in defendants' answer, and established in the findings, that the Glide Bros., though they were not bound as partners in this transaction, were nevertheless tenants in common of the land in the selling of which the plaintiff earned his commission. Therefore it is not the presumption established by Civil Code, § 1431, as contended by appellant, that should prevail. But the presumption created by Civil Code, § 1659, should control.

> "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." Gummer v. Mairs, 140 Cal. 535, 74 Pac. 26; Bell v. Adams, 150 Cal. 772, 90 Pac. 118.

Therefore defendant J. H. Glide, having signed a writing which, upon its face, by reason of the benefit accruing to him therefrom, binds himself severally as well as jointly, should not be permitted to escape his several liability upon the claim that he has also made an improper attempt to bind himself jointly with his brother, T. S. Glide. Having misled the pleader by the manner in which he signed the contract, he should not be permitted to act as though he, and not the pleader, had been misled, and to thus claim a variance in the pleading which as to him is not a material variance.

In the case of Lewis v. Clarkin, 18 Cal. 399, the defendant purchased goods just as the appellant here purchased services, and directed the plaintiff to charge them to the joint account of C. & J., just as the plaintiff here, by the signature of "Glide Bros.," indicated to the plaintiff that the charge for the services would be a joint charge against the two brothers. In that case, as in the case at bar, it was proven that the purchaser of the goods had no authority from his assumed associate to bind him in this matter. The succinct language of the decision, by Cope, J., concurred in by Field, C. J., is particularly applicable to the case at bar:

> "It turns out that C. acted without authority from J., and the latter is not therefore liable. But the former is liable, and, as by his act the transaction was made to assume the appearance of a joint liability, we think the plaintiff is entitled to a judgment against him in this suit. It was by his improper conduct that the plaintiff was induced to bring the suit in its present form, and the variance between the pleadings and the proof could not have taken him by surprise."

The artificial logic of the old common-law pleading should not be resurrected in this case to enable the defendant J. H. Glide to escape his obligation under a contract in the procurement and performance of which he was actively and beneficially interested.

[2] Where a contract is joint and several, so far as parties and pleadings are concerned, the rule is the same under section 578, Code

of Civil Procedure, as it is where the obligation consists of a tort and the obligation is joint as well as several. It has recently been held in this court that, in an action instituted against two joint tort-feasors upon a joint tort, judgment may be given against one of them, and a plea of variance will not be entertained. Haller v. Yolo Water & Power Co., 34 Cal. App. 317, at page 320, 167 Pac. 197.

And as stated by this court in Melander v. Western National Bank, 21 Cal. App. 462, at page 475, 132 Pac. 265, at page 271:

> "No reason other than absence of statutory authority can be suggested why the same principle should not as well be applicable in actions on contract, and the cases above examined very clearly establish that, under sections 383 and 578 of the Code of Civil Procedure, it is a rule applicable to the latter class of actions."

In the case of Morgan v. Righetti et al., 5 Cal. Unrep. 397, 45 Pac. 260, the court said in affirming the judgment:

> "The only question upon this appeal is whether in an action against two as partners, upon an alleged partnership liability, a recovery may be had against one of the defendants; the court finding that the defendants were not partners, but that appellant is individually liable for the indebtedness alleged in the complaint, and for which judgment was rendered against appellant, E. Righetti, alone."

In that case, under the authority of Lewis v. Clarkin, 18 Cal. 399, and Bailey Loan Co. v. Hall, 110 Cal. 490, 42 Pac. 962, it was held that the defendant, upon proof of his separate liability under the contract, could not escape judgment because the complaint, following the form in which he had created his liability, charged him with a joint liability. See, also, Hartney v. Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005.

[3] Appellant also claims that the court erred in neglecting to rule upon defendant's objection to the offer in evidence of the contract alleged in the complaint.

So far as defendant and appellant J. H. Glide is concerned, no ruling of the court was necessary. The contract was already in evidence under the admissions of the answer that—

> "J. H. Glide in form executed the agreement—by signing the same as follows: 'Glide Bros., by J. H. Glide.'"

With this admission as a foundation, the other testimony disclosing the identity of J. H. Glide as one of the Glide Bros., and his interest as a cotenant in the consideration of the contract, established the materiality of the writing as evidence.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

180 Cal. 142

HARRIS et ux. v. BARLOW et ux.

(L. A. 4746.)

(Supreme Court of California. March 10, 1919.)

1. FRAUDS, STATUTE OF 🔑102—EXECUTION OF DEEDS IN BLANK—AGENT'S AUTHORITY TO FILL IN DESCRIPTION OF PROPERTY AND GRANTEES' NAMES—NECESSITY OF WRITING.

Under Code Civ. Proc. § 1971, being the statute of frauds, where a deed is executed and acknowledged while still in blank, a notary inserting the names of the parties and description of the property must have written authority therefor, notwithstanding Civ. Code, § 1629, abolishing the distinction between sealed and unsealed instruments.

2. STATUTES 🔑225¾—CONSTRUCTION—READOPTION OF STATUTE CONSTRUED BY SUPREME COURT—EFFECT.

Where the provisions of St. 1850, p. 266, relating to frauds and perjuries, were construed by the Supreme Court, and the Legislature subsequently adopted the same language in Code Civ. Proc. § 1971, the Supreme Court is bound by that interpretation.

Department 2.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action in ejectment by Ira J. Harris and wife against Samuel Barlow and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Frank P. Doherty, of Los Angeles, for appellants.

Bert L. Cooper and A. L. Hickson, both of Pomona, for respondents.

WILBUR, J. [1, 2] This is an action in ejectment. Judgment was for the defendants, and plaintiffs appeal. Plaintiffs' alleged title is based upon a deed executed, signed, and acknowledged while still in blank, in which, in pursuance of an oral authorization thereto, the notary inserted the names of the parties and the description of the property after the grantors had left, and during their absence. This deed was retained by him in escrow, and it is claimed that by reason of the transaction between the parties it was in effect delivered. While still in the possession of the escrow holder, the grantors in said deed notified said escrow holder not to deliver the same. Appellants claim that, since the law abolishing the distinction between sealed and unsealed instruments (Civ. Code, § 1629) the oral authorization to the scrivener to insert the names of the parties and the description of the property was sufficient authority therefor. In Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266, the deed there under consideration was blank as to the grantee at the time it was signed. The court there said:

"As it could not become the plaintiff's deed until the name of a grantee was inserted, that act could not be performed by an agent, in the absence of the plaintiff, unless his authority was in writing. Storey on Agency, § 49, and notes; Dunlap's Paley on Agency, 157, and notes. The case comes within the sixth section of the statute of frauds."

That section then read as follows:

"No estate or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed, or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." Stats. 1850, p. 266.

This same language is now incorporated in our Code of Civil Procedure, § 1971, with such slight changes as the use of the words "interest in real property" instead of the words "interest in lands." The provisions of this statute have been construed by this court, and, the Legislature having subsequently adopted the same language, we are bound by that interpretation. As to appellants' contention that the statute abolishing the distinction between sealed and unsealed instruments changes the rule, it is sufficient to say that the decision of Upton v. Archer, supra, was not based upon that distinction, but upon the provision of the statute of frauds above set forth.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

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180 Cal. 144

BLAKE v. ARP. (L. A. 4804.)

(Supreme Court of California. March 10, 1919. Rehearing Denied April 7, 1919.)

1. DAMAGES 🔑103—MEASURE—STATUTE.

Under the direct provisions of Civ. Code, § 3300, in cases of tort, the rule of damages is compensation for the loss sustained.

2. FRAUD 🔑13(2)—FRAUDULENT REPRESENTATIONS AS TO TITLE—GOOD FAITH OF VENDOR.

In an action by a vendee of realty for damages for the fraudulent representation of vendor that he had title, where it appeared at the time of the purchase that a lis pendens was on record in a case against the defendant's grantor, finally resulting in judgment against him, a finding that defendant was guilty of fraud, even though he believed that he had title, was justified in view of Civ. Code, § 1572, subd. 2.

3. APPEAL AND ERROR 🔑179(3)—PRESERVATION OF OBJECTIONS—WAIVER.

Points not presented by instructions to the jury and not involved in requested instructions are waived.

Department 2.

Appeal from Superior Court, Kern County; M. L. Short, Judge.

Action by Elizabeth S. Blake against James Arp. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Kaye, of Bakersfield, for appellant.

Thomas Scott and J. R. Dorsey, both of Bakersfield, for respondent.

WILBUR, J. This is an appeal by defendant from a judgment after verdict against him for $2,100 with interest on $1,500 thereof from May 27, 1910, at 7 per cent. Plaintiff is the vendee and appellant the vendor of a certain lot in Bakersfield under written contract dated May 27, 1910. Plaintiff alleges the contract, which she sets up in hæc verba in her complaint; that she has paid $1,500 on the purchase price; that she made improvements on said property, but that at the time of the execution of the contract, as an inducement thereto, defendant falsely represented that he owned the title to said land; that plaintiff caused the improvements in question to be made thereon; that at the time of the execution of said contract there was pending an action involving the title to said land, wherein the title of defendant's grantor was attacked; that judgment therein was rendered February 5, 1912, against defendant's grantor; that in June, 1910, a separate and distinct action was brought by the plaintiffs in the last-mentioned suit against the plaintiff and defendant in this suit, based upon the same allegations, and on December 2, 1912, judgment was rendered therein, adjudging that neither plaintiff nor defendant had any title to or interest in said property. Plaintiff alleges that during all times up to the rendition of said judgment of December 2, 1912, she still believed the representations of the defendant that he owned said property. She alleges that the value of the property had increased subsequent to the purchase by her from $7,500, the purchase price, to $14,000; that she made certain improvements thereon, valued at $1,000, and other improvements valued at $970; that she had received nothing of value from defendant. Plaintiff demanded judgment for $8,970, with interest on $1,500 from May 27, 1910. Defendant answered, denying any fraud, admitting the payment of $1,500 to him, admitting the making of improvements valued at $1,000, and affirmatively alleging that these improvements were made by him for plaintiff, and that he had not been paid therefor. By way of counterclaim as to said item, he alleged that the value of improvements alleged by plaintiff to be worth $1,000 was $1,292, and demanded judgment for that amount. He also alleged the making of certain other improvements on the property by him at plaintiff's request, and the furnishing of cordwood, and alleged the value of said improvements and cordwood to be $372.60, and demanded judgment therefor. Upon the trial it was stipulated that the value of improvements made by defendant for plaintiff upon the property was $1,521, and the value of cordwood sold by him to plaintiff was $143, making the total amount thus due from plaintiff to defendant $1,664. As to the second item of $970 alleged by plaintiff, the defendant admits that amount by failure to sufficiently deny it, and plaintiff testified that she had paid "nearly $1,000" on this item. It is therefore admitted that the plaintiff had made improvements on the property valued at $2,491; that she owed the defendant on account thereof $1,521, and also owed him $143 for cordwood. The net value of the improvements made by plaintiff over the amount due the defendant was $837. The amount paid by the plaintiff on account of the property was therefore $2,337. The verdict of the jury was for $2,100. Defendant also claimed $75 per month for the use of the premises, plaintiffs having occupied the same for 21 months. But, as plaintiff was occupying the premises as a tenant of the real owner when the contract was entered into, and had been sued by that owner for the rent, and as defendant had never owned the premises, the court properly refused to submit that question to the jury.

[1] We have thus dealt in detail with the facts for the reason that we are called upon in this case to determine whether or not substantial justice has been done between the parties. We find that the plaintiff has expended upon the faith of the contract, and in reliance thereon and on the representations of the defendant, the sum of $2,337, and that she has recovered judgment for $237 less than that amount. It would appear, therefore, that she has secured judgment for less than is required to compensate her for her loss, which is the usual rule of damages in cases of tort. Civ. Code, § 3300. The complaint is framed upon the theory of an action to recover damages for the fraudulent representation of defendant that he had title. Crane v. Ferrier-Brock Dev. Co., 164 Cal. 676, 130 Pac. 429. It is not an action to rescind, or for breach of contract to convey real estate. The measure of damages for fraud and deceit in the case of an executory contract to convey real estate is that stated in Hines v. Brode, 168 Cal. 507, 143 Pac. 729. The only measure of damages given by the court to the jury in the instructions was that for breach of a contract as stated in section 3306 of the Civil Code. Appellant does not attack that instruction. On the contrary, he seems to assert its correctness. The position of appellant on the question of damages is thus stated in his brief:

> "Without establishing fraud the plaintiff could not recover. The damages alleged by her were of three kinds: First, the price paid; second, the enhanced value of the property; and, third, the value of improvements. The right to recover the first two is measured by section 3306 of the Civil Code, and the right to recover the last is measured by section 3300 of the Civil Code. It may be conceded that the plaintiff had the right to recover the $1,500 paid on the purchase price, because there was a breach of contract on the part of the defendant in failing to convey the property to the plaintiff. This sum, however, was more than offset by the value of the improvements furnished by the defendant. The value of these improvements and that the plaintiff had not paid for them were both admitted. The plaintiff could escape liability to the defendant for the amount so admitted only by showing that she was justified in constructing the improvements made by the defendant."

As we understand appellant's position, he concedes that, if there were fraud (bad faith) on his part, the plaintiff was entitled to recover for the value of improvements in this action. This might well be under the measure of damages erroneously given the jury by the court:

> "The price paid * * * with interest thereon, adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach. * * *"

If we assume that the improvements enhanced the value of the property by the amount of their cost, and that the property was worth the purchase price at the time of the agreement to purchase, and did not increase or decrease except by reason of said improvements, as we may well do upon the evidence, then the verdict for the return of the purchase price paid, and the value of the improvements, was proper under that instruction.

[2, 3] The plaintiff testified that defendant stated to her as an inducement to enter into the contract of purchase that he owned the title. At the time of his purchase a lis pendens was on record in the case which finally resulted in a judgment against his grantor, and later against himself and his vendee. The jury was justified in finding him guilty of fraud under the circumstances, even though he believed the truth of his assertion (Civ. Code, § 1572, subd. 2), and they were so instructed by the court. Appellant urges the fact that the evidence was insufficient to show any fraud on his part, for the reason, as he claims, that the plaintiff knew as much about the title as he did, and that therefore his statement was a mere expression of opinion, and cites in relation thereto the follow-

ing cases: Choate v. Hyde, 129 Cal. 580, 62 Pac. 118, and Rheingans v. Smith, 161 Cal. 362, 365, 119 Pac. 494, Ann. Cas. 1913B, 1140. But the evidence does not support appellant's position. He claims that respondent, by entering into the agreement with him for the placing of improvements upon the property after having ascertained that the injunction suit against his grantor was pending, "lost her right to rescind and also her right to any damages on account of alleged fraud," and cites in support of that contention Schmidt v. Mesmer, 116 Cal. 267, 270, 48 Pac. 54. This point was not presented by instructions to the jury, and it is not involved in any requested instruction, and the point was therefore waived. Moreover, the evidence of plaintiff was that she was constantly lulled into inaction by the repeated assertion of defendant that he had the title, notwithstanding the allegations of the plaintiff in said suit. Other points urged by appellant are without merit.

In view of the manifest errors acquiesced in by the parties, and the fact that the points urged by the appellant as errors are without merit, and in view of the further fact that it is obvious from the entire case that the defendant cannot convey to plaintiff title to the land she sought to purchase, there has been no miscarriage of justice in awarding the plaintiff the money actually paid to the defendant, with interest, and the additional amount expended by her in improvements on the property.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

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180 Cal. 135

WHITE v. KINCAID. (L. A. 4673.)

(Supreme Court of California. March 10, 1919.)

1. PRINCIPAL AND AGENT ⚿143(6)—UNDISCLOSED PRINCIPAL — SETTLEMENT WITH AGENTS.

Where defendant was receiving lumber from a partnership, in payment of a firm debt to him and without knowing the firm had incorporated, continued to receive lumber from the same parties, they were undisclosed agents of the corporation principal, and where he settled with them he is not liable to the corporation.

2. FRAUDULENT CONVEYANCES ⚿145 — CHANGE OF POSSESSION.

Where, upon transfer of partnership lumber yard business to corporation formed by the partners, the manager for the partnership continued to manage the yard for the corporation, a creditor of the partnership, not notified of the change, who continued to receive lumber from the yard to apply on the debt of the partnership to him, was not liable to the corporation for lumber so received after the incorporation of the firm, the transfer of the lumber to the corporation being void for lack of change of possession under Civ. Code, § 3440.

Department 2.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Charles I. White against E. H. Kincaid. Judgment for defendant, and plaintiff appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

WILBUR, J. [1, 2] The plaintiff sued, as assignee of Clark Bros. Lumber Company, a corporation, for lumber alleged to have been sold by said corporation to the defendant. Clark Bros., a copartnership, for more than 20 years had transacted business with the defendant. For 3 years previous to October 10, 1913, they had operated a lumber yard in Los Angeles. In July, 1913, the copartnership owed the defendant about $6,000, evidenced by a promissory note. At that time it entered into an agreement with the defendant to sell and deliver him lumber, and the defendant agreed to credit the purchase price thereof on the promissory note of the copartnership. The defendant procured lumber from time to time at the lumber yard operated by the copartnership, and on October 14, 1914, a settlement was had whereby the sum of $3,300 was credited on said note. The controversy in this case arises over the fact that on October 10, 1913, a corporation was formed under the name and style of Clark Bros. Lumber Company, with a capital stock of 750 shares. W. E. Clark, one of the Clark brothers, held 459 shares, B. W. Clark, the other member of the copartnership, 1 share, and, in addition to these shares of stock 21 shares were issued. W. E. Clark was president, B. W. Clark vice president, and Robert P. Holmes manager. Robert P. Holmes was manager of the copartnership, and continued to manage the same yard for the corporation. The lumber herein sued for was delivered to the defendant at the lumber yard by Holmes. The defendant testified that he was never notified of any change in the management of the lumber yard, and that he continued to get lumber at the yard believing that the same was being delivered to him by the copartnership. Both of the Clark brothers testified that the lumber was delivered to the defendant with the understanding that it was to be charged to the copartnership, but was to be carried on the books of the corporation in the name of the defendant merely for convenience of the copartnership. The trial court found that the lumber was purchased by the defendant from Clark Bros., a copartnership, and was paid for by giving credit upon the note due from the copartnership to the defendant, and that nothing was due from the defendant to the corporation. Respondent correctly claims that, upon the view most favorable to the appellant, Clark Bros. were the agents for the undisclosed principal, the corporation, and that having settled with the agent he is no longer liable to the principal, citing Argenti v. Brannan, 5 Cal. 351; Eldridge v. Finninger, 25 Okl. 28, 105 Pac. 334, 28 L. R. A. (N. S.) 227, 232. Appellant's position, in part, is thus stated:

> "Suppose that Kincaid did not know he was dealing with the corporation, then this was due to the acts and conduct of Clark Bros. by leading him to believe that he was dealing with them, and his complaint should be against them and not against the corporation, whose property he received, used and made a part of his estate."

In short, appellant's contention is that the respondent, having received the property of the corporation, is bound by an implied contract to pay to it the value thereof. But this contention overlooks the fact that under the circumstances, as to the defendant, who was a creditor of and also a purchaser from Clark Bros., copartnership, the transfer from Clark Bros., copartnership, to the corporation was void for lack of a change of possession, and that, therefore, as to the defendant, the lumber still belonged to the copartnership. "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession * * * and against purchasers or incumbrancers in good faith subsequent to the transfer." Civ. Code, § 3440. Under the circumstances shown by the evidence there is no liability from the respondent to the corporation. He was entitled to rely upon the fact that there had been no change of possession, and to assume that the deliveries to him were made by Clark Bros., with whom he had contracted for the lumber.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

(180 Cal. 137)

BERRY v. MOULIE. (L. A. 4728.)

(Supreme Court of California. March 10, 1919.)

1. Appeal and Error ⚷614—Statement—Authentication.

Appellant's proposed statement on appeal which is printed in the transcript, but not authenticated in any way, except that there is a minute order of the court printed in the transcript declining to settle the statement, cannot be considered.

2. Specific Performance ⚷28(1)—Sale of Secret Formula—Certainty of Contract.

Under Civ. Code, § 3390, subd. 6, relating to specific performance, contract to deliver secret formulas in writing is "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable."

3. Specific Performance ⚷6—Mutuality of Remedy—Employment in Personal Service.

Civ. Code, § 3390, not authorizing specific performance of agreement to employ another in personal service, a contract to deliver in writing secret formulas conditioned on employment of seller of formulas could not be specifically enforced, as there would not be mutuality of remedy.

Department 2.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by H. L. Berry against Eugene Moulie. Findings and judgment were entered in favor of plaintiff, and subsequently, on motion of defendant, under Code Civ. Proc. § 663, the court vacated its judgment, changed its conclusion of law, and entered a new judgment. From the order and from the new judgment, plaintiff appeals. Affirmed.

Utley & De Lorimier, of San Diego, for appellant.

Harrison G. Sloane, of San Diego, for respondent.

WILBUR, J. [1] Plaintiff and defendant entered into an agreement by which the plaintiff was to purchase from the defendant his business as a manufacturing chemist and his secret formulas for manufacturing perfumes, soap, and other toilet articles. The contract was partly carried out, the business was moved from Jacksonville, Fla., to San Diego, Cal., and there established. A year later, difficulties having arisen between the parties, they entered into the contract dated June 30, 1915, which is the subject of this action, for the purposes of settling such differences. Plaintiff seeks to enforce this contract by a decree of specific performance. The case was tried, and findings and judgment were entered in favor of the plaintiff. Subsequently, on motion of the defendant, under section 663 of the Code of Civil Procedure, the court vacated its judgment, changed its conclusions of law, and entered a new judgment. Plaintiff appeals from the order and from the new judgment. Appellant's proposed statement on appeal is printed in the transcript, but this statement is not authenticated in any way, except that there is a minute order of the court printed in the transcript declining to settle the statement. This statement cannot be considered on appeal. The contract is set up in hæc verba in the findings. It will be necessary to call attention only to certain features thereof to show the impossibility of enforcing a specific performance thereof. The defendant thereby transferred and assigned all of the property described in the previous agreement, dated June 17, 1914, and agreed, in addition thereto, upon payment of a certain sum of money, "to immediately deliver possession of all and singular the formulas, receipts, and prescriptions in writing for the manufacture of perfumes and other toilet articles referred to in said contract of June 17, 1914, and herein referred to, and said party of the second part [the plaintiff] does hereby assume the control, ownership, and management thereof, and does hereby agree to carry on and conduct the business of the manufacture and selling of perfumes and other toilet articles referred to in said several contracts, and to employ the party of the first part [the defendant] as manufacturer of perfumes and other toilet preparations at a salary of $5 per day for each and every day's work that the said Eugene Moulie may perform in such capacity, such employment to continue until the said payments herein provided to be made by the said party of the second part are fully paid." Then follows the agreement that the parties "will treat each other with all due courtesy, respect, and friendship, and that any differences that have heretofore existed in the minds of either of them shall be forgotten and disregarded in their intercourse in business, and that they will each endeavor to so conduct and deport themselves as to earn and secure the mutual respect and esteem of the other." The plaintiff agrees to employ a person "of sufficient intelligence to acquire a knowledge of said business, but that such employment shall not be deemed permanent until the party of the first part [the defendant] shall have had an opportunity of testing the capabilities of such employé's fitness for his or her duties." It is further agreed that the plaintiff should have complete control of the business of selling and disposing of all the perfumes, etc., and that the sole function and duty of the defendant "shall be to prepare the said toilet articles and to distill and to prepare the said perfumes; in other words, his position shall be that of a manufacturing chemist of the articles and perfumes to be manufactured and prepared." Plaintiff agreed that he would use every effort to make the business profitable and successful, and that he would carry the trade-marks and name of " 'E. Moulie Floral Perfumery,' and that all perfumes and toilet articles prepared, manufactured, and sold shall bear such name and trade-mark, and that in the event that the business be sold one of the conditions of such sale shall be the perpetuation in the business so sold of the name of 'E. Moulie Floral Perfumery' and every trade-mark adopted by him." The court found as a fact "that defendant did not on the 29th day of June, 1915, have, nor has he since had, any written formulas, recipes, or directions for the manufacture of the perfumes, soaps, toilet articles, and preparations mentioned in said written agreement; that defendant is able to reduce the same to writing, but that he would, in order to reduce the same to writing, be required to perform personal services and exercise his individual skill for a period of three weeks." The court also found that plaintiff was willing to employ the defendant, but that the defendant refused to perform any services whatsoever for the plaintiff. The difficulty of enforcing such a contract specifically is well illustrated by the first judgment entered in the case, wherein it was decreed that the defendant within 30 days should "write out or cause to be written out and authenticated when so written out 150 formulas, recipes, and prescriptions for the manufacture of perfumes and other toilet articles mentioned in, and referred to in, said contract dated the 29th day of June, 1915, and that he shall deliver the same to said plaintiff." It was provided that upon writing out such formulas defendant was to receive $1,622, but in the event that he did not do so, the plaintiff should be released from the payment of that amount. The defendant was also enjoined from engaging in the business of manufacturing perfumes, etc., within the state of California for the period of five years.

[2, 3] Under the plain language of section 3390 of the Civil Code, the agreement could not be specifically enforced. That portion of the decree which sought to compel the defendant to deliver or write out secret formulas is impossible of enforcement. The agreement to deliver such formulas was "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." Civ. Code, § 3390, subd. 6. The contract itself was uncertain as to the secret formulas, and apparently the evidence was equally so. The secrets remained within the breast of the defendant, and he alone would know whether or not he had complied with the judgment which required him to deliver the formulas. The agreement specifically provided for the employment of the defendant at $5 a day. This agreement "to employ another in personal service" could not be specifically enforced by the defendant. Civ. Code, § 3390, subd. 2. That being true, there was no such mutuality of remedy as would permit specific performance. Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Los Angeles, etc., Co. v. Occidental Oil Co., 144 Cal. 528, 78 Pac. 25; Pacific, etc., Ry. Co. v. Campbell, etc., 153 Cal. 116, 94 Pac. 623. Without further discussion it is apparent that the first judgment was not supported by the findings. It appears from the recitals in the new judgment that, when the court announced its order vacating the previous judgment, the parties in open court in effect assented to a judgment which was not authorized by the findings or by the pleadings, and is only proper because of that consent. The judgment recites:

> "Thereupon in open court plaintiff, through his attorneys, Utley & De Lorimier, demand that they be relieved from all further dealings with said defendant, and that all plaintiff's obligations under that certain contract hereinafter mentioned be canceled and set aside, said defendant through his attorney, Harrison G. Sloane, consenting thereto, on condition that defendant also be relieved of all further dealings with said plaintiff, and that all his obligations under said contract be canceled and set aside."

Wherefore it was decreed:

> "That the plaintiff, H. L. Berry, is entitled to rescind said contract of June 29, 1915; that neither the obligations of defendant nor the plaintiff under said contract can be specifically enforced; that plaintiff, H. L. Berry, is entitled to be relieved, and he is hereby relieved, of all further obligations under said contract and of all the future conditions specified therein; that defendant, E. Moulie, is entitled to be relieved, and he is hereby relieved, of all further obligations under said contract and of all the future conditions specified therein; that each of said parties hold and retain such moneys or material goods as they now have in their possession."

As we have already said, the statement on appeal cannot be considered. Therein it is sought to show that there was some error in these recitals in the judgment, and that as a matter of fact plaintiff did not consent to such provisions. Upon the record before us, we must hold that that portion of the judgment now objected to was entered by consent.

The order and judgment appealed from are affirmed.

We concur: LENNON, J.; MELVIN, J.

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39 Cal. App. 621

TAGGART v. GRAHAM. (Civ. 2479.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919. Rehearing Denied by Supreme Court April 4, 1919.)

VENDOR AND PURCHASER ⚿137—BREACH BY VENDOR—FAILURE TO FURNISH CERTIFICATE OF TITLE.

Where a vendor contracted unqualifiedly to furnish purchaser an unlimited certificate of title by a named title company, failure to do so, though due to the refusal of company to make certificate, will be regarded as a breach, and purchaser not forced to accept, in lieu of said certificate, a certificate under the Torrens law.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by W. H. Taggart against Frank A. Graham. Judgment for plaintiff, and defendant appeals. Affirmed.

Bischoff & Thompson, of Escondido, for appellant.

H. W. Scheld, of San Diego, for respondent.

JAMES, J. The court in this action rendered judgment in favor of the plaintiff for the sum of $500, with interest and costs. The appeal is taken from such judgment and is presented on the judgment roll and a brief bill of exceptions.

Plaintiff contracted to purchase from defendant certain real property. He paid $500 on the execution of the contract and was to pay the further sum of $2,200 at a later date. The contract contained this agreement:

> "And the party of the first part (the defendant) on receiving such payment, at the time and in the manner above mentioned, agrees to furnish to the party of the second part an unlimited certificate of title of the Union Title Company of San Diego as of such date, showing title to said premises to be vested in the party of the first part free from all incumbrances. * * *"

Plaintiff alleged in his complaint:

> That he paid the $500, and that he "has stood ready, willing, and able to perform all of the covenants in said contract contained, and has so informed the defendant, that he would pay the defendant the sum of $2,200, remaining due on said contract, at any time that the defendant would deliver the said property to the plaintiff with a certificate of title made by the Union Title Company of San Diego, Cal., as agreed to be done by the defendant herein; that defendant, at no time, has ever offered to comply with the terms of said contract, in this, that the defendant would give the plaintiff a title to the said property under certificate of title from said Union Title Company of San Diego, but, on the contrary, the defendant has refused and still refuses so to convey said property to the plaintiff under said title so agreed upon."

It was further alleged by the plaintiff that, in lieu of the certificate of the Union Title Company, the defendant had demanded of the plaintiff that he accept a certificate under the Torrens land registration law, which defendant would not accept. The answer admitted that the certificate of the Union Title Company could not be furnished because of the refusal of said title company to make a certificate on the land in question, the refusal, as alleged, being based upon the fact that such title company would not issue certificates on land registered under the Torrens law. It was also alleged in the answer that no tender was made on the part of the plaintiff of the $2,200, the second payment to be made under the contract. There was no demurrer to the complaint, and by the allegations of the answer it was admitted that the defendant could not comply with his contract had a tender been made, in the particular of furnishing a certificate of title from the Union Title Company.

The court made findings in which it determined, among other things, that the property described in the contract was registered under the Torrens land act, and that the defendant was the holder of a registrar's certificate showing title to be vested in himself and wife free and clear of incumbrances and that the defendant had deposited a grant deed in due form with the Union Title Company conveying said property to the plaintiff, and that, although requested so to do, the Union Title Company had refused to furnish a certificate of title. These findings are supported by the evidence, as it was shown by officers of the Union Title Company that it was a fact that that company had refused to make any certificate of title upon the property in question because only of the fact that the land was registered under the Torrens land law. Premising his argument upon the fact that such refusal became then an arbitrary refusal on the part of the title company to furnish the certificate, appellant insists that where such is the case, and where a marketable title is available and offered to be transferred, the other contracting party may not insist upon the particular term of the contract as to the certificate to be supplied. He cites a number of cases, some California decisions, the general type being those where an architect of the owner arbitrarily refuses to issue a certificate showing the amount of work done by the contractor, even though the contract provides for the presentation of such a certificate as a condition to payment, the contractor constructing the work may, nevertheless, collect. These decisions, of course, are sustained on the ground of agency between the owner and his architect; the act of the agent being deemed the act of the principal. Counsel cite one case, Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634, which in its abstract text tends to sustain their contention. However, in that case the provision was that the defendant's title should be passed upon by a "lawyer or conveyancer" selected by the defendant, and it was said that an unreasonable refusal to make an examination of the title would not prevent the enforcement of the contract. We think, however, that a close analysis of any of the cases decided with the result contended for will show by the facts that an agency existed, by implication at least, between the contracting party, who agreed to furnish the certificate, and the person who was to furnish it. In this case the defendant contracted to prove good title by the certificate of an established title company. He contracted unqualifiedly to do this. It may have been that the plaintiff was not satisfied to accept the certificate of any other person or corporation, or a certificate issued under the Torrens land examination law Certainly it was a matter about which the plaintiff had the right to contract; and, it being apparently an essential condition imposed upon the defendant (and voluntarily assumed by the latter), there is no good reason why a failure to comply therewith should not be regarded as a breach of the contract. We think the court was right and that the judgment should stand.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 684

VEIRS v. ROBERTS et al. (Civ. 2628.)

(District Court of Appeal, First District, Division 1, California. Feb. 11, 1919.)

1. Deeds 🔑211(1)—Competency of Grantor—Evidence.

Evidence *held* to show that plaintiff's mother was competent at the time she executed deed of gift to plaintiff.

2. Deeds 🔑211(4)—Undue Influence—Evidence.

In action involving validity of deed of gift by mother to plaintiff daughter, evidence *held* to sustain finding for plaintiff on issue of undue influence.

3. Husband and Wife 🔑273(8)—Community Property—Right of Survivor—Transfer.

Where husband died leaving his belongings which were all community property to his wife and children, and the wife with the proceeds of her share purchased other property, a conveyance thereof to a daughter to the exclusion of the other children was valid; Civ. Code, § 1386, subd. 8, as to rule of succession when owner dies intestate leaving no issue, being inapplicable.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Annie Veirs against Frank Roberts and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. A. Barham, of Santa Rosa, and R. A. Long, of Willows, for appellants.

W. F. Cowan, of Santa Rosa, for respondent.

KERRIGAN, J. This is an action to quiet title brought by plaintiff against her brothers and sisters and the administrator of her mother's estate.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The questions involved in the appeal turn on the validity of a deed made by the plaintiff's mother to her of the property described in the complaint.

On March 2, 1881, William R. Roberts, Sr., died, leaving his belongings which were all community property, to Mary J. Roberts, his widow, and to his children. Out of the proceeds of her share of the estate, as distributed, Mary J. Roberts in the year 1888 purchased the property now in controversy for $3,500. In the year 1907 she made and delivered to her daughter, the plaintiff, a deed of gift of said property, and included in the gift the furniture and personal effects in the home. From the time of the purchase of said property by Mary J. Roberts until the time of her death she and the plaintiff lived upon it. At the time Mrs. Roberts delivered to the plaintiff the deed above referred to, she said to her, according to plaintiff's testimony: "Here is the deed to the place. Put it away and keep it until I tell you to have it recorded." The deed accordingly remained unrecorded until April, 1915, eight months before the death of Mrs. Roberts, at which time, upon the suggestion of her mother, the plaintiff placed it on record. The former's expressed desire to delay the recordation of the document was due, according to testimony given by the plaintiff, to her mother's wish to avoid discussion among the members of the family and consequent annoyance to herself. No question is raised as to the delivery of the deed. The defendants rely on the claim that the evidence shows that Mary J. Roberts was incompetent at the time the deed was executed, and that the deed was the result of undue influence exercised by the plaintiff over her mother, and they also contend that under the provisions of section 1386 of the Civil Code Mrs. Roberts had no legal right to make a transfer of the property.

[1, 2] As to the questions of incompetency and undue influence, an examination of the record discloses that there is an abundance of evidence to sustain the findings of the court in favor of the plaintiff. Several intimate friends and acquaintances of the deceased testified that Mrs. Roberts up to about the time of her death was of sound mind, "a strong-minded woman," a "particularly bright woman," "a positive woman," and that they had never observed in her any indication of weakness of mind, or any indication that the plaintiff or any one else exercised an undue influence over her. A typical witness upon this subject was C. C. Belden, who testified:

> "I knew Mrs. Roberts 15 or 20 years. I have had business transactions with her in purchasing land. I was very friendly with her, and had many conversations with her about business and other matters. She was a particularly bright woman, I would say, and her mind I would consider sound. I never saw anything that indicated any weakness of mind, or that she was under the control or dominion of Annie Veirs. She told me that was her intention; that she was going to deed the property to Annie Veirs. She told me that Annie had spent much of her time in taking care of her, and she thought the least she could do for Annie was to deed her the home place."

Mary C. Burnett, another witness, testified:

> "I knew Mrs. Roberts intimately for about 40 years, and visited her very frequently. She told me in 1907 that she had deeded the property to Annie. She said Annie was delicate; that she wanted to look out for her; that she was the most delicate child she had. Annie always lived at home with her. Mrs. Roberts appeared to be of very sound mind. Her death was caused by cancer, which she had removed from her face. She was very positive in her opinions, and I never saw anything indicating that she was under the control of any person."

Other evidence was to similar effect, and fully justified the finding of the court on the questions of competency and undue influence.

[3] The remaining contention of the appellants is that the property in question, being proceeds of community property of Mrs. Roberts and her predeceased spouse, must be regarded as held by her in trust for their children, and that the attempted conveyance of it to one of them to the exclusion of the others was a violation of the rights of the latter. This contention is based upon subdivision 8 of section 1386 of the Civil Code. That section provides, in part, as follows:

> "When any person having title to any estate * * * dies without disposing thereof by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this Code, * * * in the following manner: * * * (8) If the deceased is a widow, or widower, and leaves no issue, and the estate or any portion of it, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse. * * *"

The most cursory reading of the above quotation from section 1386 makes it apparent that it has no reference to the situation presented in this case, for two reasons: First, the property concerned in this litigation formed no part of the estate of Mrs. Roberts at the time of her death; and, second, the subdivision quoted in part provides a rule of succession to a certain character of property when the owner thereof shall die intestate and leaving no issue. It fully recognizes the right of the owner to dispose of such property either by gift inter vivos or by last will and testament, which right was exercised in this case.

It follows from what we have said that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

39 Cal. App. 593

PEOPLE v. RUIZ. (Cr. 635.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919. Rehearing Denied by Supreme Court April 3, 1919.)

1. INDICTMENT AND INFORMATION 🔑110(31)—INFORMATION IN LANGUAGE OF STATUTE—LIQUOR LAWS.

Information charging the selling of and the keeping of a place for the selling of alcoholic liquors in violation of Wyllie Local Option Law, §§ 13, 14, though required by good practice to designate the supervisorial district within which the alleged violations are alleged to have occurred, is sufficient if it follows the language of the act, and charges that the illicit sale was made in no-license territory.

2. CRIMINAL LAW 🔑1167(1) — APPEAL — HARMLESS ERROR—INFORMATION.

In prosecution for selling and distributing alcoholic liquors and keeping place where such liquors are kept for sale in no-license territory, where there was no proof but that the sale of the liquors was in dry territory, the failure of the information to designate the supervisorial district within which the offense took place was not prejudicial, under Const. art. 6, § 4½.

3. CRIMINAL LAW 🔑747—PROVINCE OF JURY—CONFLICTING EVIDENCE.

It is the sole province of the jury to resolve a conflict in the evidence.

4. CRIMINAL LAW 🔑1130(2)—APPEAL—SUFFICIENCY OF BRIEF.

Where no reason or ground is assigned by appellant in his brief in support of his claim that court erred in its rulings and no statement is made other than court erred in sustaining or overruling objection to specified question and answer, the appellate court will not assume the burden of examining a voluminous record in order to determine whether such rulings are correct.

5. INTOXICATING LIQUORS 🔑236(9, 11)—SALE AND KEEPING OF PLACE—SUFFICIENCY OF EVIDENCE.

In prosecution for unlawfully selling and distributing alcoholic liquors and unlawfully conducting a place for the sale and distribution thereof in no-license territory, in violation of Wyllie Local Option Law, §§ 13, 14, evidence *held* sufficient to sustain conviction.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Ygnacio Ruiz was convicted of violation of the Wyllie Local Option Law, and from judgment of conviction, and from order denying motion for new trial, he appeals. Judgment and order affirmed.

Scherrer & Guthrie, of Independence, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Upon an information containing two counts, defendant was convicted of a violation of sections 13 and 14 of the Wyllie Local Option Law (Stats. 1911, p. 599). He appeals from the judgment and an order denying his motion for a new trial.

[1, 2] The first count of the information charged that the defendant, "on the twelfth day of August, one thousand nine hundred and eighteen, at the said county of Inyo, state of California, * * * and within the boundaries of no-license territory, did then and there willfully and unlawfully sell, serve, and distribute alcoholic liquors to Oliver Roberts," etc. The second count charged that defendant, on the same day, "at the said county of Inyo, state of California, * * * and within the boundaries of no-license territory, did then and there willfully and unlawfully keep and conduct a place where alcoholic liquors were then and there kept for the purpose of sale and distribution. * * *" Appellant attacks both counts, claiming that in neither count are sufficient facts stated to constitute a public offense, and hence his objection to the reception of any evidence in support thereof should have been sustained. Appellant insists that each count of the information should have designated the supervisorial district within which the alleged offense was committed, and that failure so to do renders both counts fatally defective. The offense was charged in the language of the statute, which, as a general rule, is held sufficient. Ex parte Anixter, 166 Cal. 762, 138 Pac. 353. Conceding the better practice in such cases is to describe the supervisorial district or unit within which such infractions are alleged to have occurred, nevertheless, "where the information, merely following the language of the act, charges that the illicit sale was made in 'no-license territory,' that ought to be a sufficient statement of the offense to inform the defendant of the particular offense against which he is thus required to defend." People v. Perry, 25 Cal. App. 337, 143 Pac. 798. The offense charged was not in conducting a place where liquor was kept for sale, nor the selling of the same, but in doing such acts in no-license territory in Inyo county, without proof of which latter act the accused would be exonerated. Moreover, as shown by the evidence, the place where the defendant kept the liquors so sold was at his residence in Lone Pine, which was dry territory, and since the proof was addressed to no other place or sale other than that made therefrom, we would be constrained to hold, under section 4½ of article 6 of the Constitution, that, upon an examination of the evidence, the failure to designate the supervisorial district did not result in a miscarriage of justice, nor, indeed,

in the slightest degree prejudice defendant in his substantial rights.

[3] At the close of the people's testimony, defendant's motion to dismiss as to the second count of the information for want of sufficient evidence was denied, and this ruling is assigned as error. There is nothing in the contention, since the witness Oliver Roberts testified that at three different times on the day alleged in the information he went to the home of defendant in Lone Pine and bought alcoholic liquors. Upon such occasions Roberts did not enter the house, but upon applying to the defendant for the purchase of such liquors the latter went into his house and brought out the bottles containing the same and delivered them to Roberts in exchange for money. This evidence was strongly corroborated by the testimony of two other witnesses standing outside some 20 feet distant from the house. It is true that evidence was offered in behalf of defendant that tended to contradict the people's witnesses; but, at most, this merely raised a conflict, in passing upon which it was the sole function of the jury to determine.

[4] Error is predicated upon a number of rulings made by the court in admitting and rejecting evidence. In arguing these assignments of error, appellant not only gives no reasons for his contention, but the excerpts from the evidence, quoted in his brief, are made without any reference to the context or connection in which such questions and answers thereto were given. In the case of People v. McLean, 135 Cal. 306, 67 Pac. 770, it is said:

> "We again repeat what we have said before, that we will not examine alleged errors presented in this way. It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion"—citing People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833.

This court will not, in the absence of appellant's counsel assigning any reason or ground for his claim that the court erred in the rulings, or making any statement other than that the court erred in sustaining or overruling objection to the following question and answer, assume the burden of examining a voluminous record in order to determine whether such rulings are correct. Suffice it to say, there is nothing in appellant's brief showing the rulings made to be erroneous.

An examination of appellant's claims of misconduct, both of the district attorney and the trial judge, shows that they are wholly without merit; indeed, trivial, and merit no consideration.

[5] The evidence on behalf of the people, which, as shown by their action, the jury believed, was ample to justify the verdict that defendant was guilty as charged in both counts of the information, and examined in the light of appellant's brief the record discloses no prejudicial error.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 706

JONES v. INTERNATIONAL INDEMNITY CO. (Civ. 2490.)

(District Court of Appeal, First District, Division 1, California. Feb. 13, 1919. Rehearing Denied by Supreme Court April 10, 1919.)

1. Appeal and Error 🔑1011(1)—Review—Finding on Conflicting Evidence.

The appellate court will not interfere with a finding of fact of the trial court based on evidence directly in conflict.

2. Insurance 🔑132 — Indemnity Insurance—Cover Note as Present Contract.

A cover note, issued by an indemnity company and countersigned by the company's duly authorized representative as policies were required to be before becoming effective, being the memorial of a prior oral contract of indemnity insurance which the parties intended to take effect as stated in the note, was itself a contract of present insurance.

3. Insurance 🔑141(2)—Indemnity Insurance—Issuance of Cover Note—Waiver of Payment of Premium.

Where a valid present contract of indemnity insurance was made, and the insurer extended credit for 60 days, and unconditionally delivered its cover note, it thereby waived payment of the premium as a condition precedent to liability.

4. Insurance 🔑634(1)—Indemnity Insurance—Complaint — Performance of Conditions.

Complaint, alleging that defendant indemnity insurance company made a valid present contract and extended plaintiff credit for 60 days, and unconditionally delivered him a cover note, and that within 60 days plaintiff offered to pay the premium, and was at all times ready, willing, and able to pay, and that plaintiff promptly notified company of accident and injury covered by the policy, was sufficient, though not alleging generally plaintiff had performed all terms and conditions of cover note and policy form.

5. Insurance 🔑638 — Indemnity Insurance—Complaint—Allegation by Implication—Nonpayment.

Complaint on indemnity insurance policy that insurer refused to receive the tendered premium, denied liability, refused to defend claim and suit for damages against insured, who was compelled to pay a judgment obtained against him, etc., *held* sufficiently to allege by implication that the insurer had not paid to the insured the amount claimed.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by F. M. Jones against the International Indemnity Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Cooley & Lachmund and A. E. Cooley, all of San Francisco, for appellant.

John D. Murphey, of Berkeley, and Albert E. Carter, of Oakland, for respondent.

WASTE, P. J. This is an action brought by plaintiff against defendant to recover the amount plaintiff was compelled to pay in satisfaction of a judgment, obtained against him, and which he claims defendant should pay, under the terms of its policy of liability insurance theretofore issued to him. Plaintiff had judgment, and defendant appeals.

The amended complaint alleges that on the 14th day of July, 1916, plaintiff applied to the duly authorized agent of defendant for liability insurance covering plaintiff's automobile in the sum of $10,000; that the defendant by its said agent, in consideration of a premium to be paid within 60 days from July 14, 1916, by plaintiff, agreed to, and did, insure plaintiff from the said 14th day of July, 1916, for one year, and did then and there issue to plaintiff a covering note, signed by defendant's agent and dated July 14, 1916, providing insurance for a period of ten days from its date, and subject to the terms and conditions set forth in the policy forms as issued by the company on the risk of plaintiff. No policy of insurance other than the covering note was ever issued.

The defendant in its answer denied that plaintiff applied to its agent for liability insurance "on the 14th day of July, 1916, or at any time prior to the 18th day of July, 1916," and alleged that the cover note was obtained by plaintiff by fraud and concealment after an accident had happened to him.

The date of the transaction is material, for on the 17th day of July plaintiff, while driving his said automobile, ran into and injured one Meyer Marcovits. On the 19th day of July plaintiff went to the office of defendant's agent and procured the covering note, but did not say anything about the happening of the accident. He notified the company in writing, on the 21st, that the accident had occurred.

Marcovits brought an action against Jones for the damages for the injuries suffered by him, and secured judgment, which, with costs and expenses, amounted to $1,568.65, the amount sued for in the present action.

[1] The vital issue in the case is raised by the defendant's denial as to the date of the issuance of the covering note. A very strong circumstance in the case is found in the fact that the document bears date July 14, 1916. The plaintiff's evidence, corroborated by the testimony of his son, and of his stenographer, further supports the finding of the trial judge that it is correctly dated. The evidence of defendant's agent and other witnesses may well challenge the correctness of the statements, but the most that can be said on the point is that there is a direct conflict of the evidence. Under the well-known rule, the appellate court will not interfere with the finding of the lower court under such circumstances.

What we have said disposes of appellant's contention that the cover note was secured by concealment after the accident. Furthermore, the trial court found "that no act or representation of the plaintiff was done or made with any fraudulent intent whatever."

Counsel for appellant contend that, assuming there was no concealment, and that the covering note was valid, no insurance commenced thereunder until after the accident, because the note was made "subject to the terms and conditions" of appellant's policy form, one of which provides that "this insurance shall not commence until this policy has been countersigned by the company's duly authorized representative." This action, however, is not based on the policy but on the cover note. Law v. Northern Assurance Co., 165 Cal. 402, 132 Pac. 590.

[2] The cover note was so signed, and the fact that it was not delivered until after the accident is immaterial. It purports to take effect prior to the date of that occurrence, and the evidence establishes that it is the memorial of a prior oral contract for such a cover note agreed to in its essentials, and which the parties intended should take effect as stated in the note. Crawford v. Transatlantic Fire Ins. Co., 125 Cal. 609, 58 Pac. 177. It has long been established that such a covering note is itself a contract of present insurance. Law v. Northern Assurance Co., supra.

The cover note, as before stated, was subject to the terms and conditions set forth in the policy form as issued by the defendant company on the risk of plaintiff. The language used served to make the policy form a part of the covering note. The policy form was not set forth in, or made a part of, the complaint. The complaint contains no general allegation that plaintiff has performed all of the terms and conditions of the cover note, and of the policy form issued by defendant, on his part to be performed. Appellant contends, therefore, that the complaint lacked essential and necessary allegations and was fatally defective in that it was incumbent upon the plaintiff to aver such performance (citing Raulet v. Northwestern, etc., Co., 157 Cal. 235, 106 Pac. 292; Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac. 138; Arnold v. American Ins. Co., 148 Cal. 660, 84 Pac. 182, 25 L. R. A. [N. S.] 6), and was therefore subject to the general demurrer interposed in the court below, which was overruled.

[3, 4] The plaintiff claimed and alleged a valid, present insurance contract with the defendant, and that defendant extended him credit for 60 days and unconditionally delivered the cover note. Defendant thereby waived prepayment of the premium as a condition precedent. Raulet v. Northwestern, etc., Ins. Co., supra. The complaint further alleged that within 60 days plaintiff offered to pay the premium, and that he was at all times ready, willing and able to pay. Plaintiff promptly notified defendant of the accident and injury to Marcovits. On the face of the complaint no other or further conditions precedent on the part of the plaintiff appear. The general demurrer was therefore properly overruled. In the cases cited the complaints showed that there were certain conditions precedent, the performance of which was not alleged.

[5] The complaint fails to allege that defendant has not paid to plaintiff the amount claimed. However, from the allegations that defendant refused to receive from plaintiff the tendered insurance premium, denied any liability under the policy, refused to defend the claim and suit for damages brought against plaintiff, and that plaintiff was compelled to pay the judgment obtained against him, "whereby plaintiff has been damaged by reason of defendant's failure to comply with the terms of its policy" in the amount specified, such nonpayment can be implied. Curtiss v. Bachman, 84 Cal. 218, 24 Pac. 379; Richards v. Travelers' Insurance Co., 80 Cal. 506, 22 Pac. 939.

For the reasons stated, the judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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39 Cal. App. 580

RANSCH v. ARP. (Civ. 2385.)

(District Court of Appeal, Second District, Division 1, California. Feb. 4, 1919. Rehearing Denied March 5, 1919; Denied by Supreme Court April 3, 1919.)

1. APPEAL AND ERROR 🔑1040(10)—HARMLESS ERROR — OVERRULING DEMURRER TO COMPLAINT—DEFAULT JUDGMENT.

Where defendant defaults on overruling a demurrer to complaint, he is in no position thereafter to complain, where one count of the complaint, which is conceded to be good, demanded more money than amount of judgment.

2. ACTION 🔑28—CONTRACT OR TORT—WAIVER OF TORT.

Where one takes possession of premises under a claim of right, and refuses to pay rent, the owner may waive the tort and recover the rental value, without damages, in an action upon implied contract.

3. ACTION 🔑47—JOINDER — CONTRACT AND TORT.

One who waives a tort, and sues upon implied contract resulting thereunder, may join in his complaint a cause of action on book account.

4. PLEADING 🔑205(4) — MISJOINDER—DEMURRER.

Misjoinder of causes of actions must be specially demurred to.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Jay Ransch against James Arp. From a judgment entered against defendant after default, defendant appeals. Affirmed.

W. W. Kaye, of Bakersfield, for appellant.

Geo. E. Whitaker and Rowen Irwin, both of Bakersfield, for respondent.

JAMES, J. Appeal taken from a judgment entered against the appellant after default taken because of his failure to answer the complaint of plaintiff.

Appellant urges as ground for reversal the points presented under a demurrer which he interposed to the complaint. The grounds of demurrer were, first, that neither of the two alleged causes of action were sufficiently stated; and, second, that two causes of action were improperly joined, to wit, one upon an open book account, and one for the value of premises alleged to have been tortiously obtained and held. Plaintiff in his first alleged cause of action stated his case as follows:

> "That the said defendants are indebted to plaintiff in the sum of $1,575 upon an open book account accruing within four years last past. That the said defendants have not paid said sum of $1,575, nor any part thereof."

In the second cause of action it is recited with some detail that plaintiff was the owner of certain described premises in the city of Bakersfield and entitled to the rents thereof, and that defendants (there being two others besides this appellant) had, on a certain date, claiming the right thereto, entered into possession of the premises and refused to pay rent; that thereafter plaintiff's title to the real estate was quieted by a judgment of the superior court, and allegations as to the value of the premises being $75 per month were included, and the total asked for was the same sum as that alleged in the first cause of action, to wit, $1,575. The demurrer of appellant being overruled and no answer being filed, default was duly taken, and the court then made its judgment, reciting that appellant and one of the other defendants had failed to answer the complaint, and that the third defendant had stipulated for judgment in the sum of $1,050, and that the order of the court would be and was that plaintiff recover from the three defendants the said sum of $1,050, with interest and costs.

[1, 2] Assuming that the first alleged cause of action was not sufficient in its statement of facts, it is conceded that the second was, and that under the second count more money was demanded than that for which judgment was entered. Appellant having defaulted, he is not, therefore, in a position to complain. Neither do we think that the special ground of demurrer, that of misjoinder of causes of action, had merit. Plaintiff recited the facts respecting the manner in which defendants obtained possession of the premises and sued only for the value of the use thereof, without damages. As we understand the rule, it is permissible for a party to waive a tort and sue upon the implied contract resulting thereunder, where no special damages are made the subject of the cause of action. We think that the second cause of action presented by the complaint should be so considered.

[3, 4] Moreover, the objection as to misjoinder of causes of action was one which constituted a special ground of demurrer only. If we were to concede that the position of appellant was well taken as to that matter, nevertheless we could not say upon this record that it was made to appear that justice had miscarried. In such case section 4½ of article 6 of the Constitution requires that the judgment be affirmed.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 625

CULLEN et al. v. FOSTER. (Civ. 2415.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919. Rehearing Denied by Supreme Court April 3, 1919.)

1. JUDGMENT 🔑235—PARTIES — RECOVERY BY ONE COPLAINTIFF.

Where two persons join in action to recover from defendant money had and received, judgment, under Code Civ. Proc. § 578, may be rendered for one plaintiff, and for defendant as to the other.

2. APPEAL AND ERROR 🔑931(7)—REVIEW—PRESUMPTIONS.

Where defendant, being sued by two plaintiffs for money had and received, alleged that he was not indebted to plaintiffs or to either of them, it will be assumed on defendant's appeal from judgment for one of the plaintiffs and for defendant as to the other that the issue presented by the pleadings was tried, and that court found that defendant was indebted only to the plaintiff in whose favor judgment was rendered.

3. TRIAL 🔑396(3)—FINDINGS—CONFORMITY TO ISSUES.

Where defendant, being sued by two persons for money had and received, alleged that he was not indebted to plaintiffs or either of them, finding that defendant was indebted to only one of the plaintiffs was responsive to issues.

4. TRIAL 🔑396(3)—FINDINGS—CONFORMITY TO ISSUES.

In action against land broker for proceeds of sale of land alleged to have been conveyed by one plaintiff to the other for purpose of enabling latter to effect sale thereof, the proceeds to be for use and benefit of former, finding that defendant sold the property for latter and for her use and benefit was in conformity to pleadings, since latter plaintiff, having title as alleged, was entitled to proceeds.

5. APPEAL AND ERROR 🔑1071(1)—REVIEW—HARMLESS ERROR—FINDINGS.

In action by two persons against defendant for money had and received, where judgment was rendered for one plaintiff and for defendant as to the other, and where record shows defendant indebted to plaintiff for whom judgment was rendered, defendant was not prejudiced by inconsistency between finding of no indebtedness as to other plaintiff and the allegations of complaint.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Margaret Cullen and Merinda Foster against William H. Foster. Judgment for plaintiff Merinda Foster and for defendant as to plaintiff Margaret Cullen, and defendant appeals. Affirmed.

S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondents.

SHAW, J. In this appeal, prosecuted by defendant on the judgment roll, he upon highly technical grounds asks for a reversal of a judgment which, while against him as to Merinda Foster, was, as to the plaintiff Margaret Cullen, in his favor.

[1] The complaint is in two counts, the first alleging that defendant is indebted to plaintiffs in the sum of $1,475 for money had and received by him for their use and benefit, which sum, though demanded of defendant, he refused to pay to plaintiffs. In the second count, the subject of which is the same indebtedness, the transactions and evidentiary facts out of which the indebtedness arose are set out at length. Appellant makes no attack upon the sufficiency of either of these counts

in stating a cause of action, but insists that, since it was alleged that defendant was indebted to both plaintiffs, the court could not render judgment for one only. "The rule," says appellant, "is that where two or more persons join as plaintiffs in an action at law, all must recover or none." We do not so understand the law. Indeed, section 578, Code of Civil Procedure, provides:

> "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

[2, 3] Appellant, in support of his contention, relies upon McDonald v. Porah, 136 Cal. 301, 68 Pac. 817, and Weinreich v. Johnstone, 78 Cal. 254, 20 Pac. 556. Neither of these decisions is applicable to the facts in the instant case. In the first it was merely held that, since the husband was a necessary party in an action against the wife, judgment should not be taken against her without service upon such necessary party. The second case was an action upon a promissory note alleged to have been given to a copartnership. The proof was that the note was made to one of the partners in his individual capacity, and, as he was not a party plaintiff, it was held no cause of action was stated in his favor; hence section 578, supra, was not applicable. Moreover, defendant in his answer denied that he was indebted as alleged to plaintiffs, or indebted to either of them. In the absence of the evidence, which is not brought up, we may assume that the issue so presented was tried, in response to which the court found that defendant was indebted to the one in whose favor judgment was given. The findings, sufficient to support the judgment, are responsive to the issues tendered by the allegations contained in the first count and answer thereto.

[4, 5] The subject of the action was the net proceeds of the sale of a parcel of real estate, which, in the second count, plaintiffs alleged had been by Mrs. Cullen conveyed to Mrs. Foster for the purpose of enabling the latter to effect a sale thereof, the proceeds derived therefrom to be for the use and benefit of the grantor, to whom Mrs. Foster agreed to pay the same. In response to this allegation, the court found that at the time of commencing the action Mrs. Foster was the owner of the property in question, and that on June 19, 1913, defendant, as attorney in fact and agent of Mrs. Foster, and for her use and benefit, sold the same. Appellant's complaint as to this finding is that it is inconsistent with the plaintiffs' allegation, and hence error. We do not think so; but, conceding so much, defendant was not prejudiced by reason thereof. As shown by the record, he wrongfully obtained and appropriated to his own use money derived from the sale of a parcel of real estate, made under a power of attorney given him by Mrs. Foster, in which property she alleged her mother, Mrs. Cullen, had a beneficial interest. The effect of the finding was that, regardless of the capacity in which Mrs. Foster held the title, she was, for the purpose of obtaining redress for defendant's wrong, the legal owner thereof, and hence the court adjudged that the defendant pay the proceeds so wrongfully withheld to Mrs. Foster, to whom his obligation was due. Whether she responded to the one for whom she claimed to be trustee was a question with which he was in no wise concerned. In our opinion, the provisions of section 578, Code of Civil Procedure, are as applicable to the second count as they are to the first. In no event is he shown by the record to have been prejudiced by the rulings made.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 746

Ex parte NOYES. (Cr. 468.)

(District Court of Appeal, Third District, California. Feb. 14, 1919.)

HABEAS CORPUS ⚷30(1)—ERRORS—REFUSAL TO ISSUE SUBPŒNA.

Refusal to issue a subpœna for a witness by a committing magistrate or by the superior court is not ground for the release of a prisoner on habeas corpus, since an abuse of the court's discretion therein is mere error and does not go to the question of jurisdiction.

Original petition by Harley Noyes for a writ of habeas corpus. Writ denied.

Harley Noyes, in pro. per.

HART, J. The petitioner, who is confined in the Folsom state prison on a judgment of conviction and sentence for the crime of statutory rape, has, in propria persona, presented to me an application, by way of a petition, to be released from said imprisonment on the ground that he was denied a fair and lawful hearing before the committing magistrate who preliminarily examined the charge against him and committed him for trial therefor to the superior court, in that the said magistrate refused, upon the request of the petitioner, to issue subpœnas for certain witnesses and thus require them to appear and testify at the preliminary hearing in his behalf. Accompanying the petition and made a part thereof is a transcript of the proceedings of the preliminary hearing of the charge before said magistrate.

The refusal to issue a subpœna for witnesses by a committing magistrate, or even the refusal to cause one to be issued for a like purpose by the superior court, is not a ground for the release of a prisoner on habeas corpus. Discretion in that regard may be abused and error thereby committed, and thus a person examined or on trial on a criminal charge deprived of a lawful hearing or trial; but such abuse of discretion either by the magistrate or the superior court is mere error, which does not go to the question of jurisdiction to make the order of commitment or to impose judgment of sentence, and therefore is not reviewable in a proceeding under a jurisdictional writ. Matter of Jacobs, 176 Pac. 698.

It is proper to say that the transcript of the proceedings which took place before the magistrate at the preliminary hearing of the charge of which the petitioner was later convicted in the superior court, and for which he is under the restraint of which he here complains, discloses that, before the date of the examination, the prisoner exercised very little, if any, diligence in the matter of procuring the attendance of witnesses at the hearing to testify in his behalf. Moreover, it further appears from said transcript that the magistrate ordered a recess of the hearing for the purpose of giving certain witnesses named in court by the petitioner an opportunity to be present and testify in his behalf. However, as first stated above, the petition shows no legal ground for the issuance of the writ of habeas corpus, and, accordingly, the application therefor will have to be denied, and it is so ordered.

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39 Cal. App. 738

BROWN v. CHEVROLET MOTOR CO. OF CALIFORNIA et al. (Civ. 2722.)

(District Court of Appeal, First District, Division 2, California. Feb. 14, 1919. Rehearing Denied by Supreme Court April 10, 1919.)

1. MASTER AND SERVANT 🔑330(3)—AUTOMOBILE ACCIDENT—OWNER'S LIABILITY FOR INJURIES—PRIMA FACIE CASE.

Proof of ownership of automobile and its use at the time of the accident under owner's permission establishes a prima facie case against owner of responsibility for resulting injuries.

2. WITNESSES 🔑246(1), 269(15)—CROSS-EXAMINATION—EXAMINATION BY COURT.

In action against owner of automobile for injuries on ground that driver of automobile at time of accident was the agent of the owner, where owner's manager as plaintiff's witness testified to ownership of car, establishing prima facie case of agency of driver at time of injuries, any facts as to the nature of the agency was permissible on cross-examination to overcome the presumption arising from the prima facie case, and proper subject of inquiry by the court on direct examination.

3. TRIAL 🔑165—MOTION FOR NONSUIT—EVIDENCE DURING CROSS-EXAMINATION.

On the determination of motion for nonsuit, all the evidence produced on behalf of plaintiff, both on direct and cross examination, must be considered; the evidence elicited during cross-examination being regarded as plaintiff's evidence, and not as the evidence of party cross-examining.

4. MASTER AND SERVANT 🔑301(1)—NEGLIGENCE OF AUTOMOBILE BORROWER—LIABILITY OF OWNER.

The relation of principal and agent between owner of an automobile and the driver making owner liable for driver's negligence does not result from the mere borrowing of the machine by the driver, though he is an employé performing duties in another part of the state.

5. MASTER AND SERVANT 🔑301(1)—NEGLIGENCE OF AUTOMOBILE BORROWER—LIABILITY OF OWNER—ESTOPPEL.

Automobile dealer is not estopped from denying that automobile negligently driven by borrower was being used in its business by reason of having obtained manufacturer's or dealer's license under Motor Vehicle Act, § 9, by signing application providing for cancellation upon violation of provisions thereof, in view of section 32, such statute not making driver of licensed automobile the owner's representative, and not prohibiting use of registered machine by borrower or making owner liable for borrower's negligence.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Joseph A. Brown against the Chevrolet Motor Company of California and another. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Louis Ferrari, of San Francisco, for appellant.

Chickering & Gregory, of San Francisco, and H. L. Breed, of Oakland, for respondents.

HAVEN, J. Appeal from judgment of nonsuit rendered in an action for damages for personal injuries tried before a jury. The injuries are alleged to have been suffered by reason of the negligent driving by one West of an automobile owned by the defendant and respondent Chevrolet Motor Company of California, a corporation. West, the driver of the car, was named as a defendant in the complaint, but no service of summons was made upon him, and the case proceeded to trial against the motor company as the sole defendant, whose motion for nonsuit was granted at the close of the plaintiff's case.

Appellant urges two grounds for reversal of the judgment:

(1) In order to prove the agency of the driver of the automobile for the defendant company, and the consequent liability of that company, plaintiff called as a witness its president and general manager, and proved

by him that the automobile which caused the injuries complained of was then being used by West under the permission of said manager, and that it then bore the license number issued to the defendant company under a manufacturers' or dealers' license. The defendant's ownership of the automobile at the time of the accident was admitted by the witness on cross-examination.

During the direct examination of this witness, in response to questions propounded by the court, and upon cross-examination by defendant's counsel, further facts were elicited as to the relations between West and the motor company and the nature of the permission under which the automobile was being used at the time of the accident. It then appeared that Mr. West was employed by the defendant company as a traveling salesman to visit prospective dealers in that part of the state of California north of Sacramento and in southern Oregon; that he had no duties in connection with the defendant company in the vicinity of San Francisco; that on the Saturday afternoon preceding the day of the accident he asked the general manager of the company for permission to have a car on Sunday to take his family and mother out for a ride, which permission was granted to him. The manager testified that no other conversation took place between himself and Mr. West as to the use of the car. The accident occurred in San Mateo county while the car was being used on this Sunday pleasure excursion.

[1, 2] Under the recent case of McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417, and many authorities in other jurisdictions, proof of ownership of the automobile and its use at the time of the accident, under the permission of such owner, established a prima facie case of responsibility for the resulting injuries as against such owner. Appellant insists that, having established a prima facie case, any evidence in conflict therewith was a part of the defense, and that it was the province of the jury to weigh such conflicting evidence and to determine therefrom the ultimate liability of the defendant. The evident answer to this contention is that the fact which plaintiff sought to prove by the manager of the defendant company was the agency of the driver of the automobile at the time of the accident. Having elicited on direct examination information sufficient to establish a prima facie case of such agency, plaintiff could not properly object to further evidence on the same subject on cross-examination, which would overcome the presumption arising from the proof of the prima facie case. Any facts as to the nature of the agency were proper subjects of inquiry upon cross-examination, or by the court during the direct examination.

In a somewhat similar case the Court of Appeals of New York has recently said:

> "The presumption growing out of a prima facie case, however, remains only so long as there is no substantial evidence to the contrary. When that is offered, the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely upon it. Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507 [Ann. Cas. 1918B, 540]. Here the presumption arising from the fact of ownership was entirely destroyed by the other evidence." Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78.

[3, 4] Evidence elicited on cross-examination is regarded as testimony on the part of the party calling the witness, and not as evidence of the party cross-examining. Upon the determination of a motion for a nonsuit, all of the evidence produced on behalf of the plaintiff, both on direct and cross examination, must be considered. Taking all this evidence into consideration, it appeared without conflict that at the time of the accident the automobile was being used by West solely in a pleasure excursion, for which purpose it had been borrowed by him from the defendant company. The fact that he was an employé of the defendant company, performing duties in another part of the state, did not alter his relations as a borrower of the machine. Appellant's brief contains a statement that the plaintiff attempted to prove that West was engaged on business of the defendant company on the day of the accident. Our attention is not called, however, to any portion of the record sustaining this assertion, for which reason it cannot be considered.

The liability of an owner of an automobile for the negligence of its driver depends on the existence of the relation of principal and agent between the two. This relation does not result from the mere borrowing of such automobile. Hence it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of borrower. Berry on Automobiles, §§ 601, 684, 685; Hartley v. Miller, 165 Mich. 116, 130 N. W. 336, 33 L. R. A. (N. S.) 81; Chamberlain v. California Edison Co., 167 Cal. 500, 504, 140 Pac. 25; Segler v. Callister, 167 Cal. 377, 139 Pac. 819, 51 L. R. A. (N. S.) 772; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057. In the case of Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161, relied upon by appellant, the ownership of the automobile by the defendant was in controversy. Neither the owner of the automobile nor the driver was called as a witness by the plaintiff. Their testimony as to the ownership of the automobile was submitted as a part of the defendant's case, and was said to be "not without its suspicious or improbable features." It was held to have been the function of the jury to determine whether or not such testimony was sufficient to overcome the presumption arising from the proof of the holding of the license by the defendant. In the instant case there is no dispute as to the ownership of the automobile by the defendant; nor does any conflict arise between this admitted fact and the testimony of defendant's manager as to the nature of the permission under which the machine was in use at the time of the accident. In our opinion the motion for nonsuit was properly granted.

[5] (2) The second ground for reversal urged by appellant is that the respondent was estopped from denying that the automobile which caused the injuries complained of was then being used by said respondent in its business. This for the reason that the automobile was then operated under a manufacturers' or dealers' license, obtained by the defendant company under section 9 of the motor vehicle act (Stats. 1915, p. 397). The section referred to provides:

> "Every manufacturer of, or dealer in, motor vehicles may make application to the department, by mail or otherwise, upon a blank provided by the department, for a general distinguishing number or symbol, instead of registering each motor vehicle owned or controlled by him. * * * And the said department shall grant the application if satisfied of the facts stated in the application, and shall issue to the applicant a certificate of registration containing the name and business address of the applicant and the general distinguishing number or symbol assigned to him; * * * and every motor vehicle owned or controlled by such manufacturer or dealer shall be regarded as registered under such general distinguishing number or symbol until sold or until let for hire or loaned for a period of more than ten successive days."

The application made by respondent to the motor vehicle department for a license under the provisions of the above section was introduced in evidence by the plaintiff, and contained the following agreement signed by the respondent:

> "It is agreed by the applicant that in consideration of the issuance of this certificate of registration the number plates issued therewith shall be used only in connection with the business of the purchase and sale of motor vehicles and for no other purpose, and it is further specifically agreed that the said number plates shall not be used upon motor vehicles in the rental, taxicab, stage, trucking or transportation service, or in any commercial business other than that of manufacturer or dealer in motor vehicles, and that the said number plates shall remain continuously in the possession of the applicant. It is still further specifically agreed that upon failure to observe any of the provisions of this agreement the certificate of registration issued to the applicant may be canceled by the motor vehicle department, and that the number plates issued therewith shall be returned to, or may be taken possession of by, the motor vehicle department."

Appellant argues that, inasmuch as the manufacturers' or dealers' license obtained under the above application contained certain concessions to the licensee not made to the owner of a single automobile, the recipient of such a license is bound by the above agreement, and is thereby estopped from claiming that an automobile bearing such license number was used otherwise than in the conduct of its business.

To sustain this contention reliance is placed upon the case of Cargill v. Duffy (C. C.) 123 Fed. 721. In that case the owner of a licensed cab let the same, together with the horse and harness, by the day, for a fixed price, to a driver, to be used by him for the purpose of carrying passengers for hire in the streets of New York. It further appeared that the owner of the cab had applied for and received from the city of New York a separate badge for each cab owned, by him, and that when he rented the cab he furnished the driver with such hackman's badge. The ordinances of the city of New York with regard to the operation of cabs and hacks are set forth at length in the opinion. Among other provisions, it is prescribed that—

> "Every licensed owner or driver of any hackney * * * shall wear conspicuously on the left breast of the outer coat a metal badge * * * having engraved thereon the words 'Licensed Hack' and the number of such licensed hackney cab, said badge to be issued to and belong to said owner, and to be issued by him to any driver representing him, and for whom he shall be responsible."

Under these facts it was held that the owner of the cab made the cab driver his representative, and so held him out to the world, and was estopped as to the plaintiff from asserting the contrary, or setting up his contract with the driver. The liability of the owner was predicated on the fact that—

> The cab was "managed by a driver upon whom he [the owner] had placed a badge of authority which said to such injured person: 'This driver represents the owner of the cab and for the acts of the driver, such owner is responsible.' "

The issuance of this "hackman's badge," and its use under the provisions of the ordinance and the authority of the owner of the cab in the business of carrying passengers for hire, distinguish the above-cited case from the one now under consideration. The English cases discussed in the opinion are also distinguished by similar differences of facts and statutory provisions.

In Trombley v. Stevens-Duryea Co., 206 Mass. 516, 92 N. E. 764, the facts very closely resemble those here involved. There, as here, the evidence introduced by plaintiff consisted entirely of proof of the nature of the injuries received and damage suffered, the number of the registration tag attached to the automobile at the time of the accident, and the certificate of registration, corresponding with that number, showing that the automobile was registered in the name of the defendant. The defendant rested at the close of plaintiff's evidence and moved for a directed verdict in its favor, which was granted. Plaintiff's exceptions to this directed verdict were overruled by the appellate court. It was held that the proof of the certificate of registration, in which defendant's name appeared under the number corresponding to the number of the car, was competent evidence either of defendant's ownership of the automobile or of his absolute right to its exclusive possession and management. The opinion then proceeds:

> "But, to recover, the plaintiff also was required to offer some evidence of the defendant's responsibility for the driver's negligence. The Legislature might have said that whenever a registered automobile was operated on the public ways, the person, firm, or corporation named in the certificate should be liable prima facie to other travelers for accidents caused by its mismanagement. The statute, however, goes no further than to provide that for the purposes of the issuance, transfer, and revocation of certificates, and the enforcement of the penal provisions of the act, automobiles shall be identified by their register number, and their owner or owners ascertained from the certificate. The common law, therefore, controls, and there is no presumption, from his mere physical possession, that the person operating the automobile was the servant or agent of the corporation. He may have hired or borrowed it or wrongfully appropriated it to his own use, and in neither event would the defendant be chargeable with his misconduct. Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 23 L. R. A. (N. S.) 442 [134 Am. St. Rep. 648]."

Under a similar statute and somewhat similar facts, the Supreme Court of Rhode Island reached the same conclusion in Colwell v. Ætna Bottle & Stopper Co., 33 R. I. 531, 540, 82 Atl. 388. In the later Massachusetts case of Gould v. Elder, 219 Mass. 396, 107 N. E. 59, cited by appellant, the automobile was registered in the name of the son, but was owned by his father. It was used in connection with a garage business of which the father was found to be the owner. The statute of Massachusetts required automobiles to be registered in the name of the owner. It was found, therefore, that the automobile from the driving of which the injuries were received was not legally registered, and that its operation on the highway was illegal. For that reason the owner was held liable, while in the earlier Massachusetts case, in which no such fact appeared, the owner was absolved from liability.

Upon careful examination of the provisions of the California motor vehicle act, we are unable to find therein any provisions which made illegal the operation of the automobile by West under the circumstances of this case. The only penalty prescribed in the application blank, upon which appellant relies, is that, upon failure to observe the provisions thereof, the certificate of registration issued may be canceled by the motor vehicle department. The motor vehicle act itself in section 32 thereof provides that "any person violating any of its provisions shall be deemed guilty of a misdemeanor." The following sections provide for special penalties for the violation of several designated sections of the act. We do not find, however, any provision of the act which can be said to have been violated by the respondent company when it loaned its automobile to its employé, West, for the purpose of a pleasure excursion. Indeed, as pointed out by respondent, the provision of section 9 of the act that the registration there provided for shall be effective as to every motor vehicle so registered "until sold or until let for hire or loaned for a period of more than ten successive days" seems to imply a statutory permission for the loaning of such vehicle under the license for any period less than ten days. Nor does the California act contain any provision similar to that of the New York ordinance making the driver of a licensed automobile the representative of the owner thereof. In the absence of any such statutory provision, either creating a liability against the owner for use of a registered vehicle by a borrower thereof, or prohibiting such use, we are unable to perceive how it can successfully be contended that the respondent company represented West to be its agent in the operation of the automobile upon the day of the accident in such a manner as to constitute the basis of an estoppel against such respondent.

Judgment affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

39 Cal. App. 704

McARTHUR v. JOHN McARTHUR CO. et al. (Civ. 1878.)

(District Court of Appeal, Third District, California. Feb. 12, 1919.)

1. Costs 🔑3—Statutory Regulation.

The matter of costs is the subject of statutory regulation.

2. Corporations 🔑189(14)—Stockholder's Suit—Attorney's Fees as Part of "Costs."

An attorney's fee as part of the "costs" cannot be recovered in an action for an accounting charging individual defendants with fraud, conspiracy, and misappropriation of funds of defendant corporation, in which plaintiff's decedent was a stockholder.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

3. Costs 🔑32(1)—Attorney's Fee—Award to Losing Party.

The award of an attorney's fee as part of the costs to the losing party against the winning party was improper; the court having held that plaintiff really had no cause of action against defendants, but that they should afford her some compensation in bringing the action by paying her attorneys for their services.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by Mary McArthur, as administratrix of the estate of Archibald McArthur, deceased, against the John McArthur Company and others. From a judgment for plaintiff for attorney's fees, defendants appeal. Reversed.

W. D. Tillotson, of Redding, for appellants.

Theodore A. Bell, of Los Angeles, and Braynard & Kimball, of Redding, for respondent.

BURNETT, J. Plaintiff brought the action for an accounting, charging the individual defendants with fraud, conspiracy, and misappropriation of the funds of the corporation defendant, in which the decedent, Archibald McArthur, was a stockholder. The answer denied all the allegations of misconduct, and the court found in favor of the defendants upon all the material issues, but declared that the books of the corporation had been unscientifically kept, although "the method of bookkeeping employed has been substantially the same as that which has been maintained by said corporation ever since its organization, and that because of the unscientific system of bookkeeping the court finds that the plaintiff is excusable for bringing this action, and for that reason reasonable attorney's fees should be allowed attorneys for plaintiff." The trial court concluded that $2,000 was a reasonable amount of said fees and entered its judgment accordingly.

This judgment is certainly unique. We would be glad to know if there is any statute or any decision of the highest court of any state that justifies it. Our attention has not been called to any authority that supports it. Indeed, respondent's counsel have made no argument in this court whatever in the cause, and the reason, no doubt, is that they would not willingly contend for something that their judgment does not approve. It must have been the result of an inadvertence on the part of the trial judge that the award was made, and it is altogether probable that he would have corrected it if the opportunity had been presented.

[1] The rule is, of course, that the matter of costs is the subject of statutory regulation. The consideration is fully discussed by Justice Hart in Murphy v. Casey, 13 Cal. App. 781, 110 Pac. 956, and Duley v. Peacock, 17 Cal. App. 418, 119 Pac. 1086, and no necessity exists to add anything as to the general proposition.

[2] Again, there is no law in this state authorizing in this class of cases the imposition of an attorney's fee as a part of the "costs" that may be recovered. Furthermore, it has been held by the Supreme Court that the act of the Legislature in providing attorney's fees in a certain class of cases is unconstitutional and void. Builders Supply Depot v. O'Connor, 150 Cal. 265, 88 Pac. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712.

[3] But, beyond all this, the attorney's fee was awarded to the losing party and against the winning party. This cannot be done. Hering v. Simon, 77 Neb. 60, 108 N. W. 154.

The court held, in other words, that the plaintiff really had no cause of action against the defendants, but, nevertheless, they should afford her some compensation for her mistake in bringing the action by paying her attorneys $2,000 for their services.

Of course, if such a rule should prevail, it would multiply litigation and afford a bonanza to enterprising attorneys who are more mindful of the emoluments than of the honor of the profession. However, there can be no serious contention that the judgment for the attorney's fee can be upheld, and it is therefore reversed.

We concur: HART, J.; BUCK, Judge pro tem.

39 Cal. App. 687

FARNHAM v. HUSTON. (Civ. 2718.)

(District Court of Appeal, First District, Division 2, California. Feb. 11, 1919.)

1. Lost Instruments 🔑8(3) — Evidence — Deeds.

Evidence to establish a lost deed must be clear and certain, and the execution must be proved and its contents must be established, but it is unnecessary that witnesses should be able to testify with verbal accuracy to its contents; it being sufficient if they are able to state it in substance.

2. Lost Instruments 🔑8(3)—Deed—Sufficiency of Evidence.

Evidence *held* to establish substantial contents of lost deed with clearness and certainty.

3. Deeds 🔑93—Intention of Parties.

Effect must be given to the intention of the parties when it can be gathered from the instrument.

4. Deeds 🔑95—Description — Intention of Parties.

The entire description contained in the instrument should be resorted to for the purpose of ascertaining the intention.

5. DEEDS 🔑97—DESCRIPTION — INTENTION OF PARTIES.

A false term in a description will be rejected when necessary to effectuate the intention of the parties.

6. APPEAL AND ERROR 🔑1011(1)—REVIEW—CONFLICTING EVIDENCE—FINDINGS.

The findings of trial court on conflicting evidence will not be disturbed on appeal.

7. LOST INSTRUMENTS 🔑6—ACTION TO ESTABLISH LOST DEED—NECESSARY PARTIES.

In action to establish lost deed brought against grantor's subsequent grantee, it was unnecessary to make the representative of the grantor's estate a party to the action, since the decree does not adjudicate any rights of such estate.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by Martin H. Farnham against Edmond L. Huston. Judgment for plaintiff, and defendant appeals. Affirmed.

John C. Scott, of Oakland, for appellant.
I. I. Brown, of San Francisco, for respondent.

HAVEN, J. This is an action to quiet title and to establish a lost deed. Judgment was rendered for the plaintiff, from which defendant appeals. The execution and delivery of the deed in controversy and the existence of a consideration therefor are conceded by appellant, but it is insisted that there was no sufficient proof of the contents or character of the document to warrant its restoration. The evidence as to these matters may be summarized as follows:

Robert M. Ford testified that he was an attorney at law; that Mrs. Huston, the grantor in the disputed deed, and Mr. Farnham, the grantee, came to his office together the day before the execution of the deed; that Mrs. Huston then stated that she wished to have a deed made out to Mr. Farnham of certain property in East Oakland, and then left with the witness a copy of the deed to herself of the property referred to "for me to get the description"; that, on the afternoon of the same day, he personally typed the deed by filling in the blank spaces on "one of the ordinary 'Hardy' forms of bargain and sale deed," which he had in his office; that he was sure it was a bargain and sale deed, and, to the best of his recollection, he used the particular form referred to; that the description which he inserted in the deed was taken from the deed by which Mrs. Huston herself obtained title to the property; that, after being informed that the deed was lost, he obtained the description, which was inserted in the copy of the deed sought to be restored, from the county recorder's record of the same deed, and personally compared such description with the record just prior to the time this suit was filed; that, independently of the record, he remembered that the property described in the deed was on Fifteenth street, between Third and Fourth avenue, "on the north side I believe"; that Mrs. Huston and Mr. Farnham returned to his office the following day, and he then showed them the deed which he had prepared, and that, to the best of his knowledge, the copy of the deed attached to the complaint as "Exhibit A" is a true copy of the deed he prepared, and represents the contents of such deed. Floyd R. Gray, a notary public, testified that Mr. Ford, Mrs. Huston, and Mr. Farnham called at his office and presented a deed made out; that Mrs. Huston signed the deed before him and acknowledged it; that he then placed his seal on the document and made his record of the transaction in his notarial book. He then produced such book and read therefrom the following record:

> "Date, April 3, 1916. Executed by Martha E. Huston. Executed to Martin H. Farnham. Character of instrument, Deed. Consideration, $10.00. Date of instrument April 3, 1916. Legal fees, 50 cents."

Contemporaneously with the execution of the disputed deed, the parties thereto entered into a written agreement as to the consideration moving to the grantor. This agreement was prepared by the same attorney who prepared the deed and at the same time. It was admitted in evidence and contains the following recital:

> "That whereas said Martha E. Huston has this day granted, sold and conveyed to said Martin H. Farnham, (subject to a life estate reserved to said Martha E. Huston) certain property on the north side of East 15th street, Between 3rd and 4th avenues, in Oakland, Alameda county, California, as appears by a deed duly executed this day. * * *"

[1, 2] Evidence to establish a lost deed must be clear and certain. The legal execution of the document must be proved, and its contents must be established "not literally but substantially." It is not necessary, however, "that the witnesses should be able to testify with verbal accuracy to its contents; it is sufficient if they are able to state it in substance." Kenniff v. Caulfield, 140 Cal. 34, 43, 73 Pac. 803, 806. In the instant case, the date of the deed, the names of the parties, and the expressed consideration are supplied by the notarial record. The description of the property is identified by the testimony of the attorney who prepared the deed to the effect that he copied it from another deed, with the record of which he subsequently made comparison. Appellant claims that it does not clearly appear that the deed was a grant. The testimony of

the witness Ford is positive and uncontradicted that it was a bargain and sale deed, and the contemporaneous agreement signed by Mrs. Huston recites that she "has this day granted, sold and conveyed to said Martin H. Farnham" certain property, which was identified as being the same property as is described in the deed in controversy. We perceive no reason why the evidence above set forth should not have been regarded as a sufficient compliance with the rule requiring the substantial contents of a lost document to be established with clearness and certainty.

The property to which respondent's title was quieted by the decree is described in the first paragraph of the complaint as "commencing at a point on the *northeastern* line of East 15th street." It is then alleged that Martha E. Huston conveyed "the above-described property" to respondent by a deed, a copy of which is annexed to the complaint as Exhibit A. The description of the property as contained in such exhibit is as follows:

> "Commencing at a point on the *northwestern* line of East 15th street (formerly Madison street), distant thereon 112 feet 6 inches northwesterly from the northwestern line of Fourth avenue (formerly Patton street), and running thence northwesterly along said line of East 15th street 37 feet 6 inches; thence at right angle northeasterly and parallel with Fourth avenue 100 feet; thence at right angle southeasterly and parallel with East 15th street 37 feet 6 inches, and hence at right angle southwesterly and parallel with Fourth avenue 100 feet to the *northwestern* line of East 15th street and the point of commencement. Being a portion of lots 7 and 8 in block 75 as said lots and blocks are delineated and so designated upon that certain map entitled Higleys Map of Clinton, of record in Liber B of Deeds at page 537 in the office of the county recorder of said Alameda county."

The findings and decree restore the deed as it appears in the exhibit, but quiet respondent's title to the property as described in paragraph 1 of the complaint. A variance is claimed between the description of the property as alleged in the body of the complaint and the proof furnished by the restored deed with its differing point of commencement. The court found, however, "that the land described in said Exhibit A is the identical land described in paragraph 1 of the complaint herein." We are of the opinion that the evidence supports this finding, and that the trial court did not err in quieting respondent's title to the property as described in the body of the complaint. The deed was restored as originally prepared and executed. No attempt was made to reform it. The witness Ford testified:

> "There is an error in the description as shown by the records; but whether that error was in the deed to her or the record, I don't recollect just how that occurred, but the word 'northwestern' in the top line, and the word 'northwestern' in the ninth line, should both be 'northeastern.'"

It was proved that the same error persisted in the subsequent deed from Mrs. Huston to appellant, who is her surviving husband, which deed the latter introduced in evidence. Appellant also testified that he knew of no other property which his wife had besides this house. As already stated, the attorney who prepared the deed was instructed to take the description from the deed by which Mrs. Huston herself acquired title to the property. It thus appears that the grantor intended to convey the only property which she owned in the knowledge of her husband. An examination of the description contained in the restored deed discloses that the point of commencement must be corrected from the northwestern to the northeastern line of East Fifteenth street in order that any effect may be given to the subsequent calls of the deed. The second call runs northeasterly parallel with Fourth avenue, and the third call proceeds, at a right angle, southeasterly and parallel with East Fifteenth street. The directions of these lines show that the only possible course of East Fifteenth street is in a northwesterly and southeasterly direction, and that there can be no northwesterly line of such a street. By correcting the error in accordance with the testimony of the witness Ford a consistent description is obtained. Otherwise the proved intention of the grantor must be disregarded.

[3-5] "The rule is, that effect must be given to the intention of the parties, when it can be gathered from the instrument." Wagenblast v. Washburn, 12 Cal. 208, 212. "And the entire description contained in the instrument should be resorted to for the purpose of ascertaining the intention." Serrano v. Rawson, 47 Cal. 52, 55. A false term in a description will be rejected when necessary to effectuate the intention of the parties. White v. Luning, 93 U. S. 514, 524, 23 L. Ed. 938; Hamm v. City of San Francisco (C. C.) 9 Sawy. 31, 46, 17 Fed. 119. In Walsh v. Hill, 38 Cal. 481, these rules were applied to the correction of an erroneous starting point as being inconsistent with the other calls of a deed.

[6] Appellant introduced in evidence a subsequent deed from such grantor to himself of an undivided one-half interest in the property in controversy. This conveyance was a gift deed in form, and the trial court found that it was executed "in consideration of love and affection and such considerations as are expressly set forth on the face of the said deed, and for no other considerations." We cannot say that this finding is unsupported by the evidence, notwithstanding that the appellant testified that such deed was made

in consideration of his turning over to his wife a fraternal life insurance policy upon his life. That transfer was made over a month before the deed was executed. Appellant further testified that he had no knowledge of the execution of the lost deed to respondent at the time the deed to himself was executed. It also appears that the husband and wife executed mutual wills in favor of each other contemporaneously with the execution of this deed. Mrs. Huston has since died, and her estate was in process of administration at the time of the trial. Construing this evidence most favorably for appellant, a conflict arises between the recitals of the deed and the statements of appellant. This conflict was resolved by the trial court against the appellant, and we may not disturb its finding.

[7] It was not necessary that the representative of the estate of Mrs. Huston should have been made a party defendant in the action. Even if a proper party, he was not a necessary party, as the decree does not adjudicate any rights of that estate.

We find no error in the record, and the judgment is therefore affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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39 Cal. App. 647

PATTERSON v. RUTHERFORD et al.

(Civ. 2694.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1919.)

APPEAL AND ERROR ⚷612(2, 3)—RECORD ON APPEAL—AUTHENTICATION.

Under Supreme Court rule 29 (176 Pac. xii), the judge alone is authorized to authenticate the papers used at the hearing below and required to be furnished the appellate Court by Code Civ. Proc. § 951, and this must be done by incorporating them in the bill of exceptions, or in accordance with the provisions of section 953a.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by B. F. Patterson against A. H. Rutherford and another. From an order taxing costs of the named defendant after judgment that defendants recover their costs incurred in the action, the named defendant alone appeals. Affirmed.

Zabala & Sargent, of Salinas, for appellant.
Hugh R. Osburn, of King City, for respondent.

LANGDON, P. J. This is an appeal from an order made in the superior court of the state of California for the county of Monterey taxing the appellant's costs after judgment in the action that he and the other defendants recover their costs and disbursements incurred in the action.

Respondent objects to a consideration of the appeal upon its merits: First, because it does not appear by the certificate of the clerk of said superior court to the transcript that any undertaking on appeal has been given, or that the same has been waived by stipulation as required by section 953 Code of Civil Procedure; and, second, that the transcript contains no bill of exceptions, and the papers contained therein are not authenticated in any way as the papers used on the motion in the trial court, as provided for by rule 29 of the Supreme Court (176 Pac. xii).

The appellant sets out in the transcript a copy of the notice of appeal and the order, the memorandum of costs, judgment, notice of motion to tax costs, and certain other papers and records in the case, to which a certificate of the clerk is appended that they are full, true, and correct copies of the originals on file and of record in his office.

Section 951, Code of Civil Procedure, requires the appellant to furnish the court with a copy of the notice of appeal, a copy of the judgment or order appealed from, and all papers used on the hearing in the court below.

Rule 29 of the Supreme Court provides how the papers are to be authenticated, and is as follows:

> "In all cases of appeal to this court from the orders of the superior courts the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in the bill of exceptions except where another mode of authentication is provided by law."

It has been held repeatedly that the judge alone is authorized to authenticate the papers used at the hearing, and this must be done by incorporating them in the bill of exceptions, or in accordance with the provisions of section 953a Code of Civil Procedure. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; San Diego Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; Hertel v. Emireck et al. (Sup.) 174 Pac. 30.

The appellant having failed to comply with rule 29 of the Supreme Court or with provisions of section 953a, Code of Civil Procedure, in providing a proper record which may be considered by an appellate court, we are compelled, in the absence of a showing to the contrary, to assume that the order appealed from was properly made.

This conclusion, as it disposes of the appeal, makes it unnecessary for us to discuss any other points raised in the briefs.

The order appealed from is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

39 Cal. App. 680

WILCOX et al. v. VARNEY et al.
(Civ. 2065.)

(District Court of Appeal, Second District, Division No. 2, California. Feb. 10, 1919.)

DEEDS ⊂⟹176 — BUILDING RESTRICTIONS — EVIDENCE.

In action to enjoin landowners from erecting buildings upon a certain lot on the ground of noncompliance with building restrictions, evidence *held* insufficient to show that there were any building restrictions.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by C. M. Wilcox, as administrator of the estate of Merle L. Wilcox, deceased, and the Title Insurance & Trust Company, against Harry E. Varney, Amelia Lombardi, Ernest Kirkpatrick, and Carrah Kirkpatrick. Judgment for defendants, and plaintiffs appeal. Affirmed.

Jensen & Jensen and Chas. H. Brock, all of Los Angeles, for appellants.

Earl D. Killion, of Los Angeles, for respondents.

THOMAS, J. This is an appeal from a judgment of nonsuit granted on the ground that "the facts do not make out any cause of action against the defendants, or either of them, in behalf of plaintiffs, or either of them." Both parties to this action contend that the court granted the said judgment on two grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that at the trial plaintiffs failed to make out a case against the defendants, or either of them. In this they are both wrong. The record discloses the following facts: (1) That a demurrer, general and special in terms, was interposed to plaintiffs' second amended complaint, which is the complaint set out in the transcript, and the same was overruled; (2) that on the day of trial defendants objected to the introduction of any testimony on the ground that the complaint did not state a cause of action. This was denied. The court took all the testimony that plaintiffs desired to offer, and at the close of plaintiffs' case granted the motion referred to herein.

The action is one asking for an injunction enjoining the defendants, and each of them, from permitting certain buildings to remain upon a certain lot, and ordering them to remove same therefrom, and for damages because of noncompliance with certain "building restrictions." It is alleged in the complaint, and denied by the answer:

"That, pursuant to a general plan of improvement for the benefit of all lots in said tract, and for each of said lots, uniform building restrictions were by the plaintiff Title Insurance & Trust Company placed thereon; that each and every lot sold in said tract was by the plaintiff Title Insurance & Trust Company sold and conveyed by recorded deed, each lot subject to uniform building restrictions inserted in the deed thereof, in words and figures following, to wit: 'That said premises shall be used for residence purposes only; that no building or structure whatever other than a private residence with the customary outbuildings, including a private stable, shall be erected, placed, or permitted on said premises, or any part thereof, and that any such residence shall cost and be fairly worth not less than fifteen hundred dollars ($1,500.00), and shall be located not less than 25 feet from the front line of said premises, and said building shall face the front line of said premises; that no part or parts of any outbuilding or private stable which may be erected upon said premises shall extend more than 50 feet from the rear line of said premises; that no intoxicating liquors of any character shall be bought, sold, or kept for sale on said premises or any part thereof; that said premises, or any part thereof, shall not be sold, conveyed, leased, rented to or occupied by any person of African, Japanese, or Mexican descent: Provided, that a breach of any of the foregoing conditions shall cause said premises to revert to the said grantor, its successors or assigns, each of whom, respectively, shall have the right of immediate re-entry upon said premises in the event of any such breach: Provided also, that a breach of any of the foregoing conditions, or any re-entry by reason of such breach, shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value as to said premises, or any part thereof, but said conditions shall be binding upon and effective against any owner of said premises whose title thereto is acquired by foreclosure, trustee's sale, or otherwise: Provided, further, that all and each of the restrictions, conditions, and covenants herein contained shall in all respects terminate and end and be of no further effect, either legal or equitable, and shall not be enforceable after January 1, A. D. 1920.'"

We have gone over the record in this case carefully, and we fail to find any evidence to support these allegations.

The evidence shows that the Southern Pacific Company, a creditor of the plaintiff Title Insurance & Trust Company, conveyed certain lands, including those claimed by the defendants herein, to it, and that a certain "syndicate," composed of Weddington, Cooper, and Rose E. Whitley, conveyed to it certain other lands, and that the Title Insurance & Trust Company held all of these lands in trust, but had nothing to do with negotiating the sales. It appears from the evidence that all the lands contained in the Lankershim tract were sold pursuant to "a general plan of improvement." Counsel in putting his questions used the word "restrictions" as, for instance:

"Q. You say all these lands were sold pursuant to a general plan of improvement for the

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⊂⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes benefit of all the lands in the tract? A. Yes, sir. Q. And these restrictions were contained in all the deeds? A. Yes, sir."

We are at a loss to know what it was that counsel was referring to in the last question. There was some discussion between counsel and the court, in which there was some reference to a "certificate of title" and "some deeds," but no certificate of title, or anything purporting to be such, is disclosed by the evidence here. We assume, however, that it was something contained in these that was referred to in asking the said question. That we are correct in this assumption is probably proven by the following testimony:

"Q. Mr. Greene, with reference to the restrictions on the lots in the Lankershim tract, were all the restrictions uniform as to the residence lots? A. Yes, sir. Q. The same as alleged in the complaint? A. Yes, sir. Q. In the deed shown here ——— Mr. Bowman: I object to that. Q. Do you know whether or not there were uniform building restrictions on all the residence lots in the tract? Mr. Bowman: I object to that. The Court: The same ruling. There is only one way here to prove that in the face of objection, and that is by the production of the documents. Mr. Jensen: Documents to prove that there were restrictions? The Court: The document was in writing, and the only way it can be proved is to produce the paper. Mr. Jensen: There is no paper to show the general plan of the improvement. We will have to show that by the testimony of the witnesses."

The only evidence there is of the so-called "restrictions" is that shown by plaintiff's Exhibit 1, but that does not contain any reference to lot 15 in block 8 of said tract, which is the lot in controversy here. There is no evidence to show that any of the land conveyed to either of plaintiffs here by others than the "syndicate" was subject to said, or any, restrictions, and so far as these defendants, or any of them, are concerned, the only evidence that they, or any of them, knew of said, or any, restrictions is the following testimony of the witness Weddington:

"Q. Did you speak to either or any of the defendants with reference to building restrictions before they began building on the lot? A. I did. Q. What did you tell them? A. I spoke to Mr. Kirkpatrick about his building. Q. What did you tell him, if you remember? A. Mr. Wilcox came to see me and said— The Court: Never mind what Mr. Wilcox told you; you are asked what you told Mr. Kirkpatrick. A. I told Mr. Kirkpatrick what Mr. Wilcox told me. Mr. Bowman: Just a moment; I would like to know whether he is testifying as the messenger of Mr. Wilcox or in some other capacity. The Court: If you want it in, all right. You have no objection to the question. You are asked as to what you told Mr. Kirkpatrick. Mr. Bowman: I withdraw the objection. A. I told Mr. Kirkpatrick Mr. Wilcox had come to see me and said that his house did not comply with the restrictions at that time. And I looked it over and measured the distance from the rear line, and that's all I told him."

By what stretch of imagination can that be construed to prove plaintiffs' said contention? We are of the opinion that in this it wholly fails. There is no proof that the defendants, or either of them, had any deed, except as shown by the pleadings; that is there is no evidence offered to sustain the allegations of the complaint which are denied in the answer. We are left totally in the dark as to this deed or its contents, covenants, or restrictions.

Thus confronted, we are of the opinion that is is wholly immaterial here whether the alleged "restrictions" constitute a "covenant running with the land." or a "condition subsequent," and that the judgment of nonsuit was properly granted.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

39 Cal. App. 601

PEREZ v. HARTMAN. (Civ. 2624.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919. Rehearing Denied by Supreme Court April 3, 1919.)

1. MUNICIPAL CORPORATIONS ⚷705(4)—USE OF STREETS—CUTTING CORNERS — NEGLIGENCE.

Violation of Motor Vehicle Act, requiring vehicles approaching intersection of street, road, or highway to keep to the right of and run to and beyond the center of such intersection, in turning to the left, constitutes negligence.

2. MUNICIPAL CORPORATIONS ⚷705(4)—USE OF STREETS—AUTOMOBILE ACCIDENT—CUTTING CORNERS.

Automobile driver is liable for collision with motorcyclist, where accident would not have taken place but for automobile driver's violation of Motor Vehicle Act, prohibiting the cutting of corners in turning to the left at street intersection, though accident occurred after he had turned into the intersecting street 15 or 20 feet from the curb line of the street along which he had been driving.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Pedro Perez against M. B. Hartman. From a judgment for defendant, and from an order denying motion for new trial, plaintiff appeals. Judgment and order reversed.

Charles H. Mattingly, of Los Angeles, for appellant.

Hutton, Jensen & Fogel, of Los Angeles, for respondent.

SHAW, J. Action to recover damages for personal injuries alleged to have been sustained as a result of defendant's negligence in operating an automobile on Porter avenue. Judgment went for defendant, from which, and an order denying plaintiff's motion for a new trial, plaintiff prosecutes this appeal.

In addition to denying defendant's alleged negligence, the answer set up contributory negligence on the part of plaintiff, as to which, however, the court made no finding, nor, indeed, was any finding made touching the issue of defendant's negligence.

The finding of the court which appellant attacks for want of sufficient evidence to support the same is that the collision between plaintiff's motorcycle and defendant's automobile occurred, not on Porter avenue, but on Brand boulevard, approximately 15 or 20 feet from its intersection with Porter avenue, as a result of which plaintiff was seriously injured, but that said collision and the resulting injury to plaintiff was not due to any negligence on the part of defendant. In other words, the finding is to the effect that defendant's negligence, if established, was not the proximate cause of plaintiff's injury.

While the evidence touching the question is meager, it appears therefrom that Porter avenue (hereinafter designated as the avenue), some 45 feet in width, is intersected at a right angle by Brand boulevard (hereinafter designated as the boulevard), which is 100 feet in width. Immediately before the accident wherein the injury was sustained, plaintiff, operating a motorcycle, was traveling southerly on the right side of the avenue, and defendant was driving his auto on the right side thereof, going northerly. The speed was such that, if continued along said avenue, they would have passed each other at about the center of the boulevard. When defendant reached a point in the avenue corresponding with the southerly line of the boulevard, into which he intended to turn, he, instead of crossing over beyond the center thereof and entering the same on the right side, turned sharply across the avenue and along a line corresponding with the southerly line of the boulevard. When defendant changed his course from the line in the avenue along which he was traveling, plaintiff, traveling at a speed of some 15 or 20 miles, and at right angles to the line in which defendant was crossing the avenue, had reached a point in the boulevard. It thus clearly appears that if defendant had observed the provisions of the Motor Vehicle Act (St. 1913, p. 639), which require that "all vehicles approaching an intersection of a street, road or highway with the intention of turning thereat, shall, in turning to the right, keep to the right of the center of such intersection, and in turning to the left shall run to and beyond the center of such intersection, passing to the right thereof, before turning such vehicle toward the left," he and plaintiff would have safely passed each other on the avenue at a point between the lines of the intersecting boulevard.

[1] Defendant's failure to comply with these provisions constituted negligence. The court, however, found that such negligence did not contribute to plaintiff's injuries, because, as found, the collision occurred at a point on the boulevard distant approximately 15 to 20 feet from the curb line on the avenue. This finding is based upon defendant's testimony to the effect that, as he crossed the avenue and reached the line of the boulevard, he saw a team driven southerly thereon approaching his line of travel from the north, and distant some 30 feet from the line on which he crossed, immediately behind which team he saw plaintiff, who, in crossing the boulevard intersection, seemed to be about to pass to the right of said team, at which time defendant's attention was attracted in the opposite direction; that, when he had reached a point on the boulevard some 20 feet from the curb line of the avenue, he felt a shock to his car caused by the impact, and, looking towards the front thereof, saw that the left side lamp was broken and the motorcycle under the car, while plaintiff was found lying back of a lamp post some 5 or 10 feet back of the point where the collision occurred. There was other testimony to the effect that the motorcycle was struck by the auto while within the lines of the avenue, and plaintiff thrown forward to the lamp post where he was found. This evidence, however, was disregarded by the learned trial judge, who accepted as satisfactory the theory, based upon defendant's testimony, that at a point 5 or 10 feet from the lamp post, plaintiff's motorcycle, which defendant did not see, collided with the left front lamp, breaking it, leaving the motorcycle under the car and plaintiff lying crosswise of the parkway between the curb line and sidewalk, behind a lamp post opposite from the car, at a point which it seems he could not have reached, except upon the theory that he was projected on the line of a curve.

[2] However, accepting the testimony at the value accorded it by the trial court, and assuming that the accident occurred on the boulevard some 15 or 20 feet from the curb line of the avenue, it is, nevertheless, in our opinion, clear that in the absence of contributory negligence on the part of plaintiff—and there is no evidence nor finding of such fact—the collision would not have occurred, had defendant proceeded, as he should have done, along the right side of the avenue to a point beyond the center of the intersecting boulevard and then turned into it on the right side thereof. To us it seems immaterial that the collision occurred on the boule-

vard, if the wrongful act of defendant in crossing the avenue in front of plaintiff's line of travel forced him in the exercise of due care to swerve his cycle to the boulevard in an effort to escape the threatened injury. It was defendant's negligent act that created the dangerous situation, to escape which plaintiff in the exercise of due care was forced from his line of travel on the avenue, causing him to collide with defendant's automobile. The findings complained of are not supported by the evidence.

The judgment and order are reversed.

We concur: CONREY, P. J; JAMES, J.

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39 Cal. App. 619

FIRST NAT. BANK OF CORONA v. COPLEN. (Civ. 2509.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919.)

1. BANKS AND BANKING ⟹134(1)—APPLICATION OF DEPOSIT TO DEPOSITOR'S DEBT.

The right of a bank under Civ. Code, § 3054, to enforce its lien upon a deposit and appropriate it in the extinguishment of the depositor's matured indebtedness, is not dependent upon the consent of the depositor.

2. BANKS AND BANKING ⟹134(1)—APPLICATION OF DEPOSIT TO DEPOSITOR'S DEBT—SECURED AND UNSECURED NOTES—STATUTE.

In view of Code Civ. Proc. § 726, providing that there shall be but one action for the recovery of any debt secured by mortgage, a bank could not enforce its lien by applying a deposit in cancellation of a note secured by a mortgage, but could apply it only to an unsecured note.

3. COSTS ⟹260(4) — FRIVOLOUS APPEAL — DAMAGES.

Where plaintiff bank held depositor's note secured by a mortgage upon hay, and after applying the deposit on an unsecured note attached the hay for balance due thereon, plaintiff's entire claim was secured by the hay, and defendant was not prejudiced by such application of deposit, and his appeal is frivolous, and under Code Civ. Proc. § 957, the court must add to the costs such damages as may be just.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by the First National Bank of Corona against J. B. Coplen. Judgment for plaintiff, and defendant appeals. Affirmed.

G. R. Freeman, of Willows, and McFarland & Irving, of Riverside, for appellant.

Walter S. Clayson, of Corona, and A. H. Winder, of Riverside, for respondent.

SHAW, J. On March 22, 1917, plaintiff held two notes made to it by defendant, one for $1,200, secured by mortgage upon 150 tons of hay, the other, unsecured, for $2,000, and both of which were then due. Defendant was a general depositor in said bank and at the time had on deposit therewith $393.38, which sum the bank, without notice to him, applied upon the unsecured note of $2,000. Upon learning of this fact, defendant telephoned the bank he wanted the deposit applied in liquidation of the secured note, with which request the plaintiff, upon the ground that it had already been credited as stated, refused to comply. Thereupon, on the following day, plaintiff brought this action to recover the balance of said note and attached the property held by it as security for the $1,200 note. Judgment went for plaintiff, from which defendant prosecutes this appeal.

[1] That "a banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business," is declared by section 3054, Civil Code; and that a bank may, in the exercise of the right to enforce such lien, appropriate the money in its possession belonging to a customer in the extinguishment of the customer's matured indebtedness, is declared in the case of Melander v. Western National Bank, 21 Cal. App. 462, 132 Pac. 265, and cases cited therein. To hold the right to so apply the deposit is dependent upon the consent of the depositor would destroy the right given.

[2] As stated, one of the notes was secured by a mortgage, and under section 726, Code of Civil Procedure, providing that there shall be but one action for the recovery of any debt secured by mortgage, the bank could not enforce its lien by applying the deposit in cancellation of the secured debt. McKean v. German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656; Gnarini v. Swiss-American Bank, 162 Cal. 181, 121 Pac. 726. Hence, the only note of defendant held by the bank upon which it was entitled to apply the general deposit was in liquidation of the unsecured note.

[3] As stated, the $1,200 note was secured by a mortgage upon a certain quantity of hay, and, after applying the deposit toward the liquidation of the $2,000, plaintiff caused an attachment to be levied upon the hay mortgaged as security for the former note. Thus, by mortgage and lien under execution of the writ of attachment, plaintiff's entire claim against defendant was secured by the hay; hence it is impossible to conceive how defendant could have been prejudiced by the application of this deposit in the manner stated. There is no merit in the appeal, and the circumstances are such as to render it apparent that the appeal was taken for delay. The declared policy of the law is in opposition to the prosecution of such appeals.

Section 957, Code of Civil Procedure, provides that—

> "When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just."

While courts in the exercise of the power so given are loath to impose the penalty prescribed for the prosecution of a frivolous appeal, nevertheless, when it is apparent that the appeal is taken merely for delay, they should, as contemplated by the provision quoted, impose penalties to discourage such litigation from adding unnecessarily to the congestion now existing in the courts. It is therefore ordered that, in addition to the costs of the appeal, respondent recover from appellant the sum of $100 as damages on account of the appeal herein having been "made for delay."

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(39 Cal. App. 693)

HOLROYD v. GRAY TAXI CO. et al.

(Civ. 2726.)

(District Court of Appeal, First District, Division 2, California. Feb. 11, 1919.)

1. Appeal and Error 🔑1011(1)—Review—Conflicting Evidence.

Where there is a conflict of evidence, the judgment of the lower court will not be disturbed.

2. Appeal and Error 🔑995 — Review — Weight of Evidence.

The appellate court will not weigh conflicting evidence.

3. Municipal Corporations 🔑706(4)—Use of Streets—Automobile Accident — Evidence.

In pedestrian's action for injuries sustained in being struck by taxicab, driver's testimony that a pedestrian, upon becoming suddenly aware of an approaching automobile, will invariably jump backward, was inadmissible, since what others would have done in emergency could not establish a custom binding plaintiff.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Frances M. Holroyd against the Gray Taxi Company and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Herbert Choynski and James Raleigh Kelly, both of San Francisco, for appellant.

J. J. Murphy, Robert W. Harrison, of San Francisco, for respondent.

BRITTAIN, J. The appeal is from a judgment for the plaintiff in a suit for damages for personal injuries. It was against the Gray Taxi Company, a corporation, appellant, and Charles E. Eagleson, who was in the employ of the defendant at the time the plaintiff received her injuries. The case was tried by the court sitting without a jury. The award was for $1,134, interest and costs.

The plaintiff, a woman of sturdy health, but somewhat past middle age, on August 12, 1915, alighted from a south-bound municipal street car on Van Ness avenue when it stopped at Bush street. She crossed Van Ness avenue towards the east to the northeast corner of the street intersection, and then turned south on the east side of Van Ness avenue, crossing Bush street. Before reaching the south side of Bush street she was struck by a taxicab belonging to the appellant and driven by the appellant's codefendant. She sustained serious injuries. She was confined to the hospital for a considerable time, and further time elapsed before she was able to return to the employment from which she earned her livelihood.

[1, 2] On behalf of the appellant it is urged that the evidence was insufficient to support the court's finding that the defendant was guilty of negligence and further, that it was insufficient to support the finding that the plaintiff herself was not guilty of contributory negligence. Numerous quotations are made in the appellant's brief from evidence of witnesses, including the plaintiff herself, from which it is argued that the appellant's contentions are well founded. In the brief of the respondents other excerpts are quoted from the evidence to support both of the questioned findings. Upon this subject, the case falls directly within the rule that where there is a conflict of evidence, the judgment of the lower court will not be disturbed, nor will the appellate court undertake to weigh the conflicting evidence.

The appellant maintains that the lower court erred in sustaining an objection to a question addressed to the chauffeur defendant by his counsel, reading as follows:

> "Now, Mr. Eagleson, I understand you to say that you have been a chauffeur six years, during which time you had had an opportunity to observe the habits and customs of people in approaching an automobile. What has been your observation and experience of people when suddenly confronted with an automobile?"

On behalf of the appellant it is argued that the chauffeur, if permitted to answer the question, would have testified, in effect, that "a pedestrian, suddenly becoming aware of the approach of a moving vehicle, will, almost invariably, jump backwards," and that this evidence would have tended to explain the action of the chauffeur in attempting to drive his machine in front of, rather than behind, the plaintiff as she was crossing Bush street.

[3] If that was the purpose of the question, it was certainly an improper one. What others may have done when confronted with a sudden danger could not possibly establish a custom by which the plaintiff in this case would have been bound. If the purpose was to show why, when confronted with the sudden appearance of the pedestrian in front of the automobile, the defendant turned to one side or the other, a direct question would have obviated the objection based upon the ruling of which complaint is made, if such evidence would be admissible. The ruling of the lower court was without error.

We have examined the entire record in this case, and we are satisfied that the judgment of the lower court was correct.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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39 Cal. App. 613

SINGH et al. v. C. H. & O. B. FULLER CO.
(Civ. 2534.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919. Rehearing Denied by Supreme Court April 3, 1919.)

1. PLEADING 🔑34(7) — SUFFICIENCY — ALLEGATION OF PAYMENT—OBJECTIONS ON APPEAL.

Allegation that defendant "refused and still refuses to pay plaintiffs" is a sufficient allegation of nonpayment in the absence of a special demurrer calling attention to such imperfect or defective pleading; objection being first made on appeal.

2. PLEADING 🔑205(2) — DEFECTIVE PLEADING — GENERAL DEMURRER — OBJECTIONS REACHED.

If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by general demurrer, but if all the essential facts are stated, but stated imperfectly or defectively, the defect can only be reached by special demurrer particularly designating the specific point at which it is aimed.

3. PLEADING 🔑34(7) — DEFECTIVE STATEMENT — OBJECTION FIRST RAISED ON APPEAL.

Where lease made part of complaint provides that defendant reserved an option to purchase pasture, when ready for pasturage, at the market price in Imperial Valley, an allegation that defendant had an option to purchase "the stock pasture at the price for cornstalk pasture in Imperial Valley at the time the cornstalks are ready for pasture," and that defendant exercised option when pasture was ready, *held* sufficient on objection first raised on appeal.

4. PLEADING 🔑34(7) — AMBIGUITY — OBJECTIONS ON APPEAL.

In action to recover for sacks furnished defendant by plaintiff for plaintiff's share of defendant's crops under crop-sharing agreement, in violation of agreement whereby defendant was to furnish such sacks, complaint failing to allege that sacks were furnished at the special instance and request of defendant *held* sufficient on objection first raised on appeal.

5. TRIAL 🔑404(1) — FINDINGS — CONSTRUCTION.

In action to recover for defendant's failure to purchase pasture after notifying plaintiff of the exercise of an option for such purchase "at the market price in Imperial Valley," court's finding of a current market price was sufficient without use of the words "Imperial Valley."

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by B. K. Singh and others against the C. H. & O. B. Fuller Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. W. Freeman, of Los Angeles, for appellant.

James W. Griffin, of Holtville, and J. S. Larew, of El Centro, for respondents.

SHAW, J. This is an appeal by defendant upon the judgment roll from a judgment in favor of plaintiffs.

By a written lease to terminate January 1, 1917, made a part of the complaint, defendant demised to plaintiffs 320 acres of land in Imperial county for the purpose of growing a crop of corn thereon, the lessor, as rent, reserving one-fourth of the corn, to be piled on the land at a place designated by it, and one-fourth of the cornstalk pasture. The lease contained a provision as follows:

> "It is further agreed and understood by the parties hereto, that the party of the first part [defendant] shall have the right to purchase the second parties' [plaintiffs] three-fourths of the stock pasture at the market price for cornstalk pasture in Imperial Valley at the time the cornstalks are ready for pasture."

The complaint, in substance, alleged that when said 320 acres of cornstalks was ready for pasture, defendant, in response to plaintiffs' inquiry, informed them that it elected to exercise its option to purchase said three-fourths interest in said pasture at the current market price; that at a time more than one month prior to the expiration of said lease plaintiffs had an opportunity of selling the pasture for $4.50 per acre, which, except for defendant's exercise of said option under the terms of said lease to purchase the same, they would have sold and received therefor the sum of $1,012.50. For a second cause of action the complaint alleged that defendant failed to furnish the necessary sacks for the part of said crop belonging to defendant by reason of which fact plaintiffs furnished the same for defendant, to wit, 475 sacks required in the sacking and care of defendant's share of said crop; that the reasonable value of said sacks was $59.37. In its answer defendant denied that it informed plaintiffs that it elected to exercise said option, but alleges that defendant advised plaintiffs that they could sell said pasture to other parties, provided that possession of said premises must be surrendered January 1, 1917, and denied that plaintiffs could have sold said pasture for any sum whatsoever, and denied that it elected to exercise its option to purchase the pasture at the current price or at any other price. And defendant, while admitting it did not furnish sacks for its share of said crop of corn, denied that it requested plaintiffs to furnish the same, and denied that plaintiffs furnished 475 or any sacks for its portion of said corn, at defendant's instance and request.

Upon the issues so presented the case was tried, and the court found that defendant did, some six weeks before the termination of said lease, exercise its option reserved therein to buy plaintiffs' interest in said cornstalk pasture, "pursuant to defendant's option provided for in said lease," notwithstanding which fact defendant neglected and refused to pasture the same until the expiration of such lease, and since the expiration thereof has received the benefit of said pasture and the whole thereof, but paid plaintiffs nothing therefor; that the reasonable value of plaintiffs' three-fourths interest in said pasture was the sum of $1,012.50. As to the sacks, the court found that defendant failed to furnish sacks necessary for its one-fourth of the crop of corn, and plaintiffs furnished the same to defendant, the reasonable value of which was $59.37.

No demurrer was interposed to the complaint, and appellant, upon the judgment roll alone, now for the first time insists that the first count of the complaint fails to state a cause of action. This is based: First, upon the failure of the complaint to allege nonpayment; and, second, upon the fact that the option given defendant was to purchase the pasture "at the market price for cornstalk pasture in Imperial Valley at the time the cornstalks are ready for pasture."

[1, 2] As to the first contention, the complaint alleged that—

> "Defendant * * * refused and still refuses to pay the plaintiffs the market value of plaintiffs' interest in said pasture, to wit, the said sum of $1,012.50, or any part thereof."

In the absence of a special demurrer directing attention to such imperfect or defective pleading, the statement in the complaint that defendant "refused and still refuses to pay plaintiffs" is a sufficient allegation of nonpayment. Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094.

> "If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by a general demurrer. If, however, it states all the essential facts, but states them improperly or defectively, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed." Harnish v. Bramer, 71 Cal. 158, 11 Pac. 888.

To the same effect is Tehama County v. Bryan, 68 Cal. 57, 8 Pac. 673, where it is said:

> "Where a complaint states all the facts essential to a recovery, but states them imperfectly, a demurrer, to be effectual, must be special, and directed against the very defect apparent."

[3] The second point is likewise, and for the same reasons, without merit. Conceding the facts to be imperfectly pleaded, it nevertheless appears from the copy of the lease made a part of the complaint that defendant had reserved an option to purchase the pasture when ready for pasturage, at the market price thereof in Imperial Valley, and if the allegations of the complaint are inconsistent with such fact, the defect should have been reached by a special demurrer for ambiguity or uncertainty. In the absence of such demurrer, the complaint upon an attack made for the first time on appeal will be construed as sufficient in alleging that defendant had an option to purchase "the stock pasture at the market price for cornstalk pasture in Imperial Valley at the time the cornstalks are ready for pasture," which option, it is alleged, defendant, at the time the pasture was ready, duly exercised. By reason of such act defendant became obligated to pay plaintiffs the market price for such pasture in Imperial Valley, notwithstanding which fact and repeated demand therefor made, as alleged in the complaint, "defendant neglected and refused to pasture the same until after the expiration of said lease, and refused and still refuses, to pay to plaintiffs the market value of plaintiffs' interest in said pasture, to wit, the sum of $1,012.50, or any part thereof," but at the expiration of the lease, it is alleged, it appropriated the use and benefit thereof to itself. All of these facts the court, in substance, found to be true.

[4] As to the sacks, for which recovery was had, it may be conceded the facts pleaded in the second count of the complaint are likewise imperfectly pleaded, since it is not alleged that they were furnished at the special instance and request of defendant. But it is alleged that they were furnished, which implies that defendant accepted the same and appropriated them to its own use and refused to pay therefor. Indeed, defendant, by its answer, admits such allegation, jus-

tifying its refusal to pay upon the ground that nothing contained in the lease required plaintiffs to furnish said sacks to it. While the count as a pleading is imperfect and subject to special demurrer, it is not, in the absence of demurrer and after judgment, subject to the objection urged.

[5] It is manifest from the foregoing that appellant's attack upon the findings, which are to be construed most strongly in support of the judgment, is without merit. The court found that plaintiffs, prior to the expiration of the lease, had opportunity to sell the same at the "current market price, to wit, the sum of $4.50 per acre." The words "current market price," used by the court, referred to and had reference to such market price in Imperial Valley, and the fact that the court did not use the words "Imperial Valley" is immaterial.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

39 Cal. App. 596

MARR v. CITY OF GLENDALE et al.

(Civ. 2792.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1919. Rehearing Denied by Supreme Court April 3, 1919.)

1. JUDGMENT 🔑370—VACATION—SURPRISE.

Plaintiff is not entitled to have judgment rendered against her vacated on the ground of surprise under Code Civ. Proc. § 473, by reason of order permitting defendants to amend answer, where defendants waived their right to amend and elected to stand upon their answer, leaving the issues exactly as they were at the beginning of the trial.

2. JUDGMENT 🔑359—VACATION—ERROR IN ADMISSION OF EVIDENCE.

Judgment for defendant will not be vacated under Code Civ. Proc. § 663, providing for the vacation of a judgment and the entering of a new one where it is not in accordance with the findings, on ground of error in admission of evidence, where it is admitted that the findings are adverse to plaintiff.

3. JUDGMENT 🔑336—VACATION—ERROR IN ADMISSION OF EVIDENCE.

Where court errs in admission of evidence, the remedy of parties against whom judgment is rendered is a motion for new trial or an appeal, and not motion to vacate judgment, under Code Civ. Proc. § 473, providing for vacation of judgment on account of excusable neglect, inadvertence, or surprise.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Winifred F. Marr against the City of Glendale and others. Judgment for defendants, and from an order denying plaintiff's motion to vacate judgment rendered against her upon the trial of the action, plaintiff appeals. Order affirmed.

Winifred F. Marr, in pro. per.

W. E. Evans and Evans, Abbott & Pearce, all of Los Angeles, for respondents.

SHAW, J. Plaintiff appeals from an order of court denying her motion to vacate a judgment rendered against her upon the trial of an action.

The motion purports to have been made pursuant to the provisions of section 473, Code of Civil Procedure, and is based upon the ground of mistake, surprise, and excusable neglect, in support of which, other than the records and files, plaintiff offered affidavits.

As disclosed by the record, it appears that pending trial of the action the court made an order granting defendants leave to amend their answer by denying certain allegations of the complaint. Assuming the amendments to be made, and after certain evidence was received thereunder, defendants withdrew their motion to amend, and elected to stand upon their answer as made. Thereupon the court set aside the order permitting the amendment. The trial proceeded to completion, when findings were made adverse to the plaintiff, and judgment rendered thereon for defendants.

[1] From what we are able to glean from the confused statement of plaintiff, who appears in propria persona, she claims to have been prejudiced by the ruling of the court in permitting the amendment, thus raising new issues, to meet which she was not prepared. At the time, however, the court, recognizing that necessity therefor might arise, stated that he would grant her time within which to procure her evidence touching the issues raised by the amended answer. Defendants' waiver of their right to amend, and their election to stand upon their answer, left the issues exactly as they were at the beginning of the trial; hence we are unable to see how plaintiff could have been surprised to her prejudice by the rulings of which she complains.

[2, 3] A further complaint is based upon the claim that, notwithstanding the admissions contained in defendants' answer, the court, upon the evidence received on the theory that the answer would be amended, based thereon certain findings adverse to plaintiff. Conceding this to be true, the error, if plaintiff was prejudiced thereby, could not be reached by a motion of this character. Her remedy was a motion for new trial or an appeal. The mere vacation of the judgment, which she sought, would leave the findings standing upon a completed trial upon which

it would be the duty of the court to enter judgment in accordance therewith, and that necessarily and concededly must be adverse to plaintiff. Section 663, Code of Civil Procedure, provides for the vacation of a judgment and the entering of a new one where it is not in accordance with the findings; but that is not this case. Appellant, conceding the findings to be adverse to her, simply asks that the judgment be vacated. While appellant may have just cause for complaint, due to erroneous rulings made by the court in the course of the trial, or based upon the fact that the findings are not within the issues or not supported by the evidence, such errors cannot be reviewed upon a motion to vacate the judgment, made under section 473, Code of Civil Procedure, on account of excusable neglect, inadvertence, or surprise.

The order is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 695

PEOPLE v. KHAIR DIN. (Cr. 636.)

(District Court of Appeal, Second District, Division 1, California. Feb. 11, 1919. Rehearing Denied March 8, 1919; Denied by Supreme Court April 10, 1919.)

1. JURY 🔑99(3)—CHALLENGES—OPINION.

A challenge in a homicide case to a juror who had an opinion that the accused in traveling out of the state used an infrequented way, question whether accused was fleeing from state after killing, being material, should have been allowed, under Pen. Code, § 1073.

2. CRIMINAL LAW 🔑1166½(8)—PREJUDICIAL ERROR—CHALLENGE TO JURORS.

Where an accused exhausted his peremptory challenges, and thereafter challenged a juror for cause, which challenge was denied, error in not allowing a previous challenge to a juror for cause, thus requiring a peremptory challenge, must have been prejudicial.

3. CRIMINAL LAW 🔑419, 420(1)—HEARSAY EVIDENCE—HOMICIDE.

In a homicide case in which a question as to the route taken by defendant in leaving state was material, testimony of a deputy sheriff that he "got information from good authority that defendant was traveling by a certain route" was hearsay and inadmissible.

4. CRIMINAL LAW 🔑419, 420(1)—HEARSAY EVIDENCE.

In a homicide case, where it was important as to route taken by defendant, a Hindu, in going out of state after killing, testimony of a deputy sheriff that "this Hindu" had been seen on a certain road, and "It is his description; I know from the simple fact I got it was a Hindu," should have been stricken as hearsay.

5. HOMICIDE 🔑171(3)—EVIDENCE—FINDING OF ANOTHER BODY.

In a prosecution for the killing of a certain person, a witness for the state was properly allowed to testify that the body of another person was also found at the place of the killing.

6. HOMICIDE 🔑338(1)—HARMLESS ERROR—EVIDENCE.

In homicide case, it was not error to admit evidence that body of person other than one defendant was charged with having killed was found at scene of killing, where defendant's attorney stated before the jury that "the case of H. [the other person killed] has already been tried, and a verdict of not guilty rendered against this defendant."

7. CRIMINAL LAW 🔑1141(2)—APPEAL—DUTY TO SHOW ERROR.

It is duty of counsel of accused to refer to contents of record showing rulings of court, wherein it is claimed that court erred in refusing to permit counsel for accused to cross-examine witnesses.

8. CRIMINAL LAW 🔑419, 420(2)—HOMICIDE 🔑157(1) — HEARSAY EVIDENCE — STATEMENTS MADE IN PRESENCE OF ACCUSED.

In homicide case, reference to statements by third persons in presence of accused, to which accused made answer, where the terms of the conversation were not given, was not improper, where tending to show some misunderstanding between accused and deceased.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Khair Din was convicted of murder in the first degree, and he appeals. Reversed.

O. V. Willson, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of murder of the first degree and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

The victim of the alleged murder was one Fared Bakhsh, and the date of the alleged killing was August 13, 1917. It appears that another man named Hassen Ali was killed at the same time, but this prosecution was for the killing of Fared Bakhsh. Hassen Ali, together with one Chanda Kahn and the defendant, were living on a ranch in Imperial county of which they were lessees. The evidence tends to show that Chanda Kahn was not at the ranch at the time of the killing. No witness has been produced who saw the tragedy enacted or who was on the place at the time. The defendant did not testify, but his defense is that he was not there at that time. On the morning of August 14th a man who visited the ranch found the dead body of Fared Bakhsh lying on the ground a short distance away from the ranch house, and the dead body of Hassen Ali was found on a bed in the house. The evidence shows that on August 17th the defendant appeared at Tia Juana, in Mexico, more than 100 miles away from the ranch where the killing was done, and there took the stage to Ensenada. A few days later he was arrested at Ensenada, and afterwards on extradition proceedings was brought back across the border to Imperial county. When arrested at Ensenada he denied that his name was Khair Din, and denied that he had lived in Imperial county. The prosecution endeavored to show that the defendant went by way of Mexicali to Tia Juana on foot by an unfrequented road. By what has been said it will be seen that the conviction was had upon circumstantial evidence.

The first assignment of error is that the court erred in denying the challenge for cause to the prospective juror Fred Guntermann. One G. G. Gonzales, a deputy sheriff of Imperial county, engaged in search for the defendant on and after August 14th. Guntermann testified that he lived near Calexico, which is a town in Imperial county adjoining Mexicali, a town on the Mexican side of the line. Guntermann testified that he discussed the matter of the murder with Gonzales, who went to get the defendant across the line. Guntermann further testified as follows:

"Q. Have you any knowledge as to which way he went to Ensenada? A. What was spoken of at the time; he didn't take the steamer and he didn't take the stage, and, knowing the roads, I don't think I ought to be on here. Q. Would that fact that you have now in mind concerning the route of his going, would that be apt to influence you in weighing his testimony on the witness stand as to the route which he says he took at that time; what you have in your mind now would be apt to influence you? A. I think it would. Q. It could not be removed by his evidence, the evidence on his behalf? A. I rather have an opinion formed at the time. * * * Q. You have no personal knowledge of how the defendant got to Ensenada? A. I have an idea. Q. Of your own personal knowledge or what some one told you? A. Just a suspicion at the time. I know he didn't go the route which most any one would have gone, and, knowing the trails as I know them, I formed an opinion what trail he took. Q. Do you have any personal knowledge at this time as to the particular route or trail he took to Ensenada? A. I know he didn't travel the highway; he didn't take the general route down there; he didn't go by stage or go by boat. Q. That is what you have been told? A. Yes, sir. Q. Have you an opinion now as to whether he is guilty or innocent? A. No; nothing definite. Q. Is it what you might call an impression? A. Yes, sir. * * * Q. Don't you think, Mr. Guntermann, you could listen to the testimony in this case and base your verdict solely upon this testimony, and not upon any suspicion that you might have entertained at any particular time? A. It would depend upon the evidence. Q. Suppose there wasn't any evidence as to how he got to Ensenada? A. I would have my own opinion then."

[1, 2] One of the particular causes of challenge is as follows:

"For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this code as actual bias." Pen. Code, § 1073.

From the testimony of Guntermann, as above stated, it is our opinion that defendant's challenge to Guntermann was well grounded and should have been allowed. Upon its denial he was peremptorily excused by the defendant. The record shows that the defendant exhausted his peremptory challenges, and thereafter challenged a juror for cause, which challenge was denied. Under the circumstances shown by the record, the error of the court in denying the challenge to Guntermann was substantially injurious to the defendant. It was so held under similar circumstances shown in the case of People v. Riggins, 159 Cal. 113, 112 Pac. 862. Concluding its comments upon the facts in that case, the court said:

"The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the Constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged, and a conviction by a jury so selected must be set aside."

In People v. Durrant, 116 Cal. 179, 196, 48 Pac. 75, 77, the court said:

"If the defendant feared to put himself upon trial before the jurors whom he had challenged, it was his duty to have availed himself of the liberal aid which the law affords, and to have excused them from the box. If, in so doing, he lessened the number of his peremptory challenges to such an extent that it appears they were exhausted before the completion of the jury, he may well be heard to urge in argument that by reason of the erroneous ruling the number of his peremptory challenges was improperly curtailed, and he was deprived of a legal right."

[3, 4] The defendant further claims that the court erred in refusing to strike out as hearsay evidence certain answers given by the state's witness, G. G. Gonzales. The statement of Gonzales which defendant sought to strike from the record was in substance that Gonzales "got information from good authority" that defendant was traveling on the Picacho Pass, going west; also, on cross-examination, after the witness had stated that it was reported to him that "this Hindu" had been seen on the road from Mexicali to Tia Juana, defendant's counsel asked: "Do you know whether it was this Hindu or another one, or a Mexican?" The witness replied: "It is his description; I

know from the simple fact I got it was a Hindu." Defendant's counsel moved to strike out this answer as hearsay. Both rulings were erroneous.

[5, 6] F. C. Kemp, a deputy marshal of the city of El Centro, testified that, upon hearing of the death of Fared Bakhsh on the 14th of August, he went to the ranch where the defendant lived. He found the dead body of Fared Bakhsh lying near a bridge east of the ranch house. Near that place he found several empty shells of a .32 caliber automatic pistol. Defendant claims that the court erred in admitting the testimony of the witness Kemp concerning the finding of the body of Hassen Ali, and in refusing to permit counsel for the defendant to cross-examine the witness concerning other results of his investigation of the premises than what had been testified to by him in answer to questions put by the district attorney. The witness testified as follows:

> "Q. Did you make any investigation to determine who had killed Fared Bakhsh? A. I did. Q. What did you do? A. I was told there were three men living on the ranch; that one of them they found dead and was identified as one of the three; it was Hassen Ali, and I immediately looked for Khair Din and Chanda Kahn. Q. At the time you found the body of Fared Bakhsh, did you find the body of Hassen Ali? A. Yes, sir. Q. Where was it? Mr. Willson: Objected to as incompetent, irrelevant, and immaterial in this case. Q. The purpose of that is to show that Hassen Ali didn't kill Fared Bakhsh. Mr. Willson: Objected to as incompetent, irrelevant, and immaterial. Mr. Simon: I am not charging this defendant with the killing of Hassen Ali in this case; I am not trying him for the killing of Hassen Ali, and you know it. The Court: Overruled. A. The body of Hassen Ali was on the bed in the house. Q. State whether or not he was dead at that time. A. He was."

The court did not err in overruling defendant's objection to the question inquiring about the location where the body of Hassen Ali was found, and we cannot see that the testimony was prejudicial to the defendant. A little later in the record we find that, without objection from the prosecution, the attorney for the defendant stated before the jury that "the case of Hassen Ali has already been tried, and a verdict of not guilty rendered against this defendant." The jury would naturally infer from such statement that the defendant had been charged with the murder of Hassen Ali and had been acquitted. The circumstances of this case could not very well have been tried without bringing to light the fact that when those premises were examined the bodies of two dead men were found there; indeed, that fact had been developed by the evidence without objection from the defendant.

The evidence showed that Fared Bakhsh had come to his death by means of shots fired from a .32 caliber gun, and that the defendant had such a gun.

[7] Counsel for defendant have not given us any reference to the contents of the record showing the rulings of the court wherein it is claimed that the court erred in refusing to permit counsel for the defendant to cross-examine the witness concerning other results of his investigation of the premises than what had been testified to by him on direct examination. This it was their duty to do. People v. McLean, 135 Cal. 306, 67 Pac. 770. We find, so far as our reading has enabled us to trace the matter, that substantially all of the questions asked by the defendant's attorney on that subject were answered and permitted to remain in the record. It has not been made clear to us that the defendant has any ground of complaint with respect to that cross-examination.

[8] By the testimony of Chanda Khan, a witness for the prosecution, it appeared that this witness and the defendant had leased the land on which they were residing and had taken into partnership Hassen Ali; that Hassen Ali had borrowed some money from Fared Bakhsh, who lived on a neighboring ranch; that Fared Bakhsh and his partners had borrowed some oil and grease from Khair Din and his partners which they had not promptly returned; that Khair Din had insisted that the return of the oil and grease be demanded; and that some unfriendly words had passed between Khair Din and Hassen Ali relating to that matter. This brings us to the next assignment of error, which is that "the court erred in permitting the witness Chanda Khan, whom the defense contended committed the murder, to testify and give hearsay evidence in order to show the malice of defendant toward Fared Bakhsh." The witness had referred to a conversation between Hassen Ali and their lessor, Mr. Meserve, in which Hassen Ali said to Mr. Meserve, "I owe some money to Fared Bakhsh, and I want my interest to be mortgaged to him." Defendant's attorney interposed an objection to this, unless it was shown that the witness was present at the conversation. Thereupon the following appears in the record and is the evidence to which the assignment of error applies:

> "Q. Did Hassen Ali report to you the conversation he had with Mr. Meserve in regard to signing this lease? Mr. Willson: Objected to as hearsay. The Court: Overruled. A. Yes, sir; the following day he said that he had mortgaged to Fared Bakhsh his interest in the lease, for the crop, rather. Q. Go ahead. A. Hearing this, Khair Din said, 'Well, I don't like this kind of work, because I had some kind of misunderstanding with Fared Bakhsh heretofore, and you have given him full authority to act hereafter and that won't do."

It will be observed that the witness, in the answer to which appellant excepts, did not attempt to state the terms of the conversation as reported to him by Hassen Ali. The important element in the testimony was that Hassen Ali, in the presence of the defendant, stated that he had mortgaged his interest in the lease to Fared Bakhsh, and that the defendant expressed dissatisfaction with that transaction. This was admissible, together with the other testimony tending to show that there had been some misunderstanding between defendant and Hassen Ali, and between the defendant and Fared Bakhsh, and that threats to kill Fared Bakhsh had been made by the defendant.

Because of the court's error in denying defendant's challenge to the proposed juror Guntermann, and because, under the facts shown by the record as above stated, the error resulted in the denial of a substantial right of the defendant in the selection of the jury, the judgment is reversed, and the order denying a new trial is reversed.

We concur: SHAW, J.; JAMES, J.

39 Cal. App. 702

CITY OF LOS ANGELES v. KAUTZ et al. (Civ. 1835.)

(District Court of Appeal, Second District, Division 1, California. Feb. 11, 1919.)

1. MECHANICS' LIENS 🔑35—USE OF STEAM SHOVEL—LIEN FOR RENT.

One who furnishes contractor steam shovel for construction of roadway upon private property is entitled to lien thereon for unpaid rent for use of shovel, under Code Civ. Proc. § 1183, giving lien to persons furnishing appliances, teams, and power contributing to the construction.

2. MUNICIPAL CORPORATIONS 🔑373(2)—CONSTRUCTION OF ROADWAY—EQUITABLE LIEN—RENT FOR STEAM SHOVEL—"PERFORMED LABOR OR FURNISHED MATERIALS."

Owner of steam shovel who rents shovel to contractor constructing roadway for city is not entitled to equitable lien upon money due contractor by city for rent due owner from contractor upon giving city written notice that such rent has not been paid, under Code Civ. Proc. § 1184, not having "performed labor or furnished materials" used in construction within such statute.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action in interpleader by City of Los Angeles, against George W. Kautz, A. L. Dechene, R. H. McCray Company, and another. From the judgment rendered, defendant R. H. McCray Company appeals. Affirmed.

J. Ira Courtney, of Los Angeles, for appellant.

Adams, Adams & Binford, of Los Angeles, for respondent.

CONREY, P. J. This is an action in interpleader. The appellant is the defendant R. H. McCray Company, and the respondent is A. L. Dechene. The city, by resolution approved November 6, 1914, employed the contracting firm of Kautz & Gabler to excavate earth and rock for the purpose of making a roadway in Elysian Park, a public park of the city. Appellant R. H. McCray Company rented to Kautz & Gabler a steam shovel which was used by the latter on the roadway. There being due from the city to Kautz & Gabler the sum of $310.20, and there being due from Kautz & Gabler to the McCray Company the sum of $200 rental, the McCray Company served on the city a notice in writing that its rental for the use of the steam shovel had not been paid. This was attempted to be done pursuant to section 1184, Code of Civil Procedure, in order to establish an equitable lien on the fund. The city paid the money into court, and the question at issue was whether the money belonged to Dechene or to the McCray Company. Dechene claims as assignee of Kautz & Gabler.

[1, 2] The principal question here turns upon the construction to be given to sections 1183 and 1184, Code of Civil Procedure. Appellant's contention is that section 1184 is not limited to persons who furnish labor or materials for the work, but that, on the contrary, it includes one who furnished the contractor a steam shovel to be used in the performance of the work. If the contract had been for work to be done upon private property, and if appellant were endeavoring to enforce a lien upon that property for the amount due him for the use of the steam shovel, we do not doubt that his claim would come within the provisions of section 1183, as amended in 1903. It is there provided, among other things, that all persons furnishing appliances, teams, and power contributing to the construction or repair of a wagon road shall have a lien upon the property for the value of the use of such appliances, teams, or power. Section 1184 of the Code of Civil Procedure provides that "any of the persons mentioned in the preceding sections, except the contractor, may at any time give to the owner a notice that they have performed labor or furnished materials, or both, to the contractor" stating certain specified facts concerning the claim. "Upon such notice being given it shall be lawful for the owner to withhold, and in case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor suffi-

cient money due or that may become due to such contractor to answer such claim and any lien that may be filed therefor, including the reasonable cost of any litigation thereunder." These provisions of section 1184 were originally enacted prior to the time when section 1183 was so amended as to include a lien for the value of the use of such appliances, teams, or power. Notwithstanding that other amendments have been made to section 1184, the Legislature did not see fit to extend the terms thereof describing the instances in which by giving said notice an equitable lien may be imposed upon the money due or to become due to the contractor. In 1909 a section numbered 1183a was added to the Code of Civil Procedure, wherein it was provided that such persons so supplying power might give written notice of the same character and effect as that which persons so furnishing materials are entitled to give, as provided in section 1184 of that Code. Section 1183a was repealed in the year 1911. It is clear that the right here claimed by appellant cannot be sustained unless it exists under the terms of section 1184, to which we have referred. Those provisions, however, are in terms limited to those who have "performed labor or furnished materials" used in the work of construction and have not been extended so as to include a claim and notice of the kind here relied upon by appellant.

The judgment is affirmed.

We concur: JAMES J.; SHAW, J.

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39 Cal. App. 661

GAMBLE v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

(Civ. 2690.)

(District Court of Appeal, First District, Division 1, California. Feb. 10, 1919. Rehearing Denied by Supreme Court April 10, 1919.)

1. Master and Servant 🔑397—Workmen's Compensation—Industrial Accident Commission—Award—Stay of Execution.

The Industrial Accident Commission, being a court of limited jurisdiction, cannot take cognizance of an application for an order staying execution on a judgment entered on its award brought by one who had not joined in any proceedings before it nor had questioned the validity of its award prior to final adjudication and affirmance by the upper courts.

2. Master and Servant 🔑417(3⅛)—Jurisdiction of Superior Court—Restraining Issuance of Execution on Award of Industrial Accident Commission.

Equity has jurisdiction of a suit to enjoin a successful claimant before the Industrial Accident Commission from enforcing the award by execution or other process.

3. Master and Servant 🔑417(3⅛)—Workmen's Compensation—Jurisdiction to Restrain Execution of Award of Industrial Accident Commission.

The superior court is not deprived of jurisdiction to restrain execution on an award of the Industrial Accident Commission, by Workmen's Compensation Act, § 84, subsec. "d," providing that no court shall have jurisdiction to annul any order, decision, or award of the commission or suspend or delay the operation or execution thereof, where application is made by a stranger to proceedings before the commission on an extrinsic showing that enforcement of the judgment would be a fraudulent violation of the judgment creditor's contract with such applicant.

Petition by George Gamble against the Superior Court of the State of California in and for the County of Alameda and others for writ of mandate against the Superior Court and its Judge, and against the Industrial Accident Commission. Petition dismissed as to Industrial Accident Commission, and granted as to the Superior Court and Judge.

W. G. Deal and J. Early Craig, both of San Francisco, for petitioner.

Frank Mitchell, Jr., of Hayward, for respondent Superior Court, Alameda County.

Chris. M. Bradley, of San Francisco, for respondent Industrial Accident Commission.

RICHARDS, J. This is an application for a writ of mandate to be directed to the superior court of the county of Alameda and Hon. Joseph S. Koford, one of the judges thereof, commanding said court and judge to entertain and pass upon the merits of a certain action pending in said court, numbered 54504, and entitled "George Gamble, Plaintiff, v. Helen Angus and White Gulch Mining Co., a Corporation, Defendant," and also commanding the Industrial Accident Commission of the state of California and the members thereof to stay execution upon a certain award and the judgment entered thereon in a certain proceeding instituted by said Helen Angus before said commission, fixing at the sum of $5,000 the liability of the said White Gulch Mining Company, a corporation, for the death of her husband as an employé of said corporation.

The facts upon which the petitioner relies for the relief sought in this application are briefly these: Wm. Angus was prior to October 30, 1914, the president and superintendent of the White Gulch Mining Company, of which the Pacific Coast Casualty Company was the insurance carrier. On said last-named date said William Angus met with an accident while in the employ of said mining company from which his death ensued. He was at that time the owner of 12,000 of the total issue of 100,000 shares of the capital stock of said mining corporation, which was community property, and to the ownership of which his widow, Helen Angus, in due court of probate succeeded. Within the time allowed by the Workmen's Compensation Act (St. 1913, p. 279), said Helen Angus instituted proceedings before the Industrial Accident Commission against said White Gulch Mining Company and its insurer to fix liability for the death of her husband. While said proceeding was pending before the commission Helen Angus offered to sell her said holding of stock in said corporation to George Gamble, the petitioner herein, for the sum of $7,500, but said Gamble informed said Helen Angus that he would not purchase said stock if said White Gulch Mining Co. was required to pay anything on account of any liability growing out of the death of her husband; whereupon said Helen Angus represented and promised to said petitioner that she would not look to said White Gulch Mining Company for or on account of said liability; and, relying upon her representations and promises in that regard, the petitioner purchased her said stock, paying therefor the sum of $7,500, and he is still the owner and holder of said stock. That, notwithstanding her said representations and promises, said Helen Angus has proceeded to obtain an award from said commission against said White Gulch Mining Company for the sum of $5,000, and has proceeded to cause a certified copy of the findings of the commission and of said award to be filed in the office of the county clerk of the county of Mariposa, and a judgment for said sum against the said White Gulch Mining Company to be entered thereon, upon which judgment she now threatens to have an execution issued and enforced against the property of said corporation, to the petitioner's irremediable injury.

The foregoing facts were presented in the complaint filed in the superior court of the county of Alameda in the action above referred to as having been instituted therein, and thereupon petitioner, as plaintiff therein, moved said court for the issuance of a preliminary injunction restraining said Helen Angus, as one of the defendants therein, from causing to be issued an execution upon the judgment entered upon the award of the commission, and taking any further proceedings for the enforcement thereof. The Hon. Joseph S. Koford, as judge of said court, refused to consider or pass upon the merits of said motion upon the sole ground that the said court had no jurisdiction of said matter, by reason of the provisions of subsection "d" of section 84 of the Workmen's Compensation Act; that thereupon the petitioner herein presented an application, setting forth substantially the same facts to the Industrial Accident Commission, praying for an order of said commission staying execution upon said judgment entered upon its award as aforesaid, but said commission also refused to entertain said application upon the ground that it had no jurisdiction in relation to the matters set forth therein. Thereupon this proceeding was instituted by the petitioner herein.

[1] As to that portion of this petition wherein the petitioner seeks to have a writ of mandate issued directing the Industrial Accident Commission to entertain and act upon the matters set forth in his application filed with that body, the subject may be briefly dismissed. We are entirely satisfied that the attitude of said commission, as set forth in its return herein, is based upon a correct view of the powers and jurisdiction of that tribunal under the act of its creation; that it is a court of limited jurisdiction, and is wholly without power or authority in matters of general jurisdiction without the scope of the Workmen's Compensation Act; that the petitioner herein, not having been a party to any proceeding before said commission in connection with its award in favor of Helen Angus and against the White Gulch Mining Company, and not having questioned the validity of said award prior to the final adjudication of the same by said commission, and its affirmance by the Supreme Court of the state of California, and also by the Supreme Court of the United States, the said application of said petitioner was in the nature of a new and original proceeding based upon extrinsic facts appearing upon the face of his said application, which were wholly without the jurisdiction of the commission to hear or determine. This being so, the application herein must be denied in so far as it relates to the respondent Industrial Accident Commission and the members thereof.

[2] In so far as the application herein seeks the issuance of a writ of mandate directing the superior court of Alameda county and the said judge thereof to entertain and hear upon the merits all matters arising out of the institution and pendency before it of the case of Gamble v. Angus et al., No. 54504, above referred to, a more serious question is presented. The said action is in form and in the nature of the relief sought therein an equitable proceeding, wherein the plaintiff seeks to have the defendant Helen Angus enjoined from proceeding to collect by execution or other process a judgment against a corporation in which the plaintiff is a large stockholder, which judgment the plaintiff alleges in substance to have been obtained by fraud, and the enforcement of which will result in irremediable injury to the plaintiff. The sufficiency of said complaint as a pleading is not before us, since the proper forum for assault upon it by way of demurrer or otherwise is the court wherein the action is pending. With respect to said action we are of the opinion that it is one of a class of actions which courts of equity have heretofore and elsewhere taken cognizance of, and assumed jurisdiction and power to grant re-

lief in. Givin v. Times, etc., Pr. Co., 114 Fed. 92, 52 C. C. A. 40. It is, however, the contention of the remaining respondent herein, the superior court and the judge thereof, that said court has been bereft of whatever jurisdiction it might have formerly possessed in matters of this character by virtue of the terms and effect of subsection "d" of section 84 of the Workmen's Compensation Act, which, so far as applicable to the question before us, reads as follows:

> "No court of this state (except the Supreme Court and the District Courts of Appeal to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order, decision or award of the commission or to suspend or delay the operation or execution thereof, or to restrain * * * or interfere with the commission in the performance of its duties."

In considering the application to be given the foregoing provision of the Workmen's Compensation Act to the facts of the case before us, it is to be noted that neither the Industrial Accident Commission nor any of its members is a party to the action pending in the said superior court, and that in such action no attempt is being made to review, reverse, correct, or annul any order, decision, or award of the commission, or to restrain or interfere with the commission in the performance of its duties; and it is to be further noted that said action has not been instituted by a person who was a party to any proceeding before said commission or to any award which it has made, or to any judgment which has been obtained upon the making of such award; nor was said action brought by any person who would have been entitled to appear before said commission in the said proceeding before it, or to apply therein for a rehearing or reversal of its award, or to have obtained relief therefrom by way of a writ of review issued out of the supreme or appellate courts. The question before us, reduced to its final analysis, is as to whether the phrase in the foregoing provision of the Workmen's Compensation Act assuming to deny to the courts of this state jurisdiction "to suspend or delay the operation or execution" of any order, decision, or award of the commission is to be given such breadth of application as to cover a case wherein a stranger to the proceeding theretofore pending before said commission seeks in a court of equity, upon a showing of extrinsic facts, to restrain the party who has obtained such award and who has caused to be entered a judgment thereon, from enforcing such judgment by execution in fraudulent violation of her contract not to obtain and not to enforce such award and judgment to the plaintiff's injury.

[3] We are of the opinion that a reasonable and proper interpretation of this clause of the Workmen's Compensation Act does not lead to its extension thus far; for to hold otherwise would be to so construe it that no agreement or arrangement made by a stranger to the record with the applicant obtaining an award from the commission, to the effect that it would not be enforced to his injury, could be availed of in a court of equity otherwise rightfully empowered to enjoin the violation of such an agreement. Suppose, for example, that the party obtaining an award against an employer enforceable against the latter's property should agree with another, not a party to the proceeding, for a consideration to be applied on account of the award, to release a certain specified portion from the employer's said property from the effect of the award and of any execution to be issued thereon, and, having received such consideration, should proceed to levy upon such released property; would the person thus fraudulently affected be powerless to seek and obtain relief in a court of equity by virtue of this clause of the Workmen's Compensation Act? Or that the execution of this award were attempted to be levied upon property standing in the name of the employer, but of which the entire equitable interest and ownership was in another; would that other be cut off from seeking equitable relief against the sale of his property upon such execution by the terms of this clause in the act? We are not disposed to give to its terms a construction which would thus utterly divest courts of equity from entertaining actions of the character of those above indicated. The instant case falls in this category, and is one over which the superior court, which is the respondent herein, has jurisdiction, notwithstanding the foregoing provisions of the Workmen's Compensation Act.

It follows that as to it and the said judge presiding over it the writ should issue.

The petition herein, as to the Industrial Accident Commission and its members, is dismissed, and as to the said superior court and the judge thereof is granted. Let the writ issue accordingly.

We concur: WASTE, P. J.; KERRIGAN, J.

39 Cal. App. 668

MISSION BREWING CO. v. RICKERT et al. (Civ. 2880.)

(District Court of Appeal, Second District, Division 2, California. Feb. 10, 1919.)

1. Chattel Mortgages 🔑272—Agreement to Dismiss.

Where a chattel mortgagee agreed, "in consideration of this agreement, and what hereafter follows, to withdraw foreclosure proceedings," etc., followed by a covenant on part of mortgagor to use beer of mortgagee in a certain city, he was not estopped from subsequently proceeding with the foreclosure, where mortgagor failed to use mortgagee's beer as agreed.

2. New Trial 🔑64—Omissions in Findings.

A new trial may be denied for omitting to find on an issue, if finding, though in favor of movant, could not have changed result.

3. Contracts 🔑137(1)—Partial Illegality—Enforcement.

A separation of the good consideration from that which is illegal in a contract will not be made where party asking to enforce contract is himself the one who has made and breached the illegal consideration.

4. Contracts 🔑137(1)—Partial Illegality of Consideration.

If there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which one of the considerations induced the promise.

5. Chattel Mortgages 🔑287—Deficiency Judgment—Security.

Where a chattel mortgagee entered into executory agreement to dismiss foreclosure proceedings, consideration being certain additional security and a covenant on part of mortgagor to use mortgagee's beer, mortgagee, on failure of mortgagor to use its beer, could disregard agreement to dismiss and proceed with the foreclosure and obtain a deficiency judgment and disregard the additional security furnished, as resort could not be had to the additional security without recognizing the contract to dismiss.

6. Chattel Mortgages 🔑287—Foreclosure—Deficiency Judgment—Security—Hypothecation.

Where, in consideration of a promise to dismiss an action to foreclose a chattel mortgage, a contract of sale of other property was given mortgagee, to be held as additional security, such additional security need not be exhausted before a deficiency judgment can be entered in an action to foreclose the mortgage.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Mission Brewing Company against Fred Rickert and others. From a judgment in favor of the plaintiff and an order denying his motion for new trial, the named defendant appeals. Affirmed.

Stephen Monteleone and Edwin M. Parker, both of Los Angeles, for appellant.

Wadham & Munkelt, of San Diego, for respondent.

THOMAS, J. This is an action brought to foreclose a mortgage on personal property owned by defendants Rickert and Widmaier. The defendant Piwald, according to the allegations of the complaint, claims some interest in the property, and because of that fact is joined as defendant. The complaint is in the usual form. The defendant Rickert denies all the material allegations of the complaint, and by way of separate defense alleges that the defendants Rickert and Widmaier and the plaintiff herein entered into an agreement by the terms of which, among other things, it was provided that the present action should be withdrawn and the defendant Ralph Piwald permitted to assume the payment of the note sued on here and to secure which the mortgage here sought to be foreclosed was given. By way of further defense it was alleged that, by virtue of certain contracts entered into on June 23, 1913, between defendant Rickert and one John Crockett, on one side, and one Wilson Chamberlain on the other, the latter agreed to sell, and the said defendant Rickert and the said Crockett agreed to buy, certain described real property for the sum of $20,000; that thereafter, and prior to the 18th day of November, 1913, said defendant and said Crockett paid thereon the sum of $5,000; that thereafter the said Crockett assigned and transferred all his interest therein to A. Widmaier, and that thereafter the defendants Rickert and Widmaier assigned and transferred all their right, title, and interest therein to plaintiffs as security for the payment of a promissory note made to plaintiff for the sum of $2,500, and interest, and, as a part of the same transaction, these defendants delivered the chattel mortgage sought to be foreclosed here; that on or about November 20, 1913, these same defendants "transferred" to one R. M. Piwald all their interest and estate in, and right and title to, the Sunset Café at Ocean Beach, and at the same time conveyed to the Union Title & Trust Company, a corporation, for said Piwald, all their interest in said property, all subject to the interest in, or lien upon, said property of said plaintiff; that it was understood and agreed by said defendants and said Piwald, and said Union Title & Trust Company, and said plaintiff, that the mortgaged property, together with defendants' interest in said mortgage, so transferred to the Union Title & Trust Company, should be held, and continued to be held, by plaintiff as security as aforesaid. Defendants, "on information and belief," further alleged that the Union Title & Trust Company, the said plaintiff and said Piwald entered into a written contract with said Wilson Chamberlain, by virtue of which it was agreed that Chamberlain would make a new contract for the sale of the land to Piwald, for the sum of $15,000, and that Piwald should immediately assign such contract to plaintiff as security for the payment of said promissory note; and that the same should take effect of, and be substituted for, said contract between said Chamberlain and said defendants—although the defendant Rickert did not, for a long time after the making of the contract last referred to, know of its execution or existence, and that the same was made without his consent. On information and belief defendant Rickert further alleges that upon the execution of said new contract with Chamberlain the said plaintiff consented to the rescission and annulment of said first contract, and that said first contract between the defendant Rickert and Crockett and said Chamberlain was annulled and rescinded, all without his knowledge or consent. He further alleges that the latter contract is in full force and effect, and held by plaintiff as security for the payment of said note; and that plaintiff, by this action, is attempting to foreclose only a part of the property had by said plaintiff as aforesaid.

The defendant Piwald denies the material allegations of the amended complaint, excepting paragraphs 1 and 2 thereof. He further alleges that in December, 1913, the defendants Rickert and Widmaier sold and transferred their interest in and to all the personal property described in the mortgage here sought to be foreclosed; that by bill of sale transferring and selling said personal property to them they "warranted and guaranteed" the title thereof, and undertook to protect him from any obligation or debt due or owing by them—other than said indebtedness set out in said bill of sale, which did not include the amount sought to be secured by the alleged chattel mortgage; that he immediately took possession of said property, and ever since he has been in possession thereof.

The issues framed by the foregoing alleged facts were the propositions before the court for adjudication, and were tried by the court without a jury. The court found for the plaintiff on all the material issues, and entered a decree of foreclosure of said chattel mortgage. There was a motion for new trial, which was denied. This appeal is from the judgment and order denying motion of defendants Rickert and Widmaier for a new trial. From the foregoing statement it appears, as appellant contends, that by his answer he tenders two separate defenses: (1) That the plaintiff is estopped from proceeding with this action; and (2) that respondent by this action is attempting to foreclose its lien upon only a portion of the property which is held as security for the payment of the note referred to herein. The action was commenced on October 27, 1913. The agreement just referred to was executed on November 17, 1913.

[1] This case must stand or fall by the proper construction placed on the said contract, i. e., whether that contract is an "executed contract" or an "executory contract." If the former, the judgment entered was error. If the latter, then the judgment here is correct. The agreement, by its own language, tells us the class to which it belongs. It says:

> "* * * The said first party * * * agreeing in consideration of this agreement, *and what hereafter follows*, to withdraw foreclosure proceedings," etc.

The italicized words, "and what hereafter follows," refer to, or rather embrace, certain executory covenants on the part of Rickert and Widmaier, and by them to be performed. The performance of these covenants, so to be performed by said Rickert and Widmaier, as well as "this agreement," constituted the consideration for respondent's agreement to dismiss the action. For this reason the consideration for respondent's agreement to dismiss was, in part at least, executory. We have no difficulty in giving the contract this construction, regardless of the evidence; but, when viewed in the light of all the evidence before us, any doubt which might have existed disappears.

From the evidence here it conclusively appears, without conflict, that "the cardinal thing" that led the Mission Brewing Company to enter into the contract was the promise of the defendant Rickert to use their beer in Los Angeles; and, according to the testimony of the same defendant, he never used any of their beer in Los Angeles. To the question, "Have you ever used their beer in Los Angeles?" he answered, "No, because I could not get the amount of money they want put up—this brewery I was indebted to in Los Angeles." Nowhere in the record is this contradicted. On this point alone plaintiff was entitled to judgment.

[2-4] The point is made by appellant that the failure of the court to find on issues presented by him in his special defense made necessary a re-examination of the "issues," and that consequently the defendant Rickert was entitled to a new trial. The point is not well taken. It has been repeatedly held that—

> "Even when the court has omitted to find upon a *material issue*, a new trial will be denied if on the evidence the findings must have been adverse to the party asking a new trial. By parity of reasoning a new trial may be denied if a finding in favor of the party asking a new trial (upon a particular issue) could not have changed the result." Gates v. McLean, 70 Cal. 42, 11 Pac. 489; Hoover v. Wasson, 11 Cal. App. 596, 105 Pac. 945.

The evidence, as has already been stated, shows conclusively that defendants never complied with their part of said contract, and hence they have never been at the place where the withdrawal of the foreclosure proceeding could have been rightfully demanded by them.

Appellant contends that the clause in said contract (Defendants' Exhibit A), providing that plaintiff would withdraw the proceeding to foreclose—in other words, would dismiss the action on condition that defendant should use the beer of the Mission Brewing Company in Los Angeles—is void and not binding upon defendants. He admits he did not comply with this part of it. He then argues that that clause is "separate and distinct" from the provisions concerning the withdrawal of the foreclosure proceeding; hence the entire agreement is not rendered void by the above provision alone. Here appellant is seeking to enforce respondent's promise to dismiss the action—a promise that is based partly upon legal consideration and partly upon the alleged illegal consideration. The rule is that the separation of the good consideration from that which is illegal will not be made where the party seeking to enforce the contract is himself the one who has made and breached the illegal consideration. Saratoga County Bank v. King, 44 N. Y. 87; 13 C. J. pp. 512, 513, § 470. If there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which one of the considerations induced the promise. 13 C. J. p. 513, § 471.

[5, 6] Another point urged by appellant is that respondent here is not entitled to a deficiency judgment against appellant for the reason that it foreclosed its mortgage only on a portion of its security. This is based on the presumption that appellant's theory of the case has been sustained by the evidence. This is not the case. The respondent could not have legally resorted to the foreclosure of this "other property" without, by so doing, recognizing the contract, Defendants' Exhibit A. It has not done so. It has been kept from so doing by appellant's failure to perform his part of the contract. Respondent was therefore strictly within its rights in disregarding the said "agreement" and proceeding with the foreclosure according to law. Assuming, without so holding, that the respondent did in fact hold this "other property" as security for the payment of the note here sued upon, still this "other property" need *not* be exhausted before deficiency judgment can be entered. Its assignment was a contract of hypothecation, and an action to foreclose which is not an action for the recovery of the principal debt. Merced Bank v. Casaccia, 103 Cal. 641, 37 Pac. 648; Ehrlich v. Ewald, 66 Cal. 97, 4 Pac. 1062; Savings Bank of St. Helena v. Middlekauff, 113 Cal. 463, 45 Pac. 840; McArthur v. MaGee, 114 Cal. 126, 45 Pac. 1068; Hawley v. Brownstone, 123 Cal. 643, 56 Pac. 468; Kraft v. Bryan, 140 Cal. 73, 73 Pac. 745.

In view of what has been said we think it unnecessary at this time to pass upon the point raised by respondent, viz. that the defendant Ralph M. Piwald has not been made a party to this appeal, not having been served with any of the notices "required for the motion for a new trial, nor on appeal; nor has a copy of appellant's brief, as required by rules of this court"—and we refrain from so doing. This phase of the case renders immaterial the other points discussed on this appeal.

The judgment and the order of the court denying the motion for a new trial are, and each of them is, hereby affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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39 Cal. App. 649

BONNER et al. v. LEHFELDT et al.

(Civ. 2695.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1919.)

1. APPEAL AND ERROR 🔑907(2) — OMITTED EVIDENCE—PRESUMPTION.

The presumption is that the record exhibits all matters material to a consideration of the points presented, and not that evidence other than that incorporated in the bill of exceptions would support the findings in question.

2. APPEAL AND ERROR 🔑837(9) — MATTERS PRESENTED SUBSEQUENT TO APPEAL—CONSIDERATION.

Where appeal from order was taken while motion to vacate order was under submission, matters contained in bill of exceptions subsequent to date of order cannot be considered.

3. EXECUTION 🔑420 — SUPPLEMENTARY PROCEEDINGS—AUTHORITY AND JURISDICTION OF REFEREE—WAIVER.

While, in proceedings supplementary to execution, the better practice would have been to follow the provisions of Code Civ. Proc. §§ 638–645, where the referee was appointed by the court under section 719, as shown by order, and appellant, alleged debtor of judgment debtor, appeared before referee, any objection as to appointment, authority, or jurisdiction of the referee was waived.

4. EXECUTION 🔑402 — SUPPLEMENTARY PROCEEDING—FUND SUBJECT—EVIDENCE.

In proceeding supplementary to execution, where money in the hands of alleged debtor of judgment debtor to the amount of the judgment was ordered paid to sheriff, evidence *held* not to warrant conclusion that money was payable to judgment debtor or his general creditor.

5. EXECUTION ⟹402 — SUPPLEMENTARY PROCEEDING—PARTIES.

Where, in proceeding supplementary to execution to subject money in hands of alleged debtor of judgment debtor to payment of judgment, it appeared that money was payable to W., not a party, court erred, where W. was not brought in, in directing alleged debtor to pay the money.

6. CREDITORS' SUIT ⟹13—EXECUTION ⟹358 — SUPPLEMENTARY PROCEEDINGS — NATURE AND PURPOSE.

The statutory proceedings supplementary to execution are designed to take the place of a creditors' bill, but if for any reason they do not afford adequate relief the old remedy lies, in view of Code Civ. Proc. § 720.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Andrew Bonner and another against Henry A. Lehfeldt. From an order supplementary to execution, directing V. Tremain, as debtor of defendant judgment debtor, to pay the amount of a judgment to the sheriff, Tremain appeals. Reversed.

Samuel R. Davis and W. H. Morrissey, both of San Francisco, for appellant.

Tum Suden & Tum Suden, of San Francisco, for respondents.

BRITTAIN, J. The appeal is from an order supplementary to execution directing the appellant, as debtor of the judgment debtor, to pay the amount of a judgment to the sheriff. The plaintiff's affidavit follows the ordinary form in which the rendition of the judgment is set forth, together with the issue, levy, and unsatisfied return of execution. It was averred that Tremain, appellant, was a debtor of the judgment debtor in an amount exceeding $50, and that he refused to apply the money in his hands to the satisfaction of the judgment. The order of examination, based on these averments, directed Tremain and Lehfeldt, the defendant, to "appear before E. M. Levy, the commissioner appointed by me," at a time and place stated, "to answer concerning the same." Tremain appeared and testified he had agreed to lend Lehfeldt and his wife $4,000 to construct a building on a lot in San Francisco. The Lehfeldts executed a note and mortgage on the property to secure the loan, and it was agreed the proceeds of the loan should be advanced in four installments, of $1,000 each, when the frame of the building was up, when the brown coat of plaster was on, when the building was completed, and 35 days thereafter. It was further agreed that all of the payments were to be made by checks drawn by the lender to the order of Lehfeldt and his wife, and by them indorsed to the order of J. W. Wright & Co., real estate agents in San Francisco. Wright & Co. were to use the checks to pay the building bills for Lehfeldt's account. Pursuant to this agreement, and coincident with the execution of the note and mortgage, Tremain drew, but did not sign, the checks. Lehfeldt and his wife immediately indorsed the checks to the order of Wright & Co. The first two checks were signed and delivered by Tremain at the appropriate times to Wright & Co. Wright notified Tremain "they had sold out the Lehfeldt property. Mr. Tremain said that he had paid $2,000 under the mortgage; that he had still $2,000 that he was willing to pay, *provided he was in every way protected from all liability against every one.*"

Some days after hearing this evidence, the commissioner read to Tremain his proposed findings, and the latter stated that they were correct "with certain exceptions, and should be amended to set out and show the Wright transaction; that Mr. Levy agreed to make these corrections, and thereafter, in the absence of Mr. Tremain, he made corrections; that Mr. Tremain did not see the findings and report of Mr. Levy after they had been corrected." The report of the commissioner in substance follows the foregoing facts, but contains the additional statement:

> "The said money was a fund to be used to pay for the building built on said lot of land; * * * that the said V. Tremain did not deny the indebtedness, but he specifically admitted that he has the money in his possession belonging to said Henry A. Lehfeldt, the judgment debtor herein, nor does said V. Tremain claim any interest in the said money or property adverse to the judgment creditors herein or adversely to said Henry A. Lehfeldt."

Upon the recommendation of the commissioner the order from which the appeal was taken was made.

In the bill of exceptions it was clearly specified that the evidence was insufficient to show that Tremain admitted that he had in his possession money belonging to Lehfeldt, and insufficient to show that at any of the times necessary to support the order he had any money belonging or payable to Lehfeldt. The assignments of error were sufficient to present fairly the question of the propriety of the order made by the lower court under the facts stated.

[1] It is contended on behalf of the respondents that the record shows affirmatively that there was other evidence than that incorporated in the bill of exceptions, and therefore that this court must presume the omitted evidence would support the finding of the commissioner to the effect that Tremain had in his possession money payable to Lehfeldt. On the contrary, the presumption is that the record exhibits all matters material to a consideration of the points presented. Couson v. Wilson, 2 Cal. App. 181, 83 Pac. 262;

Polkinghorn v. Riverside, etc., 24 Cal. App. 615, 142 Pac. 140.

[2] There were incorporated in the bill of exceptions certain affidavits and other documents presented to the lower court on a motion to vacate the order from which the appeal is taken. After the motion was presented, and while it was under submission, this appeal was taken. Under such circumstances, the matters contained in the bill of exceptions subsequent in date to the order before this court cannot be considered. Hefner v. Sealey, 175 Cal. 18, 164 Pac. 898. Argument based on such matters is without force.

[3] While not questioning the power of the court to appoint a referee under section 719 of the Code of Civil Procedure in such matters, the appellant maintains that in this case there was no referee appointed, and therefore no jurisdiction in Mr. Levy to conduct the examination, nor in the court to make the order for payment.

While the better practice in such cases would be to follow the provisions of sections 638–645 of the Code of Civil Procedure regarding references and trials by referees, the order in this case showed that the commissioner was appointed by the court. Any objection to the appointment, authority or jurisdiction was waived by the appearance of Tremain before the referee. Shain v. Peterson, 99 Cal. 486, 33 Pac. 1085.

[4, 5] From the appellant's testimony, it appears affirmatively, and the referee found, that the money in Tremain's hands constituted a special fund to be used for a specific purpose. It was to be paid at fixed times to J. W. Wright & Co. It further appears that Tremain was willing to pay the $2,000 "*provided he was in every way protected from all liability against every one.*" There was no other evidence upon the subject. This evidence warranted neither a finding nor a conclusion that the money was payable to Lehfeldt, or to a general creditor of Lehfeldt. In respondents' brief it is asserted that the judgment was for millwork furnished for the house which was to have been constructed under the terms of the agreement to which reference has been made. There is nothing in the record to indicate that this statement, even conceding its truth, was before the referee or the court below when the order appealed from was made. If it had been, the result would not have been changed. The money being payable to Wright & Co., in their absence, no order to pay it to respondents could have protected Tremain against their claim.

[6] The statutory proceedings supplementary to execution are designed to take the place of a creditors' bill, but where, for any reason, they do not afford adequate relief, the old remedy lies. Phillips v. Price, 153 Cal. 146, 94 Pac. 617; Code Civ. Proc. § 720. All known adverse claimants to a fund sought to be reached by a judgment creditor should have an opportunity to be heard; otherwise they would not be bound by the order, nor would the holder of the fund. Deering v. Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801.

The affidavit and order of examination depended on the existence of the fact that Tremain had in his possession property of the judgment debtor. If, under a creditors' bill containing the same allegations, it should have been shown that the money was payable to Wright & Co., the court would have ordered Wright & Co. to be brought in, or judgment would have been rendered for the defendant.

> "No court can adjudicate directly upon a person's right, without the party being * * * actually or constructively before the court." Mallow v. Hinde, 12 Wheat. 193, 6 L. Ed. 599.

The order appealed from is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

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39 Cal. App. 791

SMITH v. LEHFELDT et al. (Civ. 2696.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1919.)

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Robert H. Smith against Henry A. Lehfeldt. From an order supplementary to execution, directing V. Tremain, as debtor of defendant judgment debtor, to pay the amount of a judgment, Tremain appeals. Reversed.

Samuel R. Davis and W. H. Morrissey, both of San Francisco, for appellant.

Samuel J. Jones, of San Francisco, for respondent.

PER CURIAM. It is stipulated that in all substantial respects the record is the same in this case as in the case of Bonner and Le Page v. Lehfeldt, 179 Pac. 722, this day decided by this court (Civ. No. 2695).

It is further stipulated that "the appeal in this case be heard upon the papers set out in this stipulation and the record contained in the transcript on appeal in the case of Andrew Bonner and Louis Le Page v. Henry A. Lehfeldt." On the authority of that case, the order appealed from must be reversed.

The order is reversed.

39 Cal. App. 566

PEOPLE v. REDMAN. (Cr. 632.)

(District Court of Appeal, Second District, Division 1, California. Feb. 4, 1919. Rehearing Denied by Supreme Court April 3, 1919.)

1. Burglary 🔑22—Indictment and Information 🔑86(3)—Particularization of Place and Ownership.

An information for burglary in particularizing the place where the crime was committed need go no further than to allege that it was committed in the particular county, and need not allege particular ownership of the building entered.

2. Burglary 🔑28(6)—Indictment and Information 🔑175—Particularization of Place and Ownership—Variance.

Where information for burglary particularizes by specific allegation location of place where offense was committed, or particular person owning building, prosecution cannot show ownership was otherwise than that alleged, or location different, without vitiating its case by a variance between the allegations and proof.

3. Burglary 🔑28(5, 6)—Information—Location of Place and Ownership—Variance.

Where an information for burglary charged that the garage entered was "located on the San Joaquin fruit ranch near the San Joaquin Fruit Company," but the owner testified that she lived on a ranch called Irvine ranch, just above the San Joaquin fruit ranch, and defendant admitted visiting the garage, though it was not shown as to who actually owned the premises in question, but it appeared that they were neither owned by nor were in the possession of defendant, there was no variance.

4. Criminal Law 🔑683(1)—Proof of Intent—Rebuttal Evidence.

In a prosecution for burglary, to rebut proof of apparent intent to steal, which the circumstances of defendant's discovery by the owner of the property shown by the prosecution suggested, it was competent for defendant to testify he had been told by his companion that the companion owned the property and had the right to sell it.

5. Criminal Law 🔑1170(1) — Appeal — Harmless Error—Exclusion of Evidence.

The duty of the appellate court is not to reverse a conviction for error in excluding defendant's proof rebutting his apparent criminal intent, unless it can be said that he has been so prejudiced that the result is a miscarriage of justice.

6. Criminal Law 🔑1137(6)—Exclusion of Evidence—Consent to Ruling.

Statement of counsel of defendant charged with burglary that he was satisfied with the court's ruling excluding proof rebutting defendant's criminal intent apparent from the circumstances under which he was discovered *held* a consent to the ruling, leaving defendant without ground to complain.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

L. Redman was convicted of burglary, and from the judgment and an order denying his motion for new trial, he appeals. Affirmed.

Douglas L. Edmonds, C. L. Welch, Frank Dominguez, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. This appeal is taken from a judgment of imprisonment and from an order denying a motion for new trial.

Appellant was convicted of the crime of burglary, the information alleging that on the 22d day of April, 1918, in the county of Orange, state of California, he did, "willfully, unlawfully, feloniously, and burglariously, enter the outbuilding, to wit, the garage of M. G. Mastich, located on the San Joaquin ranch, near the San Joaquin Fruit Company, in said county and state, with felonious intent to commit the crime of larceny." The witness Katie Mastich testified that she lived on what was called the "Irvine ranch, just the place above the San Joaquin Fruit ranch"; that she saw the defendant there on the 22d day of April, 1918; that there were on the premises a house, garage, and other outhouses; that on the morning in question she heard an automobile drive up, and that the defendant came to the door of the house and knocked, and that she made no response; that he then went over to the garage, and finally went back to the automobile, in which there was another man, and that the two went away; that pretty soon they came back, and that defendant again knocked at the door, and, the witness having made no response, the two men drove away again a short distance and then came back and stopped nearby, where they remained talking for a time; that defendant then came to the door of the garage, accompanied by the other man, and that the witness heard the noise of the breaking of the garage door; that she secured a small rifle which was kept in the house and walked out to where the men were, and found defendant just in the act of putting a sack of beans, which he had taken from the garage, into the automobile; that the defendant exclaimed upon seeing the witness with the gun, "My God, lady, don't shoot; I will put them all back;" that he did put the beans back, and then proceeded to beg the witness to allow him to go free, stating that he had been in the hospital, out of work, and had a mother to support; that meanwhile the second man had disappeared; that the witness made note of the number of the automobile, and allowed the defendant to leave the place at that time. He was later arrested. She was asked as to whether defendant said anything about "the other fellow," and replied: "He said it was the other fellow's fault; the other fellow showed him where the beans were and how easy it was to get them."

[1-3] The first point made by appellant is that there was a fatal variance between the allegations of the information and the proof made, particularly that the information charged that the garage entered was "located on the San Joaquin ranch, near the San Joaquin Fruit Company," whereas Mrs. Mastich testified that she lived on a ranch called "Irvine ranch, just the place above the San Joaquin Fruit ranch." If we were required to say that by this evidence a different place was indicated from that alleged in the information, defendant's point would be good. However, any uncertainty as to that matter was cured by the defendant's own testimony. Defendant admitted visiting the garage, and he was asked by his counsel this question: "You went out to the place that has been designated as the San Joaquin ranch?" to which he replied, "Yes, sir." Moreover, it was not essential that the prosecution should have gone further in particularizing the place where the alleged crime was committed than to allege that it was committed in the county of Orange, nor to allege particular ownership of the building entered. People v. Geiger, 116 Cal. 440, 48 Pac. 389; People v. Mendoza, 17 Cal. App. 157, 118 Pac. 964. It may be admitted that where the prosecution does particularize by specific allegation the location of the place where a burglary has been committed, or as to the particular person owning the building, they cannot show that the ownership was otherwise than that alleged or the location different, without rendering their case open to the objection as made by appellant here of a variance between the allegations and proof. However, we have indicated that no such variance existed here. While it was not shown as to who actually owned the premises in question, it did sufficiently appear that they were neither owned by, nor were they in the possession of the appellant at the time of the commission of the alleged crime.

[4-6] Defendant, notwithstanding the incriminating statements made to Mrs. Mastich at the time the latter confronted him with a rifle, sought at the trial to show that his motive in taking the beans was wholly innocent; that he was led to believe by Olsen, his companion, that the latter owned the beans; and that he was taken to the place by Olsen for the purpose of purchasing them. He was asked to state what conversation he had with Olsen prior to going to the Mastich place, respecting the sale of the beans, to which question the court sustained an objection on the ground that, as stated in the objection, the testimony would be incompetent, hearsay, and self-serving. The court was in error in its conclusion as to the extent that a defendant may go in rebutting proof of apparent intent which the circumstances shown by the prosecution suggests. And it was competent for the defendant to testify, if such was his desire, that he had been told by Olsen that he (Olsen) owned the beans and had the right to sell them. However, our duty is not to reverse a case for such error, unless it can be said that the defendant has been so prejudiced in his rights as that the result is a miscarriage of justice. We find on an examination of the transcript that defendant was allowed to state that he was proposing to buy the beans of Olsen, and that while at the garage they dickered as to the price. Then, when the witness was stopped by the prosecuting attorney as he was about to make statements of what Olsen told him, the court, after indicating that he would sustain the objection, made quite a lengthy statement to counsel for defendant, inviting the citation of authorities under which the testimony was offered, to which counsel for defendant replied, "I am satisfied with the ruling." This statement of counsel, we think, was a consent to the ruling of the court, which would leave him without ground to complain thereof.

We have examined carefully the entire transcript of the evidence submitted and all of the points suggested by appellant. We are satisfied that no such prejudicial error is shown as to entitle defendant to a new trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 723

REAL v. KERN COUNTY. (Civ. 2511.)

(District Court of Appeal, Second District, Division 1, California. Feb. 13, 1919.)

1. TAXATION ⚷821(4)—SALE FOR TAXES—INVALIDITY OF TAX DEED — REFUND FROM COUNTY—TIME FOR CLAIM.

If the words "refunded in accordance with section 3804," found in Pol. Code, § 3898, subd. 5, providing for presentation by a purchaser of a tax deed, the sale having been determined to be void, of claim against the county for refund of the amount paid into its treasury, are to be construed as including the provision of section 3804 that the verified claim, to be effective, must be filed within three years after making the payment, such limitation as to time does not begin to run until the court has determined the purchaser is not entitled to an award of the property purporting to be conveyed by the void tax deed.

2. TAXATION ⚷820 — PURCHASER OF VOID TAX DEED — AMENDMENT OF STATUTE — EFFECT ON RIGHT TO REFUND.

Rights of purchaser of void tax deed, though purported conveyance was made prior to amendment of Pol. Code, § 3898, subd. 5, when the statute without limitation of time declared such a purchaser entitled to a refund of the money paid whenever the court determined the deed to be void, were to be measured by the statute as it existed when the court adjudged he was not entitled to an award of the property.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by C. E. Real against the County of Kern. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Dorsey, Dist. Atty., of Bakersfield, for appellant.

C. E. Arnold and Matthew S. Platz, both of Bakersfield, for respondent.

SHAW, J. In this action plaintiff sought to recover the sum of $1,440.82, which sum, in addition to accrued taxes, interest, costs, and penalties, he, in January, 1911, paid into the county treasury of Kern county as the purchase price of certain land then sold and conveyed to him by the state, title to which land it claimed to have acquired by reason of delinquency in the payment of taxes thereon for the fiscal year 1904 and proceedings thereafter had and taken pursuant to law.

Thereafter, in December, 1913, an action was instituted involving the validity of the deed so received by plaintiff, wherein it was, in November, 1916, adjudged that said deed was void as a conveyance of title to plaintiff, and the same ordered canceled and annulled. In January, 1917, plaintiff, in accordance with the provisions of section 3898, Political Code, as amended in 1913, presented to the board of supervisors a duly verified demand and claim for a refund of the amount so paid, which claim the board rejected. Defendant's general demurrer to the complaint, wherein the above facts were set forth, was overruled, and in answering it defendant admitted the same, but alleged that plaintiff did not present his claim within three years after the making of the payment, by reason of which fact the cause of action was barred by the provisions of section 3804, Political Code.

The case was submitted without evidence and judgment rendered upon the pleadings for plaintiff, from which defendant appeals.

Subdivision 5, added to section 3898, Political Code, by amendment in 1913, among other things, provides that if in an action at law the court determines a sale and conveyance by tax deed from the state to a purchaser void, by reason of which fact the property is not awarded to the party to whom the deed is made—

> "the said purchaser may also present a claim against the county, in the manner provided by law, for a refund of the amount paid into the county treasury as the purchase price of such property in excess of the amount for which he may have been reimbursed for taxes, penalties, and costs as herein provided, and such excess shall be refunded in accordance with section 3804 of this Code."

Section 3804, Political Code, among other things, provides:

> "No order for the refund of taxes, penalties or costs under this section shall be made except upon a verified claim, * * * verified by the person who has paid said tax, * * * which * * * claim must be filed within three years after the making of the payment sought to be refunded."

Basing its argument upon the two provisions quoted from section 3898 and 3804, appellant contends: First, that plaintiff having paid the purchase money in 1911, his claim for a refund thereof was not filed within three years, as required by section 3804; second, that as the purported purchase and conveyance of the land was made to plaintiff by the state in 1911, he cannot avail himself of the act of 1913, since to uphold his right so to do would give the statute a retroactive effect.

[1] As to the first proposition, section 3804 relates to erroneously collected taxes and provides for a refund thereof by the board of supervisors upon the filing of a verified claim therefor at any time within three years after making the erroneous payment sought to be refunded. Under section 3898, however, there can be no claim for a refund of the money paid for the deed until the court adjudges the same void. Not till then can it be said there has been an erroneous payment, to a refund of which the party making it is entitled. Hence, assuming that the words "refunded in accordance with section 3804," found in section 3898, are to be construed as incorporating therein the provision in the latter section to the effect that the verified claim, in order to be effective, must be filed within three years after making the payment, we are constrained to hold that such limitation as to time does not begin to run until the court has determined that the purchaser is not entitled to an award of the property purporting to be conveyed by a void tax deed. It is apparent that the purpose of the Legislature in adopting the amendment embodied in subdivision 5 of section 3898 was to provide a means for the recovery of money to which the state had no legal or equitable right. The validity of tax deeds has been a fruitful source of litigation, and where such cases, though promptly commenced, are prosecuted to the higher courts, three years rarely suffice for a determination of the question. Hence to hold that the three-year limitation contained in section 3804 begins to run from the date of the execution of such invalid deed would nullify the intent of the Legislature in enacting the provision and deprive an aggrieved party of a right which it was

clearly the purpose of the Legislature to accord him.

[2] Neither, to our minds, is there any merit in appellant's second proposition. As stated, no right existed in plaintiff as a purchaser of the property to have a refund of the purchase price made until the deed was declared invalid. This was in November, 1916, at which time the statute, without limitation of time in the application thereof, declared a purchaser of land from the state by tax deed entitled to a refund of the money paid therefor whenever the court determined such deed void. Plaintiff's rights, notwithstanding the purported conveyance was made prior to the enactment, were to be measured by the statute as it existed when the court adjudged he was not entitled to an award of the property. The subject of the provision is the right accorded at the time of such adjudication, which right was unaffected by the fact that the purported sale was made prior to the amendment.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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39 Cal. App. 717

KLOKKE INV. CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2818.)

(District Court of Appeal, Second District, Division 1, California. Feb. 13, 1919. Rehearing Denied by Supreme Court April 10, 1919.)

1. Process 🔑108—Mailing in Addition to Publication.

Where the affidavit supporting an order for publication of summons does not show that the residence of defendant is known, Code Civ. Proc. § 413, requiring the mailing of summons to a defendant whose residence is known, does not apply.

2. Process 🔑108—Publication—Sufficiency—Mailing in Addition to Publication.

Code Civ. Proc. § 413, as to mailing summons to defendant whose residence is known, is satisfied by a mailing in the ordinary way without registering the letter.

3. Courts 🔑78—Rules of Court—Operation and Effect—Acts Giving Jurisdiction.

Since the acts necessary to give jurisdiction as specified by statute cannot be added to or limited by a rule of court, compliance with Code Civ. Proc. § 413, in mailing summons to a defendant whose residence is known will not be affected by failure to observe a rule of court requiring such mailed documents to be registered.

4. Process 🔑158—Order for Publication—Setting Aside.

Where, under Code Civ. Proc. § 416, the court acquired jurisdiction by completed service by publication, and the order for such publication was not made inadvertently, or through mistake or fraud, the court is without power to set aside the service under section 937, providing that an order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it.

5. Mandamus 🔑31—Action of Court—Refusal to Proceed with Cause.

Where a superior court refuses to proceed to hear a cause, in which it has obtained jurisdiction through proper service by publication and proof thereof, a writ of mandate will issue to compel it to proceed to a hearing of the cause.

Original proceeding in mandate by the Klokke Investment Company against the Superior Court in and for the County of Los Angeles and John W. Shenk, Judge thereof. Demurrer to petition overruled, and peremptory writ of mandate issued.

W. W. Butler, of Los Angeles, for petitioner.

Joseph L. Lewinsohn, of Los Angeles, for respondents.

JAMES, J. Proceeding in mandate to compel the superior court to proceed to a hearing of a cause in that court pending. An alternative writ was issued and return made thereto. There is no material dispute as to the facts.

Petitioner herein was plaintiff in a suit to foreclose a mortgage on real estate. R. Lewis was named as one of the defendants in that action. Service was made upon R. Lewis by publication. The affidavits upon which the order for publication was made showed that an exceedingly diligent search had been prosecuted on behalf of the plaintiff in the endeavor to find the said R. Lewis in the state of California, and that said search had been unavailing. It was not shown by any of the affidavits that the residence of the said R. Lewis was known, and therefore no showing was made which required the judge of the court to order that a copy of the summons and complaint be deposited in the post office and be directed to the person to be served at his place of residence, as is provided by section 413, Code of Civil Procedure. The court did insert in its order the statement that the residence of the said Lewis might be known to two of her codefendants, and, following that statement, ordered that copies of the summons and complaint be addressed to the said Lewis in care of the two defendants, both of whom resided in the city of Los Angeles. Publication was duly made and proof furnished thereof, upon which the default of the defendant Lewis was entered.

Thereafter Lewis appeared specially in the court and moved to vacate and quash the service of summons upon several alleged grounds. It was urged on the motion that the court had not acquired jurisdiction of the defendant Lewis, in that she was a resident of the state of New York; for the further reason that neither the affidavits nor the order for publication of summons showed that plaintiff had a good cause of action against the defendant; that the person who should mail the copy of summons and complaint, as required by the order, was not named; and, further, that said summons and complaint so mailed were not sent in registered packages. This motion was by the court denied, and, the cause being called for hearing before another judge, the motion was renewed, and the court sustained the same and refused to hear the case as against the defendant R. Lewis. Petitioner then filed his petition for mandate to compel the court to proceed.

[1] It must be conceded that the affidavits upon which the order for publication of summons was made stated ample and sufficient facts to sustain the order. Under the showing presented to the court at the time the order was made, no facts appeared from which the court was required to order a mailing of the summons and complaint. Nevertheless the return as made by the plaintiff, after publication of summons, showed that it had literally complied with the order of the court in mailing copies of the complaint and summons in care of the two codefendants of the defendant Lewis; that such mailed summons and complaint were addressed as required by the court and deposited in the mails with postage prepaid.

[2, 3] It is said that a rule of the superior court required such mailed documents to be registered. Assuming that the case was one within section 413, Code of Civil Procedure (where the residence of the defendant is known), the statute was satisfied when the mailing was made as therein required. The acts necessary to give jurisdiction, as specified in an act of the Legislature, cannot be added to or limited by rule of court. The court in its order for publication recited that it appeared from the affidavits presented and from the verified complaint that a cause of action existed against this defendant, and as the files of the court were before the judge who made the order, we must presume that his conclusion on that matter was properly made.

[4] The main contention urged on behalf of the respondents is that the superior court and any judge thereof had power to quash the service of summons and set aside the order permitting the same to be made by publication, regardless of the fact that such order for publication, when made, was sufficiently supported by affidavits showing the requisite facts. This, because section 937, Code of Civil Procedure, provides that—

> "An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made."

We are not prepared to concede that an order for publication of summons, duly made, after judicial investigation of facts, is such an order as may fall within the provisions of the section noted. However, for the purposes of this proceeding, we may admit that it is. Nevertheless, where action is invoked under section 937, Code of Civil Procedure, either by the motion of the court itself or by application of a party, it by no means follows that the ex parte order may be set aside without being grounded upon any reason except that the court concludes differently than it has upon its first decision. An order inadvertently made, or under mistake, or a showing that it has been fraudulently procured, may certainly be set aside under the authority given by said section 937, but not otherwise. Wiggin v. Superior Court, 68 Cal. 402, 9 Pac. 648. We quote from that decision:

> "Where the judgment of a court has been deliberately exercised in a cause, and a final result reached as a conclusion thereof, there are good reasons why it should not be disturbed except by the formal methods prescribed by statute, but rulings, orders, and even judgments inadvertently made are not the result of judgment, but of oversight, neglect, or accident, and are subject to correction by the judge or court making them."

See, also, People v. Curtis, 113 Cal. 68, 45 Pac. 180.

In this case there can be no pretense that the judge who made the order for publication of summons against Lewis acted inadvertently or through mistake, or that he was imposed upon. No such showing was made on the motions to quash the service of summons and, as we have before stated, the order for publication was fully supported by the affidavits furnished to the court prior to the signing thereof. After service of summons had been made by the publication thereof, the court acquired jurisdiction to proceed as against Lewis:

> "From the * * * completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. * * *" Section 416, Code Civ. Proc.

[5] And so it follows that, at the time the motions to quash the service of summons were made, jurisdiction was shown by the record before the court and by a record which was complete and sufficient as to the requisites involved. The court acted without authority in refusing to proceed, and the order attempting to quash the service of summons was void.

This matter was submitted upon the demurrer of the respondents (which demurrer presented the question of law as to the sufficiency of the facts stated in the petition to entitle the petitioner to the writ) and upon the answer filed at the same time.

The demurrer to the petition is overruled; and it is ordered that peremptory writ of mandate issue, requiring the respondent court to proceed to a hearing of the cause and to determine the issues thereof as to the defendant Lewis; petitioner to recover its costs.

We concur: CONREY, P. J.; SHAW, J.

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39 Cal. App. 731

KALLENBERG et al. v. LONG et al.
(Civ. 2720.)

(District Court of Appeal, First District, Division 2, California. Feb. 14, 1919.)

1. Easements 🔑16—Rights of Purchaser.

Where owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the grantor retains.

2. Waters and Water Courses 🔑154(2) — Easements—Discharge of Water.

Where owner of tract of land sells a portion thereof, and at the time of the division there existed the right to discharge water from the upper lands to the lower, the conveyance of the lower lands carries with it the implication of a reservation of the servitude.

3. Pleading 🔑214(1)—Admissions—Demurrer.

General demurrer to complaint impliedly admits allegations thereof.

4. Waters and Water Courses 🔑119(2)—Discharge of Surface Water—Rights of Upper Owner.

Upper owner may not by artificial means collect surface waters into a single channel, where they had not flowed before and precipitate them in a single volume upon the servient tenement.

5. Waters and Water Courses 🔑118—Surface Water — Discharge upon Lower Lands—Natural Channel.

Where surface waters are discharged upon land of lower owner through a natural channel, the lower owner has no right to interfere with the flow thereof.

6. Waters and Water Courses 🔑154(2) — Surface Water — Drainage — Rights of Upper Owners.

Where the proprietor of land constructs drainage system to benefit the entire tract, and thereafter divides the tract into small parcels and sells same to different owners, purchasers of the lower land buy the property subject to the right of the upper owners to have their land drained by discharge of water upon the lower lands according to the drainage system so constructed.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Ernst Kallenberg and others against Emery M. Long and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

Clarence N. Riggins, of Napa, for appellants.

Edward S. Bell, of Napa, and P. O. Solon, of St. Helena, for respondents.

BRITTAIN, J. The plaintiffs sued for damages caused by damming back surface waters and for injunction against further interference with their flow. The complaint was in two counts based upon different theories of the plaintiffs' right to maintain the action. A general demurrer to the complaint and to each cause of action was sustained as to both causes of action, and, upon plaintiffs' refusal to amend, judgment was entered for the defendants. The plaintiffs appeal.

All the facts are set forth in the second count. The demurrer went to the root of the case. If upon all the facts the plaintiffs are not entitled to maintain their suit, it would be idle to send the case back for further proceedings by the application of a technical rule of pleading applied to a partial statement of facts in the first count. This is the typical case where upon a single series of facts the plaintiffs are in doubt upon which of several theories they might recover, not one where in the different counts they seek to recover for several infractions of distinct rights.

Disregarding the legal phraseology, the essential facts are that formerly a water course extended in a general easterly direction from the hills on the westerly side of the Napa Valley to the Napa river. This water course carried the surface waters from adjacent lands sloping towards it, and in its course it passed through the lands now owned by the plaintiffs to, and thence through, the lands now owned by the defendants.

Formerly the plaintiffs' and defendants' lands, with other lands west of plaintiffs' lands and higher on the slope, were owned by a single proprietor. On the east or lower side of defendants' lands runs, in a general northerly and southerly direction, the tracks of the Southern Pacific Railroad Company. West of the plaintiffs' lands, and separated from them by lands originally part of the entire tract, but now held by third parties, runs the county road between St. Helena and Calistoga. About 25 years ago, while all the lands were in one ownership, the proprietor, at a point west of plaintiffs' lands, dug a ditch from the natural water course southeasterly along the county road to the present southeasterly boundary of what are now the lands of the plaintiffs and the defendants, and thence along the boundary to and across the tracks of the Southern Pacific Railroad.

It is alleged that by this ditch all the water flowing in the natural water course, of course, above the opening of the ditch, was diverted so as to run through the ditch. The ditch also drained the surface waters from the southeastern part of the tract, which must have been a part, at least, of the defendants' lands, and possibly a part of the plaintiffs' lands. If nothing else had been done, the surface waters below the opening of the ditch would have continued to flow in the old natural water course. At the time the ditch was opened "for the purpose of providing for the drainage of the surface waters from the remainder of the tract, and disposing of the surface waters thereof, the owner also constructed a covered drain" across the tract northeasterly to a point on what is now the plaintiffs' land. In constructing the covered drain he used the channel of the natural water course. From the end of the drain the waters it carried drained along the channel of the water course over the lower portion of the plaintiffs' lands and the defendants' lands to the Southern Pacific tracks, where they flowed into a ditch necessitated by reason of the obstruction of the natural water course by the railroad tracks, east of and below the defendants' lands. At the time the drain was built the owner "arranged that the surface water of said tract which had, up to this time, drained into said water course, should continue to drain into the same, by placing tiling through the said tract connected with said covered drain in such a manner that it would drain said surface waters into the same so that the surface water from the entire tract was drained off of said land along the channel of said water course." It is further alleged that "said surface waters from said tract had always been drained therefrom along the channel of said water course." From the opening of the covered drain on the plaintiffs' land the water flowing in the old channel during the greater part of each year was open, obvious, and in plain sight. The drainage system was continuously in use from its construction until the winter of 1916–17, when the channel of the old water course was dammed by the defendants. The dam caused the surface waters to be backed onto plaintiffs' lands to the injury of the trees of a growing orchard.

In 1906 the owner of the land between the county road and the railroad tracks, having subdivided the tract, sold the lower, eastern portion of it to the defendants. Thereafter he sold the remaining portions to other persons, from whom the plaintiffs acquired their lands more than 5 five years before this action was commenced.

The appellants base their claim of right upon three theories: First, it is maintained that by the dam the surface waters which have always been accustomed to flow from the plaintiffs' to the defendants' lands were turned back. To this the respondents urge that in plaintiffs' first cause of action, which was drawn on this theory, the failure to allege that the waters flowed naturally constituted a fatal defect. Secondly, the appellants rely upon the theory that the dam was an obstruction to an easement reserved by implication upon the division of the land formerly held in single ownership. To this the respondents reply that in this state, when what would otherwise be the servient tenement is granted without express reservation of the easement, no servitude by implication is impressed upon the land granted. Third, the appellants maintain that the dam was an obstruction of a natural water course, or, if it did not amount to a water course, of a natural channel through which surface waters have been accustomed naturally to flow. In opposition to this, the respondents rely upon the plaintiffs' allegations to show the existence of an artificial system of drainage, the result of which was to deprive the channel of its characteristics as a natural one, and the plaintiffs of any right to relief. A decision upon this ground will necessarily dispose of the contentions relating to the formal statement in the first cause of action. We will discuss, therefore, only the second and third questions presented.

In the brief of the respondent counsel cite many cases from other states and from England in support of the theory that, where the owner of lands divides them and conveys without express reservation what would otherwise become the servient tenement subject to a servitude appurtenant to the remaining portion, the grantee takes the land free from the servitude. In effect, it is admitted that under section 1104 of the Civil Code, if the dominant tenement is first conveyed with its appurtenances, the deed carries the easement, but it is argued that under section 1084, and we may add section 1105, of the Civil Code, the conveyance without express reservation passes to the grantee a title in fee simple absolute, free from all claims of the grantor. It is further argued that any other rule would permit the grantor of such a deed to derogate from it by making unreserved claims upon the grantee.

The fallacy of this contention is demonstrated by a consideration of three instances not involving easements. When the owner of two coterminous parcels of land retains one and conveys by deed of grant the other, if respondents' theory of the conclusiveness of the grant is sound, if both parcels are riparian in character, and the grantor retains the lower parcel, he could not prevent his grantee from diverting the flowing waters to which he, as riparian owner, would be entitled, nor could he require his grantee to join him in maintaining the boundary fence between the two tracts; neither could he, as against his grantee, insist upon his right of lateral support for the land he retained. By granting one of the two coterminous parcels the grantor does not divest himself of any right which is appurtenant to the other, even though such appurtenance may constitute an easement, if it was in use and clearly apparent to the grantee of the servient tenement at the time of the grant.

[1, 2] If the matter were entirely open, we would determine this question adversely to the respondents. Despite the ingenuity of the argument presented on behalf of the respondents in this regard, however, the question is not an open one. The rule that, "where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the grantor retains," has become a rule of real property in this state as forceful as the rule in regard to the rights of lower riparian owners or the mutual obligations of coterminous owners. Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593; Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025. If at the time of the division of the entire tract there existed the right to discharge water in the way it was discharged from the upper lands to the lower lands of the defendants, the defendants' conveyance carried with it the implication of a reservation of the servitude.

[3] Upon the third point, since the demurrer was general, and not for ambiguity or uncertainty, and since the plaintiffs allege that the water course dammed by the defendants was a natural water course, we might rest our decision upon the implied admission of the defendants. As the case must be sent back for further proceedings, we do not base our decision upon the narrow ground, but deem it our duty for the guidance of the lower court, as well as of counsel, to declare the law applicable to the case directly presented by this appeal.

The distinction between a natural water course, that is, one in which waters other than surface waters flow, and a natural channel, as a swale, into which surface waters drain and by which they are carried away, is of no importance in this case. If the division line between the upper and lower lands on a slope follows the contour of the hill, and there are no lateral depressions, the water from the upper land must naturally flow across the division line for its entire length. If, on the other hand, the division line does not follow the contour, or if there are, as is usually the case, lateral depressions along the slope, the surface waters, seeking the lowest level, flow first towards, and then through such depressions. In the present case, if there had been no change made by the sole proprietor of the lands, all the surface waters of the particular basin would have flowed through the channel from the lands of the plaintiffs to those of the defendants. The sole owner did change the flow of the surface waters. By his first ditch he relieved the channel of all surface waters in the basin above the opening of the ditch, and these waters were carried to the south and around the lands of both the plaintiffs and the defendants. The defendants therefore were not hurt by having the amount of water discharged through the channel upon their lands reduced. After this reduction in the amount of water carried through the natural channel, the sole owner covered that channel for a portion of its length, or utilized the channel by building in it for a portion of its length the covered drain, the lower end of which was in the bed of the channel above the defendants' lands. If, instead of building a covered drain, he had narrowed the natural channel by building levees and had permitted the water to spread out in the natural channel below the levees on the plaintiffs' lands, so that the discharge upon the defendants' lands would have been the same, the character of the natural channel below the levees where it entered upon the defendants' lands would not have been changed. There is no difference in principle where the waters flowing in the channel were confined within the covered drain, if they were permitted again to spread out for the whole width of the original natural channel before it reached the upper boundary of the defendants' lands.

[4, 5] While an upper owner may not by artificial means collect the surface waters into a single channel where they have not flowed before and precipitate them in a volume upon the servient tenement (Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400) upon this appeal involving the pleadings only, it appears that the drainage system in its entirety caused the discharge only of a part of the same surface waters as flowed originally through the natural channel dammed by the defendants. In other words, regardless of changes made 25 years ago on and above the plaintiffs' lands, from the complaint it appears the surface waters flowing through the natural channel onto defendants' lands were thus accustomed naturally to flow there. If such was the fact, the defendants had no right to interrupt such a natural flow to the plaintiffs' injury.

[6] If there were doubt in regard to the flow being a natural flow of surface waters, under the rule that, where the sole proprietor conveys lands burdened with a servitude, the reservation is made by implication, it must be held that the respondents accepted

their conveyance subject to the easement. In this case it appears that for some 15 years prior to the acquisition by the defendants of their lands the waters were discharged upon those lands openly and obviously, as they were for more than 10 years after the conveyance was made to the defendants; that the drainage system was one made for the benefit of the entire tract, and its use was necessary for the beneficial enjoyment of the upper proprietors. The case is directly within the principle announced in Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593.

The judgment is reversed, and the cause remanded, with directions to the lower court to overrule the demurrer to the complaint, and to take such further proceedings as may be proper to determine the substantial rights of the parties.

We concur: LANGDON, P. J.; HAVEN, J.

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39 Cal. App. 726

McGILLIVRAY v. HAMPTON. (Civ. 2416.)

(District Court of Appeal, Second District, Division 1, California. Feb. 13, 1919.)

1. NEGLIGENCE 🔑134(9) — PERMITTING SPREAD OF FIRE — SUFFICIENCY OF EVIDENCE.

In an action for the destruction of hay by fire starting on defendant's land, evidence *held* to sustain finding that defendant negligently suffered the fire to extend beyond his land contrary to Pol. Code, § 3344.

2. EVIDENCE 🔑215(3)—ADMISSION—LETTER—QUANTITY OF HAY DESTROYED.

Letter from plaintiff, whose hay had been burned by fire negligently permitted to spread from defendant's land, stating that the fire "utterly destroyed some over 30 tons of my hay," *held* not an admission that only 30 tons had been burned.

3. DAMAGES 🔑226—DESTRUCTION OF HAY—COMPUTATION OF TONS BURNED.

In action for destruction of plaintiff's hay by fire negligently permitted to spread from defendant's land, court properly calculated amount of hay burned by taking acreage involved and estimates of witnesses as to yield per acre.

4. DAMAGES 🔑188(2) — MARKET VALUE OF HAY—INSUFFICIENCY OF EVIDENCE.

In suit for destruction of hay by fire negligently permitted to spread from defendant's land, evidence *held* insufficient to support finding of a market value of $8 a ton of the hay destroyed.

5. APPEAL AND ERROR 🔑1122(2)—REVISION OF FINDING OF FACT—POWER OF COURT.

The appellate court has no power to revise a finding of the value per ton of the hay destroyed by fire and sued for, which finding is unsupported by any evidence.

Appeal from Superior Court, Riverside County; George H. Cabaniss, Judge.

Action by Nettie McGillivray against R. L. Hampton, deceased. From judgment for plaintiff, defendant appeals. Reversed.

Walter S. Clayson, of Corona, for appellant.

Charles H. Seccombe, of Oakland, for respondent.

JAMES, J. In this action a recovery was allowed to the plaintiff for the value of 45 tons of hay at $8 per ton. Defendant has appealed.

[1] The hay was destroyed by fire, which, starting on the land of the defendant, spread into the hayfields of the plaintiff. It is claimed that the defendant negligently allowed the fire which had started on his land to extend to the land of the plaintiff. It is the contention of appellant that the evidence was insufficient to justify the conclusion of the trial judge that negligence was shown as against the defendant. The further points are made that the finding of the court that 45 tons of hay was destroyed, and that it was of the value of $8 per ton, are not sustained by the evidence; appellant asserting that but 30 tons of hay was shown to have been destroyed, and that the reasonable market value was not shown to be greater than $6 per ton. The appeal being by the alternative method, we are left to such quotations as are made in the briefs to determine what the evidence was. It appears that the defendant was not present on his lands at the time the fire was discovered, but his foreman was there. How the fire was started is not shown. Under the provisions of section 3344, Political Code, a person is liable not only where he negligently sets out fire on his own ground, but also for "negligently suffering any fire to extend beyond his own land." When the foreman of the defendant discovered the fire burning, he, with the assistance of several persons, proceeded to attempt to put it out along the line where the land of defendant bordered that of the plaintiff. One witness testified that the men fighting the fire "apparently put it out; it seemed to be out of fuel." McCoy, the foreman, testified:

> "We put it out; we thought we had put it out, and watched it there until almost 12 o'clock, when we left for dinner. And we went on to dinner, and it was still burning over to the west and north, and the only place we thought there was any danger of its getting out was on the east, because there was roads on the west and plowed land on the north."

Another witness testified:

That when the men left for lunch "the fire was smoldering along the east line where they

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

put it out; there was no blaze apparently at the time;" that it was smoking.

The further fact appears that after the men had had their lunch and returned to the ground the wind had shifted to the west, and the fire was then on the land of the plaintiff. Notwithstanding further efforts of the men to control the fire, it destroyed the hay of the plaintiff. There was no testimony shown from which it can be gathered that the wind which was blowing was of an unusual kind. The land of the defendant was westerly of that of the plaintiff, and hence it can be seen that a westerly wind would blow from the land of the defendant toward the land of the plaintiff. Undoubtedly this wind fanned into a blaze the smoldering fire which the witness testified was left along the east line of defendant's land, and carried it across the line. This evidence, appellant insists, fails to show any negligence on the part of defendant. This position could be taken with more assurance if it did not appear, as we have noted, that when the foreman of the defendant left the ground for lunch the fire was still smoldering along the line of the plaintiff's property. Such being the case, we think that the matter of determining whether defendant by his servants discharged the obligation of using ordinary care to extinguish the fire was one resting in the judgment of the trial court, and that it must be said that there is some evidence to sustain the conclusion arrived at. While the foreman did testify that the fire was apparently out, it at once appears as a reasonable deduction from the testimony of the other witness who saw the fire smoldering that the foreman was not diligent in making his observation to determine whether the fire was in fact extinguished before he left the field. The finding that the defendant was negligent must be sustained.

[2, 3] The court calculated the amount of hay for the burning of which damages were awarded by taking the amount of acreage involved and the estimates of witnesses to the amount of the yield per acre. Appellant insists that the court was not justified in doing this, because the plaintiff, in a letter to the defendant prior to the suit, had claimed only that 30 tons were burned, instead of 45. This letter was a letter written for the purpose of securing an amicable settlement, but it did not definitely state that only 30 tons of hay was burned. The letter was, in part, as follows:

> "I hear at same time their fire burned and utterly destroyed some over thirty tons of my hay. I depended on it to sell, and had been offered $8 per ton. Will you please make the loss good to me."

This letter did not amount to an admission that only 30 tons of hay had been burned, and the court was authorized to determine the fact as to that matter as the evidence showed it. The method adopted by the judge in computing the total tonnage destroyed was not objectionable.

[4, 5] As to the finding of the court that the hay destroyed had a market value of $8 per ton, we have searched the record in vain to find evidence to support it. None of the testimony placed the value at a greater sum than $8 for baled hay; one witness stating that it was worth "$8 or $9." The cost of baling was proved to be $1.75 per ton. The price of $8 per ton as fixed by the trial judge for unbaled loose hay is not supported by a word of testimony. We were much puzzled to understand how the court could have arrived at the figure stated in its findings as the ton price of hay until we read in the transcript a statement of the remarks of the judge in summing up his conclusions; and after we had read that statement we were more surprised than puzzled. We quote the dialogue between the court and counsel:

> "Mr. Clayson: You are establishing the value of $8 for unbaled hay? The Court: I think so. Of course, when a witness testifies as a matter of opinion, he is giving himself more leeway than when he testifies to a fact. He is simply giving his opinion, and when he testifies there is a little bias in favor of the side that calls the witness, and that is invariably noted by the courts in hearing the testimony of such witnesses. Of course, this is not a part of the record, but hay has been very high in this country for two or three years, hasn't it? Any hay would command a pretty good price. Is that true? I think $8 is probably— The lady puts the value at how much? Mrs. McGillivray: I was offered $8. The Court: $8 will do for the time being until I am reversed by a higher court."

The statement of Mrs. McGillivray, volunteered in answer to the court's question, referred to no particular time, but her testimony given earlier in the trial showed that the only offer of a higher price than $8 for baled hay received by plaintiff was after the fire occurred—how long does not appear. We regret exceedingly in this case to be compelled to verify the prophecy of the trial judge by ordering a reversal of the judgment, especially for the reason that the amount involved is small and much delay has been occasioned by the protracted course of this litigation over a few tons of hay. If we were authorized to modify the judgment, we would adopt that course; but the error complained of goes to a finding of fact which we have not the power to revise.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

39 Cal. App. 674

MARKER v. WILLIAMS. (Civ. 2083.)

(District Court of Appeal, Second District, Division 2, California. Feb. 10, 1919.)

1. SALES ⚷472(3), 473(1) — CONDITIONAL SALES—INNOCENT PURCHASERS.

The vendee under a conditional sale of personal property until conditions are performed has no interest in property which he can transfer as against vendor, even to an innocent purchaser for value.

2. FIXTURES ⚷21—REFRIGERATION PLANT—"TRADE FIXTURE"—VENDOR AND PURCHASER.

A complete refrigeration plant in a hotel, none of machinery, pipes, or boxes constituting any part of support of building or any of its walls, so that its removal would do no more than leave brackets attached to walls and apertures in walls requiring plastering thereof, would constitute a "fixture," under Civ. Code, §§ 660, 1013, as between grantor of hotel and grantee, relying in good faith on appearances and without notice of anything to the contrary, yet it was not so incorporated that it could not be detached, under section 1019, as a "trade fixture."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fixture; Trade Fixtures.]

3. FIXTURES ⚷9—MACHINERY—CONDITIONAL SALES.

Purchaser of hotel, who was told that lessee had installed refrigerating plant therein and had paid therefor, was thereby given such notice that it might be a trade fixture, that he could not claim to be innocent purchaser of refrigerating plant, on ground that it was part of real estate, as against one who had installed it under conditional contract of sale.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Rebeccah Marker against Frederick J. Williams. From a judgment for plaintiff, defendant appeals. Affirmed.

J. C. Macfarland and Fairbanks & Macfarland, all of Los Angeles, for appellant.

Tyrrell, Abrahams & Brown, A. L. Abrahams, and Chas. W. Fricke, all of Los Angeles, for respondent.

SLOANE, J. This is an appeal from a judgment against the defendant for conversion of certain personal property. The facts are as follows, so far as necessary to an understanding of the issues raised on appeal:

Defendant acquired, by purchase, title to real estate upon which was situated, as part thereof, a hotel building, in which had previously been installed machinery and appliances constituting a refrigerating plant for the hotel. This machinery was of a character and so attached to the premises as to obviously pass with the title as part of the real estate, as between grantor and grantee, in the absence of any conditions or reservations in the deed. The defendant claims to be a purchaser for value of the real estate, without notice of any fact to inform him or put him on inquiry as to any adverse claim to the machinery of the refrigerating plant. The plaintiff, at the time of bringing this action, claimed the ownership of the refrigerating plant as the assignee of a conditional sale contract with former lessees of the hotel property, whereby plaintiff's assignor had delivered and installed in said building for such lessees the machinery and appliances in question, reserving the title thereto until such time as deferred payments on the purchase price were made. The tenants defaulted in their payments under the sale contract, and subsequently under their lease contract, but remained in possession of both the refrigerating machinery and the hotel until they were ousted from the real estate and their leasehold was terminated by proceedings in court instituted by the defendant, who took possession of the premises, including the refrigerating plant. There were other transactions involving a second conditional sale of this machinery by plaintiff to other tenants of the hotel, who, in turn, defaulted in both their deferred payments to plaintiff and their rents to defendant, and who were dispossessed by defendant, leaving him in possession of the entire premises; but no question seems to be raised as to any change thereby as to the legal status of the respective rights of the parties. The issue presented, it seems agreed, is squarely as to the relative rights of one claiming the title as personalty, reserved under a conditional sale contract, as against another claiming the same property as a fixture previously attached to real estate, which he has purchased for value and without notice of any adverse claim to the fixtures as personalty. The case was tried in the superior court on an agreed statement of facts, and the findings conform to the statement. The only question of error arises upon the conclusion of the trial court that the facts sustained a judgment for plaintiff.

It is conceded that the plaintiff is possessed of all the rights of the original vendor of this property under the conditional sale contract; but appellant contends that such rights were lost, or, at least, that the plaintiff is estopped from asserting the same by reason of her assignor having affixed the machinery to the real property so as to make it a part of the realty, and under circumstances calculated to mislead, and which in this case did mislead, an innocent purchaser to buy the realty in the belief that the refrigerating plant was an integral part thereof. Under the law governing conditional sales, as recognized in this state, it is clear that, if appellant can defeat the judgment against him at all, it is only on this ground.

[1] It is the established law, under our court decisions, that the vendee under a conditional sale of personal property, until the conditions are performed, has no interest in the property which he can transfer, as against the vendor, even to an innocent purchaser, for value. He cannot divest the conditional vendor of his interest by any act or omission to act not authorized by such vendor. Appellant's case, then, is predicated upon two considerations of fact: (1) Were the conditions and manner of installing this refrigerating plant in the hotel building such as to justify a purchaser of the real property, without notice, in treating it as an integral part of the hotel building? (2) Was the defendant here an innocent purchaser for value and without notice?

[2] As shown by the agreed statement of facts, the refrigerating plant comprised a gas compression pump, 5-inch bore by 5-inch stroke, set on concrete base, in which are imbedded six bolts, the gas pump fastened thereto by bolts and nuts; an electric five horse power motor resting on blocks attached to the concrete floor by bolts and screws, and the motor attached to the base by lag screws; a double ammonia pipe condenser, consisting of a coil of 1½-inch ammonia pipe, six pipes high, about 10 feet long, set into a rack, and attached to the brick walls by bolts put through the wall; piping in racks attached by bolts and screws; a centrifugal brine circulating pump, attached to four bolts sunk into the concrete floor, and fastened thereto by nuts; brine pipes fastened to the walls by nails or bolts, and running through the partition walls of the basement; pipes connected by ordinary connection with water and sewer outlets, with other similar appliances attached to the floors and walls in like manner, and all connected up, so as to constitute a complete refrigerating plant for use of the hotel building. None of the machinery pipes or boxes constitutes any part of the support of the building, or any of its walls; the removal of said machinery, piping, and boxes from the building would leave the brackets attached to the walls, and would leave apertures in the walls, and would leave the walls, in one or two places, requiring the plastering thereof.

We are of the opinion that the character of the machinery, the use for which was intended in connection with the hotel, the manner in which it was installed, and the apparent intent of its annexation, filled all the requirements of sections 660 and 1013 of the Civil Code to constitute it a fixture, as between the grantor and a grantee relying in good faith on appearances, and without notice of anything to the contrary. Yet it was not so incorporated into the hotel building as to be necessarily an integral part of it. It could be removed without serious injury to the real property, and might, under the definition of section 1019 of the Civil Code, be detachable as a trade fixture.

[3] But was the defendant an innocent purchaser without notice? It is recited in the agreed statement of facts:

> "That prior to and at the time of said purchase the defendant inspected said premises, and was shown said refrigerating plant, and was told by Geo. W. Fox, from whom he purchased said property, and by the president of the Golden Bay Hotel Company, the lessee thereof, that said lessee had installed said refrigerating plant, and paid for it in full; and thereupon the defendant purchased said property, believing and relying upon said statement, and without any notice or knowledge whatsoever of any ownership or claim of ownership in or to said refrigerating plant of or on behalf of plaintiff or her assignors."

It may be conceded that if the defendant had relied in good faith on merely what he saw in the inspection of the premises, or if on inquiry of the owner and the lessees he had been informed that the refrigerating plant had been built in originally as a part of the hotel building, and, relying upon this information, had bought the property in the belief that the refrigerating plant was a part of the real property, he would be entitled to all the protection due to an innocent purchaser for value and without notice. But he was informed that the tenants then in possession of the hotel, and operating it, had installed this machinery. That at once was notice that it had the earmarks of a trade fixture: that it was so situated as to be subject to detachment as personal property and removal from the building before the termination of the leasehold. In other words, the information that he received was such as to suggest that the refrigerating plant might not be irretrievably attached to the real estate. He at least knew that it was not installed by or for his grantor as part of the original construction of the building. He took the property apparently subject to such rights as the tenants might have. Did he not further take it subject to such claims as the original vendor might have reserved against the tenants? Was he justified in accepting, without further investigation, the statement of these people that they had paid for it, when he knew it had been installed under circumstances consistent with the retention of its character as personalty by a conditional vendor? In other words, if he had notice which suggested that this machinery was not what it appeared to be—an integral part of the real property—he was bound, in due caution, to consider all the contingencies which might apply to personal property so installed, and among these was the very likely circumstance of its having been purchased under a conditional contract of sale.

The law of California very properly favors the conditional contract of sale. It has become very largely a factor in the purchase and sale of personal property, and, too, of that class of machinery and appliances commonly used in connection with real estate. It should be the policy of courts to afford every proper protection to upholding the conditions of such sales, both in the interest of the buying and selling classes. It should be borne in mind that the question here is not whether the defendant had notice of a conditional sale contract, but only whether he had notice that the character of personalty might still attach to this machinery. Conceding the force of reasoning and weight of authority presented by counsel for appellant in behalf of the equities of one who purchases real property, relying in good faith on the presumption that machinery affixed thereto so as to appear to have become an integral part of the realty passes with his deed, we are not prepared to hold, under the facts of this case, that the appellant has brought himself sufficiently within such conditions as to justify a reversal of the conclusions reached by the trial court.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

180 Cal. 157

ADAMSON v. PAONESSA et al. (L. A. 4627.)

(Supreme Court of California. March 19, 1919. Rehearing Denied April 17, 1919.)

1. SUBROGATION ⚿33(2)—EXTENT OF RIGHT.

Payment by the surety of a contractor with a city for street work pursuant to its obligations as surety works a subrogation in its favor to any rights possessed by those whose claims it paid, but gives no further rights.

2. MUNICIPAL CORPORATIONS ⚿373(2) — STREET IMPROVEMENT ACT—RIGHTS OF MATERIALMEN AND LABORERS.

Despite Code Civ. Proc. § 1184, under Street Improvement Act, § 19, the rights of materialmen and laborers were limited to a personal recovery against the contractor with a city to do street work, and to a recovery on the bond given by the contractor's surety, and they had no rights against the moneys or bonds due from the city on completion of the work.

3. ASSIGNMENTS ⚿87—PRIORITIES—RIGHT OF SUBSEQUENT ASSIGNEE WITHOUT NOTICE.

As between successive assignees of a chose in action, such as the right of a contractor with a city to the agreed compensation for street work done, the assignee who first gives notice to the debtor will have the preference, even if his assignment was subsequent in time, if, at the time of taking it, he had no notice of the prior assignment.

4. ASSIGNMENTS ⚿88—RIGHT IN BONDS ASSIGNED AS SECURITY.

Where contractor with city to do street improvement work, after assigning his right to the agreed compensation, certain bonds, to his surety, also assigned such right as security to one making advancements who had no notice of the prior assignment, the surety, standing in the contractor's shoes, has still an interest in the bonds awarded to the subsequent assignee, who first gave notice of assignment to the city.

5. CONTRACTS ⚿147(2)—CONSTRUCTION WITH REFERENCE TO FACTS—INTENTION.

The language of a contract must be construed with reference to the particular facts of the particular case, and if the intention of the parties is clearly evident, and they have actually given expression to it, however inapt the expression, effect must be given their intention.

6. ASSIGNMENTS ⚿72 — CONSTRUCTION OF LANGUAGE.

In determining whether a provision of a contract between a surety company and a contractor to do street work for a city constituted an assignment of certain bonds to the surety, the language must be construed as if the question were one between the surety and the contractor alone.

7. ASSIGNMENTS ⚿41 — ASSIGNMENT TO SURETY BY STREET CONTRACTOR.

Application of contractor to do street work for a city for bond from a surety company *held* sufficient, as an assignment, to entitle the surety company to claim and receive as against the contractor certain bonds due to be issued on completion of the work.

Department 1.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Interpleader suit by John Z. Adamson against George C. Paonessa, Charles W. Lloyd, and the National Surety Company. From judgment for defendant Lloyd, defendant National Surety Company appeals. Judgment modified by striking out a portion, and new trial ordered on a single issue.

Curtis & McNabb, of San Bernardino, and Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for appellant.

Meserve & Meserve, of Los Angeles (F. C. Austin, of Los Angeles, of counsel), for respondents.

LAWLOR, J. This is an appeal from a judgment in an interpleader suit in favor of one of the defendants and claimants as against the other defendant and claimant. There is practically no conflict in the evidence, and the material facts are as follows:

One Paonessa entered into a contract with the city of Colton for the doing of certain street work under the Improvement Act of 1911. Stats. 1911, p. 730. As a condition of the contract he was required by the statute to give, and did give, a surety bond for the payment of claims for materials furnished or labor rendered in the doing of the work. The appellant, National Surety Company, was the surety on this bond. In order to obtain the bond the contractor, Paonessa, made a written application to the surety company which, by its terms, constituted a contract between them. The portion of this application contract material here reads:

> "All payments specified in the above-mentioned contract [i. e., the contract with the city of Colton for the doing of the work] to be withheld by the obligee until the completion of the work shall, as soon as the work is completed, be paid to the company [i. e., the surety company], and this covenant shall operate as an assignment thereof, and the residue, if any, after reimbursing the company as aforesaid, be paid to the applicant after all liability of the company has ceased to exist under said bond."

No notice of this assignment, if it be such, was given to the city of Colton, or, so far as appears, to any one else, until shortly before the commencement of this litigation.

While the work was in progress the other defendant, the respondent here, one Lloyd, advanced certain sums of money to the contractor, Paonessa, and took from him an assignment of all his rights under the contract, all without notice of the prior assignment to the surety company and in complete ignorance of it. This assignment Lloyd filed with the city clerk immediately.

The proceedings under which the contract was let provided, as permitted by the statute, for payments in street improvement bonds. Upon the completion of the contract, the city authorities, recognizing Lloyd as the assignee of Paonessa, delivered to him the warrant and assessment for the payment of the work, and the city treasurer was about to issue to him street improvement bonds in payment when the surety company demanded of the city treasurer the issuance of the bonds to it. This was the first notice to the city authorities of any claim of assignment to the surety company.

In the meantime Paonessa had failed to pay claims approximating $10,000 for material and labor furnished and rendered in completing the contract. The surety company was obligated under its bond to pay these claims and did so. No claim is made by the respondent that such payment was not pursuant to the obligation of the bond and in strict accord with it.

Upon the surety company demanding the issuance of the bonds to it and Lloyd insisting that they be issued to him, the city treasurer interpleaded the two claimants and deposited the bonds in court. A trial was had and judgment was rendered against the surety company in favor of Lloyd that the bonds be delivered to the latter.

The contention of the surety company that the judgment is erroneous and that it is entitled to the bonds, or at least to sufficient thereof to reimburse itself for the amounts which it paid to materialmen and laborers, is twofold.

[1, 2] The first ground advanced is that, by virtue of its payments as surety for Paonessa of the claims against him for materials and labor furnished, it acquired by subrogation an equitable lien upon any moneys or bonds due under the contract in payment for the work superior to any assignment or other disposition which Paonessa might have made. There is no doubt but that the payment by the surety company pursuant to its obligations as surety would work a subrogation in its favor of any rights which the claimants had whose claims were paid. It is equally clear that the subrogation would give no further rights than this. What rights, therefore, had these materialmen and laborers against the moneys or bonds that were due under the contract on the completion of the work? If they had none, and if their rights were limited to a personal recovery against Paonessa and to a recovery upon the bond given by the surety company, it is clear that there was nothing upon which the subrogation could work. Such we believe to be the case under the Improvement Act of 1911, under which the work was done.

The only provision in the act of 1911 providing security to materialmen and laborers for the payment of their claims is section 19. This section requires that every contractor to whom a contract is awarded under the act must file with the superintendent of streets a good and sufficient bond inuring to the benefit of any and all persons performing labor on or furnishing materials used in the work or improvement. There is no provision which gives such claimants any right or lien, equitable or otherwise, upon money or bonds coming to the contractor. In particular, there is no provision in the act authorizing or permitting the retention by the municipality, or by the owners whose lands are assessed, of anything which may be due the contractor in order to pay the claims of materialmen or laborers, or permitting the deduction of the amount of such claims from anything that may be due the contractor. We are constrained to believe that it was the intention of the statute that parties furnishing materials or labor to a contractor doing work under a contract let in accordance with this act must look solely to the contractor's personal responsibility and to the bond which the statute requires him to furnish.

This construction of the statute is strengthened by a consideration of the method of payment contemplated by it. It contemplates that the contractor be paid directly by the property owners whose property is assessed for that purpose, each paying for himself his own assessment, and this whether the payment be in money or in bonds. It is true that any property owner may discharge the assessment on his property by making payment to the city treasurer, but the act clearly contemplates that the city treasurer in such case is merely acting as a convenient means or conduit whereby the property owner may make payment to the contractor. Essentially the payment is one by each property owner directly to the contractor.

It is manifest that under such circumstances there is no single fund out of which the contractor is to be paid, and it is likewise clear that, in view of the fact that payment may be made to the contractor without the interposition of the city treasurer or any other city official or common conduit of payment, any right to have moneys or bonds coming to a contractor retained in order to meet claims against the contractor would be quite impracticable. The act provides no machinery by which the amount to be retained from the payment by the property owner can be ascertained or he be notified of the amount he is to retain.

The result so arrived at is not affected by the provisions of section 1184 of the Code of Civil Procedure. That section, as amended in 1911, provides for the giving of notice by any person who has performed labor or furnished materials under a contract, and then continues as follows:

> "Upon such notice being given it shall be lawful for the owner to withhold, and in case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who

contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim and any lien that may be filed therefor including the reasonable cost of any litigation thereunder."

This provision is clearly applicable only to cases where the contractor is to be paid either by the owner of the property upon which the work is done, or by the person, public or private, by whom the contract was made. It cannot be applied where payment is not to be made in that manner, but is to be made by a number of different persons not parties to the contract, each of whom pays independently his separate share of the amount due.

Right here also lies the difference between the present case and the line of authorities cited by appellant's counsel, beginning with Prairie State Nat. Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. In those decisions the facts are essentially the same as in this, with the exception that either by statute or by the contract itself a fund was in effect reserved for the benefit of materialmen and laborers whom the contractor might fail to pay. In other words, the materialmen and laborers had a right as against a certain fund in addition to any recovery against the contractor or his surety. Under such circumstances, if the surety paid their claims, he would be subrogated to their rights against such fund. Such, however, is not the case here, as there is no fund against which the materialmen and laborers have a right.

[3] The second point made by the appellant is that, by virtue of the provision heretofore quoted of the application contract executed by Paonessa, he assigned to the appellant his right to the bonds subsequently to become due him under the contract, and that this assignment, being prior in time to the assignment by Paonessa to Lloyd, is prior in right.

Passing for the time being the question as to the sufficiency of the contract provision as an assignment by Paonessa, it does not follow that because it is prior in time it is necessarily prior in right to the subsequent assignment to Lloyd. The surety company neglected to give immediate notice of the assignment to it, and before it gave such notice Lloyd had taken an assignment for a valuable consideration without notice or knowledge of the prior assignment, and had given notice of his own assignment. The rule in such a case is well established. It is thus stated in Widenmann v. Weniger, 164 Cal. 667, 672, 130 Pac. 421, 424:

> "The effect of such successive assignments and the rights of the successive assignees without notice, with respect to each other, were considered and decided in Graham Paper Co. v. Pembroke, 124 Cal. 117 [56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26]. There is some conflict of authority on the subject, but this court approved and followed the English rule stated as follows: 'As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment.'"

The judgment of the lower court, therefore, in directing the delivery of the bonds to Lloyd, was correct and to that extent is affirmed.

[4] The judgment of the lower court, however, goes further than this. The court found and its judgment decrees, that the surety company has no right or interest in the bonds. The evidence at the trial showed without conflict that Lloyd took his assignment by way of security for advances. It follows that as between himself and Paonessa he was not the absolute owner of the bonds. Paonessa still had an interest in them. If, then, the application contract executed by Paonessa did in fact amount to an assignment by him to the surety company, the latter stood in the former's shoes, and had, and still has, an interest in the bonds, and the finding of the court to the contrary is not supported by the evidence. This brings us to the question of the sufficiency of the application contract as an assignment by Paonessa to the surety company. If it amounts to an assignment, the finding that the surety company has no interest in the bonds is contrary to the evidence, and the decree of the court to the same effect is in that particular incorrect.

[5-7] Considering this question, certain it is that, as applied to these bonds, the language of the application contract is exceedingly inapt. The subject-matter of the purported assignment is described as "all payments specified in the above-mentioned contract to be withheld by the obligee until completion of the work." But, as we have seen, there are no payments to be withheld. The provision in question is one very evidently intended for cases of contracts containing the ordinary provisions for the retention of a part of the contractor's compensation to answer for claims against him. Such is not this case. Nevertheless the language must be construed with reference to the particular facts of the particular case, and if the intention of the parties is fairly evident, and they have actually given expression to it, no matter how inapt that expression may be, effect must be given to their intention. Furthermore, the language must be construed as if the question were one between the surety company and Paonessa, and between them solely. Looking at the matter from this point of view, we believe that as between Paonessa and the surety company the language in question, inapt though it is, would be sufficient to entitle the latter to claim and receive the bonds in dispute as against the

former. It is fairly evident that it was the intention of the parties that the surety company, in order to secure it against its liability on the contractor's bond, should have the right to receive on the completion of the contract any payments that might be coming to him. The designation of such payments as "payments to be withheld by the obligee until the completion of the work" seems to us to be rather a case of imperfect description than one where the parties have actually failed to give expression to their intention, so that it is beyond the power of the court to give effect to it by construction. It follows that the surety company did have an interest in the bonds to be delivered to and held by Lloyd, and that the finding and decree of the lower court to the contrary are not in this respect correct.

While there is no conflict in the evidence bearing on the point under immediate discussion, and the facts establishing the rights of the parties appear clearly and without dispute, yet there is no finding in accordance with the evidence upon which this court can direct a modification of the decree in this respect. A further hearing upon this point is necessary in order that such finding be made.

The judgment of the lower court is therefore modified by striking out the portion which decrees that the appellant has no right or interest in the bonds, and a new trial is ordered on the single issue as to whether or not as between himself and the surety company the respondent Lloyd holds the bonds as absolute owner or by way of security merely.

Both prior to the commencement of the litigation and at the time of the trial respondent Lloyd offered to account to the surety company for any balance which he might receive from the bonds after the satisfaction of his own advances. This was all that the surety company was entitled to. Accordingly, although the judgment is reversed in part and a new trial is directed as to one of the issues, it is ordered that appellant pay the costs of appeal.

We concur: OLNEY, J.; SHAW, J.

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180 Cal. 175

In re HENRICHS' ESTATE.

AHRENS v. ASTON et al.

(S. F. 8801.)

(Supreme Court of California. March 27, 1919.)

1. Descent and Distribution 🔑71(4) — Presumption — Relatives Nearer than Fifth Degree.

Under Code Civ. Proc. § 1963, subd. 28, relating to disputable presumption that things have happened according to ordinary course of nature, etc., there is a very strong presumption that a decedent left relatives nearer than the fifth degree.

2. War 🔑10(2) — Probate Proceedings — Distribution of Estate — Claim by Alien Enemy.

A German, claiming the entire estate of a decedent as in fourth degree of relationship against distributees of estate in fifth degree of relationship, having presented certificates and records of relationship in support of his motion for continuance until after the war, was entitled to a reasonable time in which to prepare and present his case, which involved continuance until peace was declared and communication with Germany re-established.

3. War 🔑10(2) — Alien Enemies — Right to Defend Petition for Distribution of Estate—Statute.

Under the Trading with the Enemy Act, § 7, subd. "b" (U. S. Comp. St. 1918, § 3115½d), where persons claiming as rightful distributees of decedent's estate presented petition for distribution and forced case to hearing, thus, in connection with their notices, summoning all the world to admit or deny their claims of heirship, citizen of Germany claiming nearer kinship to decedent had right by motion for continuance until peace between two countries to defend his rights in courts of this country.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of William J. Henrichs, deceased. From a decree of distribution to Euclid Aston and others, Robert Ahrens appeals. Judgment reversed, with instructions.

Gustave Gutsch, of San Francisco, for appellant.

True Van Sickle, of Oakland, for respondent Aston and others.

Cullinan & Hickey, of San Francisco, for respondent Hynes.

WILBUR, J. This is an appeal from a decree of distribution by which the whole estate, consisting of $11,778.71 in money, was distributed to the respondents, five children of Anna Fredericksen Aston. It is conceded that the distributees were related to the decedent in the fifth degree. The court finds that they were the grandchildren of decedent's predeceased aunt, Maria Gertrude Ahrens Fredericksen. Robert Ahrens claims to be a son of a brother of said Maria Gertrude Ahrens Fredericksen, and of decedent's mother, Anna Bernardina Elisabeth Ahrens, thus being related in the fourth degree and entitled to inherit the entire property of the decedent. Both claim to be related to the decedent through his mother. Among the papers of the decedent was a certificate of the marriage of decedent's parents, certifying that "Henrich Gerhard Henrichs, single, born in Blexun, Oldenburg, 31 years of age, 337 Walker, tinsmith, and Bernhardine Arens, single, 30 years of age, of Neuenkirchen, Oldenburg, 337 Walker Street, were married" February 8, 1863, at the German Evangelic Lutheran St. Matheus Church on Walker street, New York; a certificate of birth and baptism on November 15, 1863, at New York, of a son of Henrich Gerhard Henrichs, 287 Eleventh street, born in Blexen, Oldenburg, and Anna Marie Bernhardine, née Arens, his wife, who was baptized on February 18, 1864, and received the name of Johann Wilhelm; and also the certificate of confirmation, showing that Johann Wilhelm Henrichs was born on November 15, 1863, and was confirmed April 14, 1878, in the Evangelic Lutheran St. Paulus Church of San Francisco. The last two certificates are of the birth and confirmation of the decedent.

In connection with appellant's motion for a continuance certain records were presented which it was contended established appellant's relationship to the decedent. The record of baptisms of the Catholic Community at Neuenkirchen, Oldenburg, showed that Anna Bernardina Elisabeth Ahrens (also spelled Arens), was born on August 22d and baptized on August 24, 1831, daughter of Bernard Friedrich Ahrens (also spelled Arens), and Maria Gertrud, née Horstmann, shoemaker in Neuenkirchen, Oldenburg. It is claimed by appellant that Anna Bernardina Elisabeth, born August 24, 1831, is the mother of the decedent. The name is slightly different, the birthplace is the same, and the age and year different from that set forth in the marriage license and birth and confirmation certificates found among the papers of the decedent. The same record of baptisms of the Catholic church at Neuenkirchen showed two other children of the same parents, namely, Catharina Juliana Josephina, born April 15, 1827, and Maria Gertrud Elisabeth Ahrens, born January 25, 1830. The trial court found that Maria Gertrud Ahrens Fredrickson was an aunt of the deceased and the grandmother of respondents. As tending to show that the above-named Bernard Friedrich Ahrens and his wife, Maria Gertrud, née Horstmann, were the maternal grandparents of decedent, we have not only the similarity of the name of one child, Anna Bernardina Elisabeth Ahrens, to the name of the mother of the deceased, as stated in the marriage and birth certificates found among the papers of the decedent, but also the fact that another child of the same parents, Maria Gertrud Elisabeth Ahrens, the grandmother of respondents, is shown by the record to be a sister of Anna Bernardina Elisabeth Ahrens, who is found by the trial court to be a sister of decedent. Assuming it to be established that Bernard Friedrich Ahrens, and his wife, Maria Gertrud Horstmann, were the grandparents of decedent, appellant claims that his father, Clemens Joseph Ahrens, is their son, and thus decedents' uncle. To establish this fact, he produces from the same church book of the Catholic Community of Neuenkirchen, Oldenburg, the certificate of birth of Clemens Joseph Ahrens, son of Johann Bernard Ahrens (also spelled Arens) and Anna Gertrudes Catharina, née Horstmann, his wife, shoemaker, at Neuenkirchen, Oldenburg, on October 2, 1823. The name of the father is stated as Johann Bernard Ahrens instead of Bernard Friedrich Ahrens, and the name of the mother is stated as Anna Gertrudes Catharina Horstmann Ahrens, instead of Maria Gertrudes Horstmann Ahrens. The names of the father have in common the name Bernard Ahrens, and of the mother, Gertrud (or Gertrudes) Horstmann Ahrens, while in both certificates the occupation shoemaker at Oldenburg is given for the father. In the certificate of marriage of appellant's father (1849) the latter's father's name is given as Bernard Ahrens, and not Johann Bernard Ahrens. It certifies that Clemens Joseph Ahrens, cigarmaker at Vlotho, is a son of Bernard Ahrens at Neuenkirchen, Oldenburg, 26 years old at the date of the marriage, February 18, 1849. This would correspond with the date of the birth (October 2, 1823), given in the birth record above quoted, and is significant in that the name "Johann" is omitted in giving the name of the father, which would indicate that, although in 1823 the father went by the name of Johann Bernard, he later used the name Bernard. Appellant produced a certificate of the death of Joseph Clemens Robert Ahrens, cigarmaker at Vlotho, which stated that he died August 9, 1856, at the age of 36 years 1 month and 2 days. Proof of the alleged relationship of appellant to decedent turned in large measure upon whether it could be shown that Johann Bernard Ahrens was the same person as Bernard Friedrich Ahrens. Similarity of names, residence, age, and wife's name tend to show that fact. Appellant moved for a continuance under the following circumstances: The administrator of decedent's estate filed his final account and petition for distribution May 21, 1917. The testimony of residents of San Francisco was introduced, tending to show that respondents were the only heirs of the decedent. This evidence consisted largely of declarations of the decedent and of the mother and grandmother of respondents. The case was continued from time to time at the request of the attorney who now represents the appellant. Finally, on September 11, 1917, counsel for appellant filed a written notice of appearance for the appellant, who claimed to be the sole heir of decedent. After several continuances for that purpose, having secured from Germany through the Swiss Legation, which represented the interests of the United States in Germany during the war, the certificates and affidavits of appellant used on the motion for a continuance, on November 23, 1917, a motion was made that the case be continued until after the termination of the war, or until appellant's inability to produce evidence was removed. The appellant is a native and citizen of Germany and has always been a resident thereof. It was stated in the affidavit that it would be impossible during the continuance of the war between Germany and the United States to secure full proof of the heirship of the appellant, but in connection with his application the various certificates above mentioned were presented to the court, together with the affidavit of the claimant that he was a first cousin of the decedent, giving in detail the family history showing that relationship. The motion for continuance was denied, and on April 1, 1918, the court distributed the property to the respondents. It being admitted that the respondents are related to the decedent in the degree in which they claim, the question presented at the trial was whether all other relatives of nearer degree were dead.

[1, 2] The presumption that decedent left relatives nearer than the fifth degree is very strong. Section 1963, subd. 28, Code Civ. Proc.; People v. Roach, 76 Cal. 294, 18 Pac. 407. Respondents contend that the affidavits presented do not conform to the requirements of an affidavit for continuance, in that it is not shown what evidence could be secured. Section 595, Code Civ. Proc. Even if we assume that this rule controls where we are dealing with the appellant's fundamental right to be heard, appellant does show the certificates and records above set forth, and it is admitted that they are not certified so as to entitle them to be received in evidence, and their importance as evidence is not denied. If we concede the right of an alien enemy to appear in our courts, it is evident that the appellant could not properly prepare and present his case, based necessarily, as he states, upon the testimony of witnesses to be procured in Germany, while a condition of war existed between Germany and the United States. We will not undertake to pass upon the merits of appellant's claim upon the motion for continuance. Claiming to be the sole heir of the decedent, he desired an opportunity to present his evidence, and by the ruling of the court he was prevented from so doing. He does present record evidence which he believes shows his relationship and which, supplemented by proof, no doubt readily obtainable in time of peace, might fully establish his claim, or be met by proof which might readily defeat it. Under these circumstances appellant was entitled to a reasonable time in which to prepare and present his case, and this involved a continuance until peace was declared and communication with Germany re-established.

[3] Respondents contend that appellant, an alien enemy, was not entitled to be represented by counsel or to appear in this litigation, and therefore claim the right to have the case decided solely upon the evidence presented by them. If their contention is sustained, it means that upon presenting prima facie evidence that all other kin in nearer degree and of the same degree as themselves are dead, they can secure title to property without having their witnesses undergo cross-examination, and in the absence of the conflicting claims and evidence of appellant. It is conceded, however, that an alien enemy has the right to appear in a case where he is made a defendant. Section 7, subdivision "b," of Trading with the Enemy Act, passed by Congress on October 6, 1917 (chapter 106, 40 Stats. L. 416 [U. S. Comp. St. 1918, § 3115½d]), provides in that regard as follows:

> "Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war. * * * And provided further, that an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

Under our practice in a proceeding on distribution, by publication of the necessary notices, all the world is summoned to admit or deny the claims of heirship advanced by the petitioner. In this case, the petition for distribution, having been filed, notice of the hearing thereof having been given, the appellant was required to present his proof of heirship at the time fixed, failing in which he was bound by the decree, the effect of which, if he was the sole heir, was to divest his title to the estate and vest it in the distributees. The appellant could have waited—indeed, he desired to wait—until the war was over, before presenting his claim of heirship. But the act of the respondent heirs, against his wishes and desires, in presenting their petition and forcing the case to a hearing, followed by the decree in their favor, had the effect of depriving an alien enemy of his property without an opportunity to be heard. It is unnecessary to consider whether or not the alien enemy was a defendant in an action at law or in equity in a technical sense, because it was evidently the purpose of Congress to permit an alien enemy to maintain his rights in the courts of the country against an actual assault thereon, as in this case. But see sections 1063, 1716, Code Civ. Proc.

If it should be the policy of the government to forfeit or otherwise dispose of the property of an alien enemy, then this property, if inherited by the appellant, is subject to such disposition, and the effect of the decree in this case was to deprive the United States government of any relief with reference thereto. And in this connection it may be observed that the Trading with the Enemy Act was amended November 4, 1918, to provide (section 1, subd. "c"):

> "If the President shall so require any money or other property including * * * choses in action, and rights and claims of every character and description * * * belonging to * * * an enemy * * * which the President after investigation shall determine * * * belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the alien property custodian, or the same may be seized by the alien property custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act."

Under the extraordinary circumstances shown by the affidavits of appellant and of his attorney, it was an abuse of discretion to refuse the continuance.

The judgment is reversed, with instructions to continue the application for distribution of the estate until after peace is declared between Germany and the United States, and a reasonable opportunity has been thereafter granted to appellant to secure testimony upon which he relies to establish his claim to heirship.

We concur: LENNON, J.; MELVIN, J.

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180 Cal. 171

KENDALL v. FOULKS. (L. A. 4749.)

(Supreme Court of California. March 20, 1919.)

1. Partnership 🔑324—Suit for Accounting and Dissolution—Temporary Injunction.

In suit between partners for an accounting and dissolution of the firm, temporary injunction was properly granted as an ancillary measure, to preserve the status quo pending the outcome of the case on its merits.

2. Injunction 🔑135, 161—Temporary Injunction—Discretion of Trial Court.

Granting, denying, dissolving, or refusing to dissolve a preliminary or temporary injunction rests in the sound discretion of the trial court, on a consideration of all the particular circumstances of each individual case.

3. Injunction 🔑146—Temporary Injunction — Complaint — Denial by Verified Answer.

A temporary injunction will not usually be granted on the complaint alone, when defendant files a verified answer specifically denying all its material allegations; but there may be peculiar circumstances justifying temporary injunction, even in the face of the absolute denials of the answer.

4. Injunction 🔑147—Temporary Injunction—Denial of Complaint—Consideration of New Circumstances.

Where, on hearing of application for temporary injunction, defendant having filed verified answer specifically denying all the material allegations of the complaint, additional and peculiar circumstances are shown by testimony or by affidavits, the court, in the exercise of its discretion, may consider such circumstances.

5. Partnership 🔑324—Suit for Accounting and Dissolution — Temporary Injunction.

In suit between partners for an accounting and dissolution, where defendant's affidavits admitted the creation of the firm, and then merely set up matter constituting an avoidance of the averments of the complaint, rather than an absolute denial, and plaintiff filed a counter affidavit controverting defendant's affidavits, the trial court did not abuse its discretion in granting plaintiff temporary injunction to preserve the status quo.

6. Injunction 🔑158—Temporary Injunction—Order—Effect.

Granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy, but merely determines that the trial court, balancing equities, concludes that defendant should or should not be restrained from exercising rights claimed by him pending a trial on the merits.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by F. W. Kendall against W. R. Foulks. From an order granting a temporary injunction, and from an order refusing to dissolve it, defendant appeals. Orders affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

E. Burton Ceruti, of Los Angeles, for respondent.

LENNON, J. The complaint in this action is in two counts. For the purposes of this opinion, it is necessary for us to consider only the allegations of the second count. In this count the plaintiff alleges, in effect, that on November 5, 1914, he and the defendant entered into a partnership agreement, for the purpose of engaging in the business of carting and hauling. At the time of the creation of the partnership the defendant was purchasing a motor truck under an installment contract. It was agreed that each of the parties should pay the vendor of the truck $50 per month from his own funds, until the balance of $750 due on the truck was paid. Plaintiff was to "drive and use said truck in said partnership business, for which services" he should receive, "out of the income of said business, the sum of $60 per month." After the payment of the balance due on the truck, and a further payment to defendant of $275 in certain installments, plaintiff was to become a joint owner of the truck with defendant. The parties agreed to share the cost of maintaining and repairing the truck.

The complaint further alleged plaintiff's performance of all acts agreed by him to be performed under the partnership agreement, and that defendant had, from time to time, procured, obtained, secreted, and applied to his own use the receipts and profits of the business, aggregating a sum of money far in excess of his own share thereof; that he had deprived plaintiff of plaintiff's share thereof; that defendant had failed to apply moneys so received to the costs of the business, or to meet any of the payments to the vendor of the truck, as provided in the partnership agreement. It was also alleged that under said agreement plaintiff was entitled to the exclusive use and possession of said truck, and was charged with the duty of operating it; that on November 7, 1915, defendant fraudulently and by trick and device obtained possession of the truck, and ever since has maintained the exclusive possession of the truck, and has prevented the plaintiff from having access to the same, from participating in the partnership business, from discharging his duties in said business, and from participating in any of the profits; that defendant still collects the partnership debts and appropriates the proceeds to his own use, to the exclusion of plaintiff and greatly exceeding the proportion to which defendant was entitled, to the detriment of the firm's business and to plaintiff's injury. The complaint alleged that plaintiff is without adequate remedy at law, and that by reason of the acts complained of he has suffered and will suffer irreparable injury. The prayer of the complaint is for an accounting, for a dissolution of the partnership and a sale of its property, with a division of the proceeds between the partners, and for an injunction restraining defendant from interfering with plaintiff's possession and use of the truck and from interfering with the debts, moneys, or other property and effects of the partnership.

After an order to show cause, a temporary injunction was granted plaintiff, which purported to maintain the rights of the respective parties in statu quo pending the hearing of the merits. The hearing of the application for an injunction pendente lite was had upon the allegations of the complaint and the affidavits pro and con of the respective parties; no answer having been filed at the time of the hearing of the application.

The defendant appeals from the order granting the injunction, and also from an order refusing to dissolve the same; but, inasmuch as neither the motion to dissolve nor the order refusing to dissolve appears in the record, we need discuss only the appeal from the order granting the injunction.

[1, 2] Appellant's first point is to the effect that the complaint does not state facts sufficient to constitute a cause of action for an injunction, nor does it appear therefrom that the plaintiff was without an adequate remedy at law, or that he had or would suffer irreparable injury. In considering this point, we must bear in mind the purpose for which the action is brought, and the object of the temporary injunction. The suit is being prosecuted for an accounting and for a dissolution of the partnership. The injunction is ancillary thereto, being granted in order to preserve the status quo pending the outcome of the case on its merits. This is a proper subject for the remedy of a temporary injunction. Raisch v. Warren, 18 Cal. App. 655, 124 Pac. 95; 2 High on Inj. (4th Ed.) § 1342; 30 Cyc. 725. However, we need not decide whether the complaint, in itself, states facts which, standing alone, suffice to support a temporary injunction. It is a rule so universally followed and so often stated as to need only to be referred to that granting, denying, dissolving, or refusing to dissolve a preliminary or temporary injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case. White v. Nunan, 60 Cal. 406; Marks v. Weinstock, Lubin & Co., 121 Cal. 53, 53 Pac. 362; Piper v. Hawley, 175 Pac. 417; 22 Cyc. 746. A careful consideration of the opposing affidavits of the respective parties, in connection with the complaint itself, satisfies us that the court below did not abuse its discretion in granting the injunction complained of.

[3-5] The appellant further urges that the injunction was improperly granted, because of the fact that the defendant met the complaint by affidavits denying the material allegations of the complaint. It may be conceded that the general rule is that a temporary injunction will not be granted upon the complaint alone, when defendant files a verified answer specifically denying all the material allegations of the complaint. Crandall v. Woods, 6 Cal. 449; Gagliardo v. Crippen, 22 Cal. 362. But this court has also held that there may be peculiar circumstances in a case justifying a temporary injunction even in the face of the absolute denials of the answer. De Godey v. Godey, 39 Cal. 157, 166; McCreery v. Brown, 42 Cal. 457. And where upon the hearing of the application, additional and peculiar circumstances are shown by testimony or by affidavits, the court, in the exercise of its discretion, may take these circumstances into consideration. Coolot v. C. P. R. R. Co., 52 Cal. 65; Hiller v. Collins, 63 Cal. 235; 2 High on Inj. (4th Ed.) §§ 1508, 1509. In the present case the affidavits of defendant admitted the creation of the partnership, and then merely set up matter which constituted an avoidance of the averments of the complaint, rather than an absolute, unequivocal denial. See 22 Cyc. 947. Furthermore, the plaintiff filed a counter affidavit controverting the affidavits presented by the defendant. Here, again, we cannot say that the court abused its discretion in granting the temporary injunction, after taking all the circumstances before it into consideration.

[6] Finally, appellant urges that specific performance of a partnership contract will not be decreed, and that an injunction cannot be granted to prevent a breach of a contract which will not be specifically enforced. But these rules do not apply to the case before us, since specific performance is not sought or given by the relief here granted. The relief sought is an accounting and dissolution, and the injunction simply preserves the subject-matter of the action to await the final disposition of the cause on the merits.

> "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him." Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391.

The orders appealed from are affirmed.

We concur: WILBUR, J.; MELVIN, J.

180 Cal. 148

PEOPLE v. MORISAWA. (Cr. 2200.)

(Supreme Court of California. March 18, 1919.)

1. Criminal Law 🔑48, 50—Insanity—Irresistible Impulse.

In order to establish defense of insanity in a criminal prosecution, it must be proved by preponderance of evidence that at time of committing act accused was laboring under such a defect of reason from disease of mind, temporary or otherwise, as not to know nature and quality of act he was doing, or, if he did know it, that he did not know he was doing what was wrong; and an irresistible impulse to commit an act which one knows is wrong or unlawful does not constitute the insanity which is a legal defense.

2. Criminal Law 🔑1160—Review—Approval of Verdict—Insanity.

Where evidence in a criminal case was such that question of insanity was one for jury, and for trial court on motion for new trial, which was denied, an appellate court may not question correctness of conclusion reached.

In Bank.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

R. Morisawa was convicted of murder in the first degree, and he appeals. Affirmed.

W. N. Vallandigham, of Santa Rosa, for appellant.

U. S. Webb, of San Francisco, and J. Charles Jones, of Sacramento, for the People.

ANGELLOTTI, C. J. Defendant was convicted of murder in the first degree for the killing of one N. Daitoku. He appeals from the judgment pronounced upon such conviction and from an order denying his motion for a new trial.

[1] The killing was admitted, and the defense was insanity. Complaint is made of the instructions given by the trial court as to the test of insanity. Upon this matter the instructions were in accord with the well-settled law of this state, being substantially to the effect that insanity interposed as a defense in a criminal prosecution means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong, in relation to the act with which he is charged; that in order to establish the defense, it must be proved by a preponderance of evidence that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, temporary or otherwise, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong; that if the defendant at the time he fired the shot at the deceased, if he did so fire, understood the nature of his act, and knew it was wrong and deserved punishment, he is legally responsible for his act, if committed as charged in the information; that the true test of insanity is whether at the time of committing the crime he was conscious that he was doing what he ought not to do; and that if the defendant was in that mental situation in which he did not appreciate the act he was committing, and he did not know it was wrong to do it, that, of course, would be a legal defense.

Counsel for defendant, as we understand it, claims that the instructions were erroneous in not including in addition to the elements stated, the element of "power" on the part of the defendant "to adhere to the right and avoid the wrong," "the power to govern his body." In other words and as it was put by the appellant in People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651, "the mere intellectual knowledge of right and wrong is not enough to defeat a defense of insanity, unless with such knowledge the defendant also has the volitional power to choose the one instead of the other; * * * the power to do or not do the killing under the guidance of such knowledge." In the Hoin Case it was said by the court: "Such irresistible impulse to commit an act which he knows is wrong or unlawful * * * does not constitute the insanity which is a legal defense." This is now so firmly settled in California as not to require discussion. People v. Hoin, supra; Marceau v. Travelers' Ins. Co., 101 Cal. 342, 35 Pac. 856, 36 Pac. 813; People v. Ward, 105 Cal. 335, 343, 38 Pac. 945; People v. Hubert, 119 Cal.

216, 223, 51 Pac. 329, 63 Am. St. Rep. 72; People v. McCarthy, 115 Cal. 255, 262, 46 Pac. 1073; People v. Barthleman, 120 Cal. 7, 11, 52 Pac. 112; People v. Owens, 123 Cal. 482, 489, 56 Pac. 251; People v. Methever, 132 Cal. 332, 64 Pac. 481.

[2] There is no merit in the claim that the evidence was such as to compel a conclusion that defendant was insane at the time of the commission of the homicide. The evidence was such that the question was one for the jury, and for the trial court on motion for a new trial, and an appellate court may not question the correctness of the conclusion there reached.

Examination of the record shows that the defendant was accorded every substantial right by the learned judge of the trial court, and that there is no good reason for a reversal.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; MELVIN, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

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180 Cal. 165

CITY OF SAN DIEGO v. HALL et al.
(L. A. 4716.)

(Supreme Court of California. March 19 1919.)

1. APPEAL AND ERROR ⟹1011(1)—REVIEW—JUDGMENT ON CONFLICTING TESTIMONY.

The Supreme Court cannot interfere with the judgment of the trial court, based on testimony substantially in conflict.

2. DEDICATION ⟹44 — STREET — SUFFICIENCY OF EVIDENCE.

In a city's action to quiet title to a strip of land across defendants' tract, as a street, evidence *held* to justify findings that the street, as extending across the land, never became dedicated to the public use.

3. DEDICATION ⟹20(5) — STREET — CASUAL USER.

Something more than a mere casual user of a strip of land by the public as a street must be shown before any valid dedication will be implied.

4. DEDICATION ⟹15 — INTENT — STREET.

There must be an intention on the part of the owner to devote the property to the public use before dedication of street is shown.

Department 2.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the City of San Diego against M. Hall and Etta Hall. From a judgment for defendants, plaintiff appeals. Affirmed.

T. B. Cosgrove, S. J. Higgins, and M. R. Thorp, all of San Diego, for appellant.

Sam Ferry Smith, of San Diego, for respondents.

MELVIN, J. This action was brought by the city of San Diego to quiet its title across block 404 of Horton's addition. It was stipulated that the fee belongs to the defendants, but the city took the position that by use of this property for many years the public had obtained an easement for the extension of Horton avenue, a street 75 feet in width. Judgment was given in favor of the defendants, and the city appeals.

The map accompanying the record indicates that block 404 was one of the subdivisions of an addition placed upon the market some years ago. It is bounded upon all sides by dedicated streets. Horton avenue leads into Upas street, which bounds block 404 on its southerly side. The theory of the plaintiff is that Horton avenue was used by residents in that part of the city, and by the public generally, and that with the knowledge of the owners of the aforesaid block that part of block 404 which would have been a part of Horton avenue extended became a public highway by user.

The substance of the decision appears in the following findings:

> "That said premises are not any part of Horton avenue in said city of San Diego, and have never been used by said city or by the public, or by any one, as a part of, or as a continuation of, Horton avenue in said city. That said defendants and their predecessors in interest have never used any part of said premises for street or highway purposes, and the same have not been used with the actual knowledge of the defendants, or the defendants' predecessors in interest for street purposes, and that there has been no adverse user of said premises or any part thereof by the plaintiff or by the public in general.
>
> "That no part of the land described in plaintiff's complaint is a public street known or called Horton avenue, or any other street, or any part of a public street within the corporate limits of the city of San Diego."

[1, 2] The theory of the appellant is that these findings are not supported by the evidence, but that the uncontradicted testimony shows a user of this strip sought to be condemned. Our examination of the voluminous transcript, however, convinces us that the court acted in accordance with abundant testimony on behalf of respondents, and that this is one of those cases in which, there having been a substantial conflict in the testimony, this court may not interfere with the judgment. Some of the witnesses, called on behalf of respondents, testified that while there was a road wide enough for a wagon to traverse, extending in a general northerly and southerly direction across block 404, its location changed from year to year according to the fancy of those who had occasion to drive there, and that when grain was grow-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing on the property residents in that part of the city went around the standing crop. Witnesses both for the plaintiff and the defendants testified that the roadway commonly used by people in that vicinity passed far to the west of the strip sought by the city to be condemned. Others testified that those crossing block 404 never used Horton avenue at all, but came in from a point far to the westward of Horton avenue as that street is delineated on the filed map presented in evidence. This testimony, if believed, would, of course, justify findings to the effect that Horton avenue, extended across block 404, never became dedicated to public use.

[3, 4] The record also fails to show that there was a user of any definitely delimited portion of block 404 continuously and adversely for five years with the knowledge of the owners or by their consent, direct or implied. This lack of proof supports the judgment, because something more than a mere casual user must be shown before any valid dedication will be implied. The rule upon this subject—a rule to the measure of which appellant's testimony fails to reach—was well expressed by Mr. Justice Sloss, speaking for the court in bank, in the case of F. A. Hihn Co. v. City of Santa Cruz and Union Traction Co., 170 Cal. 436–447, 150 Pac. 62–68:

> "In order to constitute a valid dedication, there must be an intention on the part of the owner to devote his property to the public use. California Navigation Co. v. Union Transportation Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936; Niles v. Los Angeles, 125 Cal. 572, 58 Pac. 190. It is true that this intent may be inferred from long acquiescence in a use by the public. 13 Cyc. 455. But where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate. 13 Cyc. 484."

It follows that the judgment must be, and accordingly it is, affirmed.

We concur: LENNON, J.; WILBUR, J.

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180 Cal. 151

SAECKER v. COHN. (L. A. 4747.)

(Supreme Court of California. March 18, 1919.)

1. EVIDENCE 🔑335(1)—PATENTS—RECORDATION.

Since a patent from the United States for land may be recorded without acknowledgment under Civ. Code, § 1160, the record thereof is evidence of its contents, under Code Civ. Proc. §§ 1919, 1951.

2. PUBLIC LANDS 🔑41—"CERTIFICATE OF PURCHASE"—RECEIPT.

Receipt given at the receiver's office showing full payment for land purchased from the United States is a "certificate of purchase" within Code Civ. Proc. § 1925, providing that a certificate of purchase of lands sold by the United States, issued by the receiver of the United States land office, is prima facie evidence that the holder of the certificate is the owner of the land described.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Certificate of Purchase.]

3. EVIDENCE 🔑181, 183(6)—RECORD OF RECEIPT—SECONDARY EVIDENCE—FOUNDATION.

Record of receipt given purchaser of land from United States is inadmissible as proof of the contents of the receipt, in the absence of preliminary proof of the loss of the original and the accuracy of the copy.

4. APPEAL AND ERROR 🔑231(5)—FAILURE TO URGE SPECIFIC OBJECTION—WAIVER OF ERROR.

Error in admission of secondary evidence without proper foundation will be disregarded on appeal where objection to the evidence on such ground was not raised in lower court.

5. NAMES 🔑16(3)—TAXATION 🔑758—IDEM SONANS—TAX DEED—SUFFICIENCY—RECITALS.

Tax deed reciting that property was assessed to "O. T. Kelley" is void, under Pol. Code, § 3785, where in fact property was assessed to "Charity S. Kelley"; former name not being idem sonans with the latter.

6. ADVERSE POSSESSION 🔑22—UNINCLOSED LAND USED AS PASTURAGE—INTERRUPTED USAGE.

Possession of wild uninclosed land by use thereof as pasturage during a few days in the spring and a few days in the fall *held* not that continuous and notorious adverse possession, which is necessary to give notice to the owner that some other person is claiming land, where on two occasions during the five-year period preceding the action there was an interval of an entire year when the land was wholly unoccupied and where there was no proof that the land was being occupied by others during such time.

Department 1.

Appeal from Superior Court, Kern County; M. T. Farmer, Judge.

Action by H. J. Saecker against C. Cohn. Judgment for defendant, and plaintiff appeals. Reversed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant.

Matthew S. Platz, of Bakersfield, for respondent.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant.

The complaint alleges a cause of action to quiet the title of plaintiff to a certain quarter section of land described, situated in Kern county. The answer denied the plaintiff's ownership, and alleged that the defendant is the owner of the premises under a tax deed from the state of California, that the plaintiff claims title adverse to the defendant, and asks that the defendant's title be quieted as against the claim of plaintiff. It also avers that the action is barred by section 318 of the Code of Civil Procedure.

The court found that the defendant is the owner of the land, that the plaintiff has no title thereto, and that the plaintiff's action is barred by section 318 aforesaid. Thereupon judgment was given for the defendant. It is claimed that the findings in favor of the defendant are not sustained by the evidence.

[1-4] The defendant interposes the preliminary objection that the evidence does not show any title in the plaintiff, citing Williams v. San Pedro, etc., Co., 153 Cal. 49, 94 Pac. 234. The plaintiff claims title under one John F. Maio. To prove the acquisition of the title by Maio from the United States the plaintiff offered in evidence the record of deeds in the office of the county recorder of Kern county, showing the record of a document purporting to be a receipt given at the "receiver's office at Visalia, Cal.," dated April 14, 1893, by R. L. Freeman as receiver, to John F. Maio, for $198.13, as full payment for the quarter section in question at $1.25 per acre. The defendant objected to the admission of the record on the ground that it was incompetent, irrelevant, and immaterial. This objection was overruled, and the record admitted as evidence. A certificate of purchase or location of lands sold by the United States, issued by the receiver of the United States land office of the proper district, is prima facie evidence that the holder of the certificate is the owner of the land described therein. Code Civ. Proc. § 1925; Witcher v. Conklin, 84 Cal. 499, 24 Pac. 302. A patent from the United States for land may be recorded without acknowledgment, and consequently the record thereof is evidence of its contents. Civ. Code, § 1160; Code Civ. Proc. §§ 1951, 1919. But this receipt, although a certificate of purchase within the meaning of section 1925 (Witcher v. Conklin, supra), is not a patent. We know of no law authorizing such receipt to be recorded, at least unless its execution is acknowledged, nor of any authority for the proposition that such record can be admitted as proof of the contents of the receipt, in the absence of the preliminary proof of the loss of the original and of the accuracy of the copy, as in other cases of secondary evidence. The objection was in the general form that the evidence was "incompetent, irrelevant, and immaterial." It would have been both material and relevant if it had been competent, and it would have been competent if the preliminary foundation had been laid as above indicated. The objection that no sufficient foundation had been laid was not made nor was the defect we have stated pointed out to the court below. Indeed, it is not argued in the briefs. Therefore, even if we concede, although we by no means decide, that a defect in plaintiff's proof, if vital, inherent, and incurable, might be good cause for affirming a judgment given for the defendant upon an affirmative defense, without inquiry into the merits of the plaintiff's appeal, we should disregard the error. We mention it solely because we find it necessary to reverse the judgment for the defendant and remand the case for a new trial, and the point might then become important to the plaintiff.

[5] The defendant claims title to the land under a tax deed from the tax collector of Kern county to L. Cohn and also by adverse possession under color of title. The validity of the tax title depends upon the deed made by the tax collector to the state of California in 1904, based upon a sale of the land for the taxes of 1898. The land was assessed in 1898 to Charles F. Maio, but no tax was levied against this assessment, because the valuation was all absorbed by a mortgage deduction. The mortgage interest was assessed to Charity S. Kelley, and a tax was levied thereon, for the nonpayment of which the tax sale was made. The law in force at the time of the sale, and at the time of the execution of the deed to the state in 1904 required this deed to recite "the name of the person assessed." Pol. Code, § 3785. The deed to the state aforesaid recited that the property was assessed in the year 1898 to "O. T. Kelley." This name cannot be said to be idem sonans with "Charity S. Kelley," and it follows that the recital is erroneous with respect to the name. For this reason the deed is void, and the defendant can maintain no valid claim of title thereunder. Henderson v. De Turk, 164 Cal. 296, 128 Pac. 747.

The defendant's claim of title by adverse possession is based upon the following facts which the evidence in his favor tends to show: The tax collector, acting under the above-mentioned deed to the state which we have held to be void, sold the land to L. Cohn, and in pursuance of such sale executed a deed therefor to him on June 17, 1907. This deed was recorded on July 6, 1907. The affairs of L. Cohn with respect to this land were conducted by the defendant C. Cohn, who was his agent for that purpose. On May 23, 1914, L. Cohn conveyed the land to the defendant, who thereafter acted for himself.

In July, 1907, the defendant, as agent for L. Cohn, leased the land to the Kern County Land Company for grazing purposes for the remainder of that year. From that time until the trial the lease was orally renewed from year to year. The occupancy of the land, which it is claimed amounts to adverse possession, was maintained solely by the Kern County Land Company under these leases. At the time of the first lease and until the fall of 1912, the land was uninclosed. In the fall of 1912, about two years before this action was begun, the land company erected a fence which inclosed this and other lands in its possession in one inclosure; the whole area being about 1,000 acres. Prior to this inclosure the land constituted a part of a large tract of open country about 20 miles long and 9 miles wide, all of which was unimproved and uncultivated, and was used only for grazing, and was not suitable for any other purpose. The adverse possession which it is claimed existed during this period by reason of the occupancy of the land company consisted of the use by it of this land for grazing sheep and cattle thereon.

The defendant rests his case upon the question of adverse possession on the decision in Webber v. Clarke, 74 Cal. 11, 15 Pac. 431. In that case, as in this, the land was not inclosed or cultivated, and no one resided upon it. The surrounding country was open, uninclosed, uncultivated, and unimproved. The adverse claimant and his grantors herded their sheep upon the land during the grazing season of each year, that is to say, from February to July. During the rest of the year the land was "not pasturable" for sheep and was entirely unoccupied. The court said, referring to subdivision 3, § 323, of the Code of Civil Procedure, and Coryell v. Cain, 16 Cal. 573:

> "We think that pasturing during the pasturing season is 'appropriate use, according to the particular locality and quality of the property.' To pasture the land when it was 'not pasturable' would not only be not an appropriate use, but an impracticable one. In the case of cultivation, there is an interval of several months between the harvesting of one crop and the preparation of the soil for another. And there would be just as much sense in holding that the interval destroyed the continuity of the possession in the one case as in the other. * * * It is sufficient that the use is in accordance with the usual course of husbandry in the locality."

Upon this reasoning it was held that the defendant had made out a case of adverse possession.

[6] The proof in the present case does not come up to the measure of that which was made in Webber v. Clarke. The land company was pasturing sheep and cattle over that region of the country, which included this particular tract of land. This stock was kept in charge of herders. The agent of the company testified in general terms that he had sheep on the land during the grazing season; that is, during the time there was feed there, in each year of the period in question. But on cross-examination, when he was asked to give the details of this occupation, he stated that he pastured the land for a few days in the spring and a few days in the fall each year, with the exception that he could not say that he had stock on the land at all in the fall of 1908; that he had no stock on the land in the spring of 1909, but had some cattle there in the fall of 1909; that in 1911 he had sheep thereon in the spring, but no stock whatever there in the fall of that year nor until the spring of 1912. During the time when he was pasturing the land with sheep or cattle, they would remain thereon only for seven or eight days, in the spring or fall as the case may be. It thus appears that he had sheep on the land in the fall of 1908, and that there was no use whatever of the land thereafter until the fall of 1909, nor during the time from the spring of 1911 until the spring of 1912. On two occasions, therefore, during the five-year period next before the beginning of the action, there was an interval of an entire year when the land was wholly unoccupied by the tenant of Cohn. Furthermore, in the present case there is no proof that during the long intervals when the land company was not pasturing the land other people were not occupying the same. Such occupancy is wholly insufficient to constitute that open, continuous, and notorious adverse possession which is necessary to give notice to the owner thereof that some other person is claiming his land. There is no evidence that the plaintiff and his predecessors in interest had any knowledge whatever of the use or occupation of the land company, or of the claim of Cohn. The proof was substantially the same as that considered in De Frieze v. Quint, 94 Cal. 653, 660, 30 Pac. 1, 28 Am. St. Rep. 151, and which the court there held was insufficient to prove adverse possession. The court there said that to set the statute of limitations in motion and constitute adverse possession the occupancy of the land—

> "must be sufficiently open and notorious to notify an ordinarily prudent owner of its existence, and of its hostile character, unless he is otherwise actually notified of these facts; and to be available against persons dealing with the owner for the land, the occupancy must be of such a character, at least, as should put them upon inquiry as to the title of the occupant, * * * and the burden of proving all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it."

It follows that the evidence is insufficient to support the finding that the defendant had acquired title to the land, either under the tax deed or by adverse possession.

The judgment is reversed.

We concur: LAWLOR, J.; OLNEY, J.

(180 Cal. 168)

ELLIS v. BONEBREAK. (L. A. 4799.)

(Supreme Court of California. March 20, 1919.)

NEGLIGENCE ⟹142—ABSENCE OF SPECIFIC FINDING OF NEGLIGENCE—EFFECT.

Though the general allegation of negligence in the complaint is sufficient to support a judgment, the cause must be reversed, where there is no specific finding of negligence and the probative findings made do not lead to the inevitable conclusion of negligence.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Roy Ellis against A. S. Bonebreak. Judgment for plaintiff, and defendant appeals. Reversed.

Duke Stone, of Los Angeles, for appellant.

Richard A. Dunnigan, of Los Angeles, for respondent.

MELVIN, J. Defendant appeals from a judgment for $500 obtained in an action for personal damages. The findings of fact, which are supported by the evidence, are in substance as follows: On the 22d day of July, 1915, plaintiff, accompanied by a lady, was walking in a westerly direction on the north side of Hammel street, in the county of Los Angeles. Hammel street is a public highway, and is without the limits of any incorporated city or town. The pedestrians were walking "just a little north of the center of the highway," the lady being at plaintiff's right. Defendant, who was driving a motorcar, approached them from the rear. According to the findings "the defendant was not operating his automobile on the wrong side of Hammel street, and was not operating it at a careless or dangerous rate of speed, but was operating it at the rate of 20 miles an hour. As the defendant approached the pedestrians he saw them in front of him for more than a block, and did not sound any horn until he was within 100 feet of them, when he did sound a horn loud enough for them to hear if they had been paying strict attention. He did not, however, slacken the speed of his automobile at that point, but continued at the same speed until he was within about 25 or 30 feet" of the pedestrians. Meantime neither of them had changed position on the highway, nor had they indicated in any manner that they had heard the blowing of the horn. Thereupon he immediately slackened his speed, again sounded the horn, and swerved to the left for the purpose of passing them. When the automobile was somewhere between 6 and 15 feet of them, the lady leaped to her right and avoided injury. The plaintiff, who looked around at that time, leaped to the left in front of the automobile, and as soon as the defendant saw that the pedestrians were changing their course, he immediately put the brakes on the machine and stopped it as quickly as it was possible for him to bring it to a standstill. It was further found that—

> "If the plaintiff and Bertha Liebig had continued in their original course, he would have passed around them in the course he took by swerving to the left, and neither of them would have been injured."

It was also found that there was plenty of room on the street for the defendant to have swerved farther to the left than he did, thus avoiding the plaintiff. The plaintiff was struck by the machine, and received injuries which need not be here enumerated, for the reason that no point is made by appellant that the judgment is excessive. As conclusions of law from the facts found the court determined that plaintiff was entitled to recover from defendant in the amount named.

Appellant insists that the cause must be reversed because there was no formal finding of negligence on the part of the defendant. Respondent contends that the probative findings support a conclusion that the defendant was guilty of negligence. With this latter theory we cannot agree. While it is true that the complaint does contain a general allegation that all the injuries were caused proximately by defendant's negligence and without any carelessness on plaintiff's part, the specific averments were that the automobile was driven at excessive speed and on the wrong side of the street, and that no warning was given. The court found against these alleged instances of negligence. If we assume that the general allegation of negligence was sufficient to support a judgment, nevertheless we are confronted by the fact that there was no specific finding of negligence. The probative findings as made do not lead to the one inevitable conclusion of negligence; therefore the absence of a specific finding upon that subject compels this court to order the case to the superior court for another trial.

Judgment reversed.

We concur: WILBUR, J.; LENNON, J.

39 Cal. App. 721

VARNEY BROS. & CO v. ABBOTT et al. (Civ. 2562.)

(District Court of Appeal, Second District, Division 1, California. Feb. 13, 1919.)

1. Appeal and Error 🔑757(1) — Briefs — Requisites.

Where on appeal the parties have failed to print in their briefs such portions of the record as they desire to call to the attention of the court, as provided by Code Civ. Proc. § 953c, and no part of the clerk's transcript containing the judgment roll has been printed, and the evidence is incompletely set forth in the briefs, the appellate court will not search the typewritten transcripts.

2. Appeal and Error 🔑1073(7)—Harmless Error—Judgment.

A defendant cannot complain of a judgment rendered upon an open account against it, because the evidence showed there was an account stated by the parties, claimed by defendant to be for $913, where the amount of the judgment did not exceed $804, the amount claimed in the complaint, and the record showed that defendant stipulated that the account stated by plaintiff was correct.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Varney Bros. & Co. against H. S. Abbott and others. From a judgment for plaintiff, defendant H. S. Abbott appeals. Affirmed.

Ault & Chase, of Calexico, for appellant. Jas. W. Glassford, of El Centro, for respondent.

CONREY, P. J. [1] The appeal of the defendant H. S. Abbott from the judgment in this case is presented upon a typewritten reporter's transcript and a typewritten clerk's transcript under the alternative method of presenting records on appeal. It has been held many times by the Supreme Court and by the several District Courts of Appeal that those courts will not search the typewritten transcripts where the parties have failed to "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c. In this case no part of the clerk's transcript containing the judgment roll has been printed, and the evidence is very incompletely set forth in the briefs. In the brief for appellant it is said that "the solitary ground of appeal is that the evidence is insufficient to sustain the findings." But counsel have not set out any part of the pleadings so as to show what were the issues; have not set out the terms of any of the findings; have not pointed out the particulars in which the evidence is insufficient to sustain any one of the findings.

Appellant informs us that the judgment was rendered upon an open account of the plaintiff corporation against the defendant partnership and its members. He claims that the plaintiff was not entitled to judgment upon that account for two reasons: First, that the evidence showed that there was an account stated by the parties; and, second, that there had been a novation whereby another agreement and a promissory note executed by the debtor took the place of the pre-existing account.

[2] So far as the first point is concerned, it is clear that appellant has no ground of complaint against the judgment, for he claims that the account stated was in the sum of $913.22, whereas he says that the amount asked for in the complaint was $804.37. We are likewise informed by the briefs that the amount of the judgment did not exceed the amount thus claimed in the complaint. The record, as far as printed in respondent's brief, shows that it was stipulated on the part of the defendant that the account as stated by plaintiff was correct.

Those portions of the evidence contained in the brief for appellant when supplemented by those portions set forth in the brief for respondent, show that negotiations took place between the defendant and some of its creditors, including the plaintiff, which negotiations, if they had been carried to completion according to their apparent intention, might have substituted a new obligation for the original indebtedness. But a part of the evidence thus presented tends to show that those negotiations did not result in a complete transaction, and that the parties did not do all of the things necessary to constitute a new agreement.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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39 Cal. App. 552

MARTIN v. CITY OF STOCKTON et al. (Civ. 1887.)

(District Court of Appeal, Third District, California. Feb. 3, 1919. Rehearing Denied by Supreme Court April 3, 1919.)

1. Deeds 🔑90—Construction.

In construing a deed to ascertain the interest that was conveyed, the entire instrument must be considered.

2. Deeds 🔑144(1)—Construction—Conditions—Re-entry Clause.

The claims of a reversionary interest will be upheld, although conveyance does not contain a re-entry clause, where the language of the conveyance plainly imports that the grant conveys only a conditional fee.

3. Deeds 🔑97 — Construction — Conflict Between Granting and Holding Clauses.

Where there is a conflict between the granting and the holding clauses, the granting clause will prevail.

4. Easements 🔑1—Conditional Fee or Easements.

Where property was conveyed to city upon express condition that the city use the property for excavation and as a waterway and drain, and for no other purpose, the city acquired a conditional fee and not merely an easement in the property.

5. Remainders 🔑17(3) — Adverse Possession.

No adverse possession can ever be acquired as against a remainderman so long as the life tenant or the party who holds the conditional fee is in possession, or has not been ousted for conditions broken.

6. Adverse Possession 🔑8(1)—Property Subject to—Public Channel.

Land situated within the boundaries or exterior lines of a waterway and drain cannot be acquired by adverse possession; the use thereof for the purpose of waterway and drain being a public use under Code Civ. Proc. § 1238, subd. 12.

7. Adverse Possession 🔑8(1)—Property Subject to—Public Use.

Where city has conditional fee in land for purpose of waterway and drain with the right to excavate for such purpose, the right to the use of land within the boundaries of waterway constructed by city, for purpose of supports for a platform and small building used as a paint shop, cannot be acquired by adverse possession.

8. Quieting Title 🔑52 — Sufficiency of Judgment—Land Not in Dispute.

In action to quiet title against adverse claims, where defendants disclaimed interest in a portion of the land, no finding or judgment was required as to such portion of the land.

9. Appeal and Error 🔑877(4)—Review—Errors Reviewable.

In action to quiet title, plaintiff appealing from judgment for defendant cannot complain that judgment was not sufficiently certain as to the interest of one of the defendants, where such defendant did not appeal.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by A. Martin against the City of Stockton and another, in which defendants filed cross-complaint. Judgment for defendants and cross-complainants, and plaintiff appeals. Affirmed.

A. H. Carpenter and R. C. Minor, both of Stockton, for appellant.

Daniel V. Marceau and O. B. Parkinson, both of Stockton, for respondents.

BURNETT, J. The action was brought to quiet title to a certain parcel of land in the city of Stockton. The defendants answered and filed a cross-complaint, by which it appears that they claim title to a portion of the property, the city claiming a conditional fee, and Kile the reversionary interest; but both disclaiming any interest or claim in or to the residue of the land described in plaintiff's complaint. The court found in accordance with the contention of defendants and cross-complainants, and from the judgment in their favor the appeal has been taken. The trial judge, Hon. J. A. Plummer, gave careful consideration to the questions involved, and he filed a written opinion which presents a clear and comprehensive view of the law of the case, and we adopt it as the opinion of this court, as follows:

"The testimony shows that the premises in controversy are situated within the boundaries or exterior lines of that certain waterway passing through the city of Stockton, known as and called 'Miner's Channel.' On behalf of the plaintiff, it is alleged and shown by the testimony that he and his grantors have, for more than 20 years preceding the commencement of this action, occupied a portion of said lots by building and maintaining on such portion a platform and small building used as a paint shop; the supports to said platform and building resting upon the real estate above described. But, during said period of time, the structures referred to have not interfered with the uses and purposes to which the city of Stockton has devoted said channel.

"It also appears from the testimony that Miner's Channel, for more than 50 years, has been used as a drain, or waterway, and has been, during that period of time, necessary for the purpose of draining a large portion of the city of Stockton, and obviating the recurrent floods of the winter seasons; that, during said period of time, said Miner's Channel has been and still is devoted to the uses herein set forth; that said channel has been and now is necessary for such purposes and, during all of said period, has been necessary for the conserving of the public health and safety of a large portion of the residents of Stockton.

"It further appears by the testimony that on or about the 20th day of September, 1879, Joseph Kile, then the owner of the premises involved in this action, executed and delivered to the defendant city a certain grant, bargain, and sale deed, conveying all of the disputed premises to the defendant city, the material portions of which instrument of conveyance are as follows:

" 'Now, therefore, the said party of the first part * * * has granted, bargained and sold, conveyed and confirmed, and (subject to the conditions, limitations and restrictions hereinafter expressed) does hereby grant, bargain and sell, convey and confirm, unto the said party of the second part, and to its successors forever, all those certain portions of lots seven (7), nine (9), eleven (11) and fifteen (15) in block number seventy-four (74), east of Center street, which lie north of the southerly line of Miller's Slough or Channel.'

"The said portions of said lots 7 and 9 are the premises involved herein. Said deed contains the further provision and condition:

" 'Providing, however, and this conveyance is made and accepted upon this express condition, limitation and restriction, that said party of the second part, and its successors forever, shall use said premises for excavation, and as a waterway and drain only, and for no other purposes whatsoever; and provided further that said party of the second part shall bulkhead the sides of said channel adjacent to the above described premises, as soon as said channel shall be excavated through the same, and shall thereafter maintain said bulkhead at the expense of the party of the second part,' etc.

"The testimony shows that, following the execution and delivery of the deed just set forth, the city proceeded to bulkhead the sides of said channel, and has ever since said date maintained the granted premises as required by said deed of conveyance and used the same in accordance with the conditions and limitations required by said instrument.

"Plaintiff claims title by adverse possession (asserting that he and his grantors have held the premises openly, notoriously, and under claim of right and ownership), and that, if he is not entitled to be awarded a full fee in the premises, his claim of title be adjudged valid and be quieted, as against the defendant Kile, as to the fee in said premises; and, as against the city, subject only to the right of the city to use said channel for a waterway or drain (i. e., limiting the right or ownership of the city to an easement only).

"It is also insisted that, by reason of the fact that no re-entry clause was inserted in said deed from Joseph Kile to the city, no reversionary interest is now owned or possessed by the defendant Kile, who is the successor to whatever title, if any, belonged to said Joseph Kile after the execution of the instrument of conveyance by Joseph Kile to the defendant city.

[1-3] "In order to ascertain just what the deed (of Joseph Kile) means, and what interest was conveyed to the city, the entire instrument must be considered. It is not material that a re-entry clause is not included in a conveyance, before the court will uphold the claim of a reversionary interest, if the language of the conveyance plainly imports that the grant conveys only a conditional fee. Where there is any conflict between the granting and the holding clauses in this particular, the rules of interpretation require that the granting clauses shall prevail. But in the instrument under consideration the granting clause contains (as hereinbefore stated) the following words: 'Subject to the conditions, limitations and restrictions hereinafter expressed.' The limitations and conditions thereafter expressed in the instrument became, by the very words just quoted, as much a part of the granting clause of the deed from Joseph Kile to the city of Stockton as though they were set forth letter by letter in the granting clause. And when we look at the holding clause, we find that the deed specifies and particularizes the purposes for which it is granted, and the conditions and limitations imposed upon the city.

[4] "It is also claimed on the part of the plaintiff that, if a reversionary interest exists in the defendant Kile, the city obtained only an easement, and that plaintiff's claim of title by adverse possession should be held good as against the defendant Kile. But this claim is not borne out by the deed under consideration. The granting clause is the same as in any ordinary deed of conveyance, transferring title from Joseph Kile to the city, of the real estate embraced within the description of the premises, as fully and completely as words can accomplish. The condition attached does not change the fee to an easement, but it does vest in the city a conditional fee, which the city and its grantees may hold and enjoy forever, with the right to use the same for the purposes conveyed, and to remove any portion of the earth therein contained, subject only to the limitation as to the place of disposal of the dirt removed. The fact that the conveyance is conditional does not transform the ownership of the city from a fee to an easement. The language of the deed from Joseph Kile to the city is almost identical with that used in the deed the construction of which was involved in the case of Papst v. Hamilton, 133 Cal. 632, 633, 66 Pac. 10, where it was held that such a deed transferred a conditional estate and left in the grantor a reversionary interest, which interest he might assert in the event of an abandonment of the purposes for which the conveyance was made, or of a failure to comply with the conditions, and insist upon forfeiture as fully and completely as though a re-entry clause had been specifically set forth in the instrument of conveyance. The doctrine of that case has been reaffirmed in Fitzgerald v. County of Modoc, 164 Cal. 490, 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229.

[5] "Irrespective of the conclusion to be arrived at herein as to the respective rights between the plaintiff and the defendant city, it is clear from the foregoing that, following the case of Pryor v. Winter, 147 Cal. 554, 82 Pac. 202, 109 Am. St. Rep. 162 (see, also, Potrero Nuevo L. Co. v. All Persons, 29 Cal. App. 754, 755, 743, 156 Pac. 876, A. H. A.) the plaintiff has acquired nothing, either by the act of himself or his grantors, as against defendant Kile. No adverse possession can ever be acquired as against a remainderman, so long as the life tenant or party who holds the conditional fee is in possession or has not been ousted for conditions broken.

"The testimony in this case shows that the compliance by the city of Stockton with the conditions of the deed from Joseph Kile (under which it claims title) has been continuous, consistent, and fully in accordance with the requirements of that deed.

"The second question for determination herein is: Has the plaintiff, by reason of the use of the premises, in the manner set forth, by himself and his grantors for a period exceeding 20 years, acquired any rights therein against the city?

"That Miner Channel, for the purpose of a waterway and a drain, has been for more than 50 years devoted to a public use, and that the use to which it has been devoted is a public use, is clearly established by the testimony, and the law relating to such projects. Billings Sugar Co. v. Fish, 40 Mont. 256, 106 Pac. 565, 26 L. R. A. (N. S.) 973, 20 Ann. Cas. 264-272 (and note, p. 273, A. H. A.); Code Civ. Proc. § 1238, subd. 12, etc.

[6, 7] "In some states, the doctrine is admitted that title to property devoted to a public use may be acquired by adverse possession; but in this state no such principle prevails. Wherever the subject has come before the court for final determination, it has been held and decided that no rights can thus be acquired in and to the public property, or property devoted to a public use, or owned by a municipality for public uses. The mere fact that the municipal officers have been either ignorant of, or indifferent to, the public rights of a municipality, does not enable any trespasser thereon to acquire any ownership therein, or divest the city of one particle of its fee in the estate involved. Nor can the claim of a split or divided fee in and to the premises involved in this action be admitted. The existence of such a doctrine in this state is denied in Patton v. City of Los Angeles, 169 Cal. 521, 147 Pac. 141 (which case is cited with approval in Central Pacific Co. v. Droge, 171 Cal. 40, 32, 151 Pac. 663). But were such a doctrine a rule of decision in this state, it could not be applied, under the circumstances, to the case at bar. Here, the city has an absolute right to go upon the premises and dig up and remove the soil. This is utterly inconsistent with any rights claimed by the plaintiff to rest any structure thereon, and this court knows of no authority by which any one can acquire title to real estate by inclosing the air which circulates above it. That is all that plaintiff could or can claim in this action, where the undisputed right of the city to remove everything beneath the air clearly exists. The fact that Miner Channel crosses a large portion of the territory included within the limits of the city of Stockton, and that a number of other persons are claiming rights against the city under similar conditions, has caused the court to give this matter careful and thorough consideration.

"It follows, from what has been said, that the city of Stockton owns a conditional fee in the premises involved herein; that the defendant Kile is the owner of a reversionary interest in the same premises; that no adverse possession has been acquired against his reversionary interest; that, the property being devoted to a public use, no rights as against the city have been or can be acquired by the plaintiff; and that the prayer of the complaint should be denied."

To the authorities cited by Judge Plummer we may add: Howard v. Oroville School District, 22 Cal. App. 544, 135 Pac. 689, and City of Daly v. Holbrook, 178 Pac. 725.

In considering the foregoing opinion of the trial judge, it must, of course, be understood that his attention was directed to the question of whether title by prescription could be acquired as against the city. He did not have in view the doctrine of estoppel whereby even a municipality is sometimes precluded from claiming title to real property. Such was the case of City of Los Angeles v. Cohn, 101 Cal. 373, 35 Pac. 1002. No such claim was made herein, nor was there any evidence to support it.

[8] Appellant complains that no judgment was entered in his favor for the portion of the lots which, it was admitted, he owns. Since, however, defendants disclaimed any interest therein and admitted that plaintiff was and is the owner thereof, no finding thereon was required and no judgment was necessary. His action was to quiet his title against the adverse claims of defendants; but, the latter having disclaimed any interest whatever as to a portion of the property, the action might have been dismissed as to that. But, at any rate, in view of the whole judgment roll there can be no future controversy between the parties to this action as to the questions involved in this litigation.

[9] Appellant, of course, cannot complain that the judgment is not sufficiently certain as to the interest of J. M. Kile. As long as the latter is satisfied with that judgment, the former should be contented.

We find no merit in the appeal, and the judgment is affirmed.

We concur: HART, J.; BUCK, Presiding Judge pro tem.

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39 Cal. App. 548

In re MASH. (Civ. 2480.)

(District Court of Appeal, First District, Division 1, California. Feb. 3, 1919. On Rehearing in Supreme Court, in Bank, April 4, 1919.)

1. Attorney and Client ⟹61—Disbarment —Reinstatement.

The District Court of Appeal will reinstate attorney who has been disbarred for delinquencies in past life if convinced that there has been a reformation and that he will, in the future, be a law-abiding citizen and show a proper regard for the duties and responsibilities of his profession.

On Rehearing in Supreme Court.

2. Attorney and Client ⟹61—Disbarment — Application for Reinstatement — Nature.

Application for reinstatement by attorney previously disbarred is not in the nature of an application to relieve applicant from punishment or to give him an opportunity to reform, and is not to be regarded as a motion to vacate order revoking previous order admitting him to practice, but is to be considered as an application for admission on examination or production of license of another state, under Code Civ. Proc. §§ 276, 279; in either case a good moral character being essential to admission.

3. Attorney and Client ⟹3, 4—Admission to Practice — Court of Appeals — Good Character.

The power to admit persons to practice law is vested exclusively in the District Court of Appeals, which is required to determine from the testimonials produced whether applicant is of good moral character.

4. Attorney and Client ⚷7—Admission to Practice—Decision of District Court of Appeals—Review.

The Supreme Court will not interfere with the finding of the District Court of Appeals as to moral character of applicant for admission to practice, unless the record and proceedings in that court show that an error of law led to the decision, or the evidence was wholly insufficient to establish the good moral character of the applicant, or so slight as to be grossly inadequate.

In the matter of the application of Samuel L. Mash for reinstatement as attorney at law. Application granted. Petition for rehearing before Supreme Court denied.

Samuel M. Shortridge, of San Francisco, for applicant.

Lloyd S. Ackerman, of San Francisco, for respondent San Francisco Bar Ass'n.

WASTE, P. J. This is an application by Samuel L. Mash for an order restoring him to the roll of attorneys and counselors at law, entitled to practice in the courts of this state.

It appears from the record that the applicant heretofore, upon the presentation to this court of a license to practice law granted to him by the Supreme Court of the state of Iowa, was admitted to the bar of this state, and that subsequently such license to practice law was revoked, for the reason that the applicant concealed from this court certain delinquencies in his past life which this court held it was his duty to disclose, and which if disclosed would have led this court to deny his application, the statute law of this state requiring that only persons of good moral character shall be licensed to practice law in its courts.

[1] In considering the present petition the decisive question to be determined is whether Mash is at the present time a man of good moral character, and a fit and proper person to practice law and to be intrusted with the duties and accorded the privileges incident to that practice. The applicant is now advanced in years; and, while the record discloses serious delinquencies in his past life, he has produced to this court the testimony of many citizens of this community, including that of business men, judges, reputable members of the bar, ministers of religion, which shows a complete reformation, and that for more than three years last past Mash has lived an upright, industrious, and honorable life, and is a man of good moral character. This having been admitted at the hearing, it is our opinion that neither the vindication of the integrity of the bar, nor the maintenance of a proper standard of legal ethics, requires the permanent exclusion of the applicant from the practice of the law. In a matter of this kind, as in others, there may well be a locus penitentiæ; and, where the present conduct of an attorney satisfies the court that the continuance of his disbarment is no longer necessary, it should not be required. This view we regard as in accord with the spirit of our institutions, as evidenced by our reform schools, and our parole system as applied to persons convicted of offenses against the law, which have satisfactorily demonstrated that wrongdoers, if given an opportunity, are frequently capable of reforming. In considering an application such as the present, while of course we cannot ignore past delinquencies, we must accord prime importance to the present manner of life and conduct of the applicant; and if we are convinced that there really has been a reformation, and that the disbarred attorney will in the future be a law-abiding citizen, and show a proper regard for the duties and responsibilities of his profession, we will lift the ban that past lapses necessitated placing upon him. People v. Payson, 215 Ill. 476, 74 N. E. 383; People v. Essington, 32 Colo. 168, 75 Pac. 394; In re Simpson, 11 N. D. 526, 93 N. W. 918; In re Burris, 147 Cal. 370, 81 Pac. 1077.

The application is granted.

We concur: KERRIGAN, J.; RICHARDS, J.

On Rehearing in Supreme Court.

PER CURIAM. The petition for a rehearing of this matter before the Supreme Court is denied.

[2, 3] The application to the district court is not to be regarded as a motion to vacate the order previously made by that court revoking its original order admitting Mash to practice law. That order stands unaffected. His present application to that court is to be considered as an application for admission to the bar, either on examination in open court and "testimonials of good moral character," under section 276 of the Code of Civil Procedure, or for admission on production of a license from a sister state "and satisfactory evidence of good moral character," under section 279, Code of Civil Procedure. In either case a good moral character was essential to his admission. The power to admit persons to practice law is now vested exclusively in the District Court of Appeal, and consequently it is to that court that the "satisfactory evidence," or the "testimonials," as the case may be, are to be produced, and it is for that court to determine whether they are sufficient to establish the moral character required. Such a decision is a finding upon a question of fact.

[4] Our functions in such a case are supervisory only. We have no original authority to admit persons to practice law. Hence, we

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

should not interfere with the decision of the District Court of Appeal upon such question of fact, unless the record and proceedings in that court show that an error of law led it to the decision, or that the evidence was either wholly insufficient to establish the good moral character of the applicant, or so slight as to be grossly inadequate.

The fact that we refuse to order the matter transferred to this court for a rehearing is, of course, not to be understood as an indication that we have examined the evidence and have found it sufficient, or that we are satisfied of the fact, or that we have any opinion on the subject except that evidence was produced to that court, which, if believed and given full effect according to the tenor, would support the finding of that court.

It should always be kept in mind that in determining such a question the District Court of Appeal is not considering an application to relieve the applicant from punishment or to give him an opportunity to reform, but that its sole object is to determine whether or not the character of the applicant is such that he should be admitted to an office of trust and recommended to the public as a trustworthy person fit to be consulted by others in matters of confidence. A certificate of admission to practice law is a standing affirmation that he is of that character, and it invites others to enter into intimate confidential relations with him. The interest and safety of those who may be thus led to consult him should be regarded as the end to be accomplished. Upon the record we must assume that the District Court of Appeal considered the case upon these principles.

ANGELLOTTI, C. J., and SHAW, MELVIN, WILBUR, and LENNON, JJ., concur.

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180 Cal. 182

LATHROP et al. v. FRANCIS. (L. A. 4680.)

(Supreme Court of California. April 4, 1919.)

1. VENDOR AND PURCHASER 🔑341(2)—REPUDIATION OF CONTRACT BY VENDOR—ACTION TO RECOVER MONEY PAID—PLEADING.

In an action to recover money paid under a contract of sale of land, repudiated by vendor, complaint *held* to state a cause of action.

2. ATTACHMENT 🔑225—MOTION TO DISCHARGE—SCOPE OF HEARING.

A motion to discharge a writ of attachment cannot be made to perform the office of a demurrer to the complaint.

Department 2.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by G. A. Lathrop and others against Mary F. Francis. From an order refusing to dissolve an attachment, defendant appeals. Affirmed.

C. E. Arnold and Matthews S. Platz, both of Bakersfield, for appellant.

Geo. E. Whitaker, of Bakersfield, for respondents.

MELVIN, J. Defendant appeals from an order refusing to dissolve an attachment for $15,600.

Plaintiffs are trustees in liquidation of the West Virginia Oil Company. From the allegations of the complaint it appears that on June 10, 1911, defendant sold to one E. S. Good an option to purchase certain described land in Kern county; that in the following month said Good agreed to sell said option to the West Virginia Oil Company; that on July 29, 1911, defendant and Good entered into a written contract whereby she agreed to sell and he promised to buy all of her right, title, and interest in and to said property for a certain sum, a part of which, namely, $10,000, was then and there paid; that on January 9, 1912, E. S. Good executed and delivered to West Virginia Oil Company an assignment of all his interest in the last-named contract; that on January 29, 1912, a certain supplementary contract was executed by Mary F. Francis and the West Virginia Oil Company modifying the contract of July 29, 1911, by extending the time of payment of certain of the installments of the purchase price; and that thereupon the corporation paid to Mrs. Francis $5,000 principal and $600 interest on the purchase price of $70,000. This sum, together with the $10,000 previously paid, nominally by Good, but really by the corporation, his assignee, makes up the sum of $15,600, for recovery of which the respondents insist was stated a cause of action justifying the issuance of the writ of attachment.

Under the contracts set forth in the complaint the oil company entered into possession of the property and expended $70,000 in an endeavor to develop oil. Both before and after the acquisition by the West Virginia Oil Company of Mr. Good's interest, Mrs. Francis had represented to that corporation that her right, title, and interest in said land was unincumbered by any claims or contracts; whereas, there was at all said times an outstanding contract, executed by defendant's predecessor in interest, giving to one Fox a lease with an option to purchase, and the existence of said agreement was not known to the corporation before it had made the payments above described and had expended the $70,000 for development. Upon hearing of the defect of the title the officers of the corporation refused to make further payments, and on October 1, 1912, Mrs. Francis notified the West Virginia Oil Company, in writing, that all of its right, title, and interest to the land had been forfeited. Thereafter she re-entered into possession of the property and held it at the time of the institution of the action.

There were allegations that the false representations regarding title were fraudulently made by Mrs. Francis. The plaintiffs demanded and prayed judgment for the $15,600 paid under the contracts and for the $70,000 expended in development work.

Respondents concede that the action for the $70,000 is not based upon a contract for the direct payment of money by the defendant. Their position is that they have joined, as they have the right to do, an action sounding in tort with one based upon an implied contract (subdivision 8, § 427, Code Civ. Proc.; Jones v. Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142); that when defendant chose to rescind, as they claim, the written agreement of sale, there at once arose an implied contract to repay the installments of the purchase price and interest; and that such an agreement is one upon which suit may be brought and attachment may be levied for the amount involved.

[1] Defendant's counsel insist that the complaint is fatally defective, in that it does not state facts sufficient to show that defendant has made any breach of her contract, and in this behalf they assert that any allegations concerning her representations of unincumbered title to the land are attempts to vary the terms of written contracts by averments of oral statements, because by her writings she promised not a full title but only such right, title and interest as she possessed. But this is not an action to rescind a contract. It is asserted that defendant has repudiated the contracts evidenced by the writings, and the part of the pleading with which we are here concerned has only to do with the alleged implied contract to repay the money received under the agreements now claimed to be canceled.

[2] Large portions of the briefs of appellant's counsel are devoted to discussions of the alleged infirmity of plaintiffs' pleading. In this connection it is sufficient to call attention to the rule that a motion to discharge a writ of attachment cannot be made to perform the office of a demurrer. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

No other matters require analysis.

The order is affirmed.

We concur: LENNON, J.; WILBUR, J.

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180 Cal. 192

VALENTINE v. HEAD CAMP, PACIFIC JURISDICTION, WOODMEN OF THE WORLD. (S. F. 7852.)

(Supreme Court of California. April 4, 1919.)

1. INSURANCE 🔑755(2)—FRATERNAL INSURANCE—WAIVER OF BY-LAWS—POWER OF LOCAL CAMP CLERK.

In view of laws of defendant mutual fraternal organization, *held*, that local camp clerk was nothing more than a special agent of defendant with defined powers known to members, so that he could not waive any requirements of the law of the organization or by any act or course of conduct create an estoppel against defendant.

2. INSURANCE 🔑756(1)—FRATERNAL INSURANCE—SUSPENSION OF BENEFIT CERTIFICATE.

The local camp clerk having no power to waive requirements of law of defendant society as to time of payment of assessments or consequences thereof, failure of insured to pay assessments as required operated ipso facto to remove him from good standing and suspend his benefit certificate.

3. INSURANCE 🔑761 — FRATERNAL INSURANCE—REINSTATEMENT.

Statement in application for reinstatement in defendant fraternal organization, "I certify, warrant, and represent that I am in good sound bodily health," was one upon the literal truth or fulfillment of which validity of contract depended, and amounted to a warranty, so that there was no effective reinstatement where warranty was absolutely false.

4. INSURANCE 🔑763—FRATERNAL INSURANCE — WARRANTY IN APPLICATION FOR REINSTATEMENT—FALSITY—ESTOPPEL.

In view of limitations upon the powers of local camp clerk under laws of defendant fraternal organization, he could not by any course of conduct or possession of knowledge of insured's bodily health bind defendant in such manner as to estop it from defending upon the ground that warranty of insured as to bodily conditions in application for reinstatement was false.

5. INSURANCE 🔑763—FRATERNAL INSURANCE — REINSTATEMENT — EFFECTIVENESS — ESTOPPEL.

The rights of the parties became fixed upon death of insured, and retention by local camp clerk of defendant fraternal order of money paid by insured's wife upon attempted reinstatement, made a few days before insured's death, at which time the Head Camp had no knowledge of the payment, would not constitute a waiver or estoppel on the part of defendant to dispute effectiveness of reinstatement.

In Bank.

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by Flora A. Valentine against the Head Camp, Pacific Jurisdiction, Woodmen of the World. Judgment for plaintiff, and defendant appeals. Reversed.

Robinson & Robinson and Harry L. Price, all of Oakland, and J. C. Nichols, of Berkeley, for appellant.

Stanley Moore and Geo. K. Ford, both of San Francisco, and Wilder Wight, of Oakland, for respondent.

ANGELLOTTI, C. J. This action was brought by plaintiff to recover upon a fraternal benefit certificate issued by defendant to her husband, Clarence A. Valentine, which provided for payment to her upon his death, if then in good standing, of the sum of $3,000. Judgment was given in favor of the plaintiff by the trial court and we have here an appeal by defendant from such judgment.

The defendant is a mutual fraternal organization maintained on the lodge plan, purely for the mutual benefit of its members, and, among other things, to provide and maintain, by means of assessments on its members a benefit fund from which is paid to designated relatives or dependents of each deceased member who is in good standing at the time of his death, such sum, either $1,000, $2,000, or $3,000, as is specified in his benefit certificate. It consists of a national or supreme body known as the Head Camp, and local organizations or lodges, known as camps. As is usual in this kind of association, the supreme authority of the association is vested in the supreme body, the Head Camp, which at its Head Camp sessions composed of the officers of the supreme body, delegates from the local camps, and past head consuls, made its laws, elected its officers, etc. The matters of the issuance of benefit certificates, levy of assessments, etc., were in the hands of the Head Camp; the business relative thereto being conducted by the officers of the Head Camp in accord with the provisions of the constitution and by-laws adopted by the Head Camp sessions. The collection of the assessments was in the hands of the local camps, and particularly of the clerks of the local camps, who received from the members of their respective camps amounts due for assessments and local camp dues, forwarding the former as collected to the proper Head Camp officers, who were required to keep the accounts showing the situation as to each member.

Mr. Valentine became a member of defendant association in the year 1901, his benefit certificate being dated January 16, 1901, and subsequently affiliated with the local camp at Oakland, Cal., known as "Bay Tree Camp, No. 640." He died on August 22, 1912. The controversy in this case is as to his good standing as a member of defendant association at the time of his death, the terms of his benefit certificate expressly providing, as required by the constitution of the order, that the beneficiary is entitled to "participate in its benefit fund after his death when in good standing and not otherwise," and that the certificate will not be in force at any time when the member stands suspended and is not in good standing pursuant to the constitution and by-laws "now in force or hereafter regularly adopted and in force at the time of his death." To remain in good standing it was imperatively required by the constitution and by-laws of the order that the member pay to the clerk of his camp every assessment levied and called during the month in which it is payable; failure to do this ipso facto putting the member out of good standing. This requirement, which was one essential to the maintenance of the mutual benefit fund from which assessments were to be paid, was emphasized by repeated provisions in the constitution and by-laws of defendant, as well as in the benefit certificates issued by it. Apparently the only exception provided was one for the benefit of a member who, while in good standing, becomes sick or disabled, and while still in good standing properly notified the clerk of the local camp thereof. Such a member may be carried by such local camp for a limited time; the latter remitting to the Head Camp from the local camp funds the amount of his assessments as the same accrue. This provision, however, has no materiality here. From May, 1911, until two days before his death, Mr. Valentine was continuously delinquent in his payments on account of assessments to the clerk of the local camp, making small payments on account thereof from time to time to the clerk of the local camp to some time in June, 1912. The clerk of the local camp, in violation of the laws of the order, had continued to carry him as in good standing to August 1, 1912, at which time several assessments remained unpaid by him, the amount of all of which, however, except that due for July, 1912, had been advanced for him by the clerk of the local camp, and forwarded by such clerk to the Head Camp to his credit, with the result that, in so far as the Head Camp was informed, he was regularly paying his assessments as required by the laws of the order. The amount of the assessment due in July, 1912, was not so advanced by the clerk, nor forwarded to the Head Camp. On August 14, 1912, such clerk in his report sent to the Head Camp reported Mr. Valentine as delinquent for failure to pay the July assessment. So far as appears in the record, this was the first intimation to the Head Camp of any delinquency at any time on the part of Mr. Valentine; the reports theretofore received showing him as regularly paying all assessments. On August 17, 1912, while engaged in his trade as a carpenter, he fell from a ladder a distance of about 20 feet. His neck was broken by this fall. The full extent of his injury was not at once known, and in view of the findings of the trial court it will be assumed that it was not known until after August 20, 1912. He was taken to a hospital, where he remained until August 22, 1912, when he died as a result of the injury. On August 19, 1912, Mrs. Valentine paid to the clerk of the local camp all amounts accruing for assessments and dues to September 1, 1912, including the July assessment, the total so paid being $23.20. On August 20, 1912, she paid such clerk the further sum of $2.95 as advanced assessment for September, 1912. The law of the order provided that a suspended benefit member could become reinstated within a limited time after his suspension by complying with certain specified conditions, and not otherwise, one of which was the delivery by the member to the clerk of the local camp of an application for reinstatement, certifying, warranting, and representing that he was then "in good, sound bodily health," and another of which was the payment of all arrearages. The benefit certificate in terms provided, as required by the laws of the order, that if any assessment was not paid within the time allowed, "then this certificate shall be null and void and continue so until he is reinstated as required by the Head Camp constitution and by-laws of his camp." When the payment of August 19th was made by Mrs. Valentine, the clerk of the local camp informed her that a reinstatement application must be signed by Mr. Valentine and delivered to him, and he furnished Mrs. Valentine a form for that purpose, which he himself had filled in with name and date. It was not the form prescribed by the laws of the order, the difference being in the omission of a final paragraph to the effect that the member agreed that the representation of present sound bodily health is a strict warranty, and that, if his death occurred within one year as the result of any disease with which he was then afflicted, no beneficiary shall be entitled to receive benefits. The constitution provided in effect that no reinstatement could be accomplished except by the presentation of an application in the exact form required thereby. Mrs. Valentine procured Mr. Valentine's signature to this application so furnished and delivered it to the clerk the next day. This application, as required by the law of the order, stated:

> "I, C. A. Valentine, a delinquent and suspended benefit member, hereby request to be reinstated, and offer herewith all arrearages of benefit assessments, equalization payment and camp dues. I certify, warrant, and represent that I am in sound bodily health. * * *"

When the payments were made and the application for reinstatement was delivered by Mrs. Valentine to the clerk of the local camp, the latter was informed by her of the accident and that Mr. Valentine was seriously injured. The evidence fairly shows that there was then no attempted concealment of any of the facts from the clerk, and that no one then knew that the neck was "broken." But the clerk did know from the information given him that Mr. Valentine was not in "sound bodily health." Unquestionably his sympathies were with Mrs. Valentine in the effort to put Mr. Valentine in good standing. The amounts paid by Mrs. Valentine in August, 1912, were never forwarded to the Head Camp by the local clerk, but appear to be still in his custody. This was doubtless due to the almost immediate death of Mr. Valentine. His statement that he informally offered to return the money is disputed by Mrs. Valentine. However, he did within a day or two of Mr. Valentine's death advance Mrs. Valentine $50, none of which has been returned. No Head Camp officer had any notice or knowledge of any attempted reinstatement until after the death of Mr. Valentine. At the time Mr. Valentine became a member of the order the constitution of defendant provided in express terms, as it has ever since, that "camp clerks and bankers are by this constitution expressly made agents of the camp and of the several members thereof, and not agents of the Head Camp." As amended and revised at the Head Camp session in 1910, which it will be observed was prior to any delinquency on the part of Mr. Valentine, the constitution was made to provide with relation to "every benefit certificate" "that no agent or representative of this society nor any officer or member of a local camp has the right or power, by any statement, agreement or promise, or by any method of transacting business with its members, to waive a strict observance and compliance with the laws, rules and regulations of this society as set forth in this constitution, and by-laws of his camp, and such amendment or alteration therein as may be hereafter made." It was expressly declared in the section including this provision, among others, that the conditions enumerated "shall apply to every benefit certificate and shall be binding on both the members and this order." Section 118. At the same time it was provided in section 130 that noncompliance with any of the conditions named in the laws of the society shall be an absolute bar to any claim on the benefit fund thereof "under or by virtue of any benefit certificate that may have been issued, or that may hereafter be issued to an applicant, or by reason of any steps taken by an applicant to entitle him to the same, or by a subordinate camp or member thereof, and no officer or member of the Head Camp has any authority to change, alter, modify, or waive the foregoing requirements, or the consequences thereof in any manner."

The theory upon which the trial court awarded judgment to plaintiff was twofold, being: First, that the imperative conditions and provisions of the laws of the order and the benefit certificate in the matter of the payment of assessments, etc., were waived by defendant by the course of conduct in receiving payments from Mr. Valentine from May, 1911, notwithstanding his delinquency, with the result that he was in good standing at all times up to the time of his death; and, second, that if out of good standing because of nonpayment of assessments, he was reinstated August 20th, and died in good standing.

[1] It cannot be doubted that the laws of the defendant constituted a part of the contract between Valentine and defendant (see Butler v. Grand Lodge, 146 Cal. 172, 175, 79 Pac. 861), or that Valentine was charged with full knowledge of the provisions of the constitution of defendant (see Supreme Lodge v. Price, 27 Cal. App. 607, 616, 150 Pac. 803). These propositions are so well settled as to require no citation of authority. In this connection it must further be held that the express provisions written into the constitution of defendant in 1910 to the effect that no officer or member of a local camp or of the Head Camp has any power or authority to waive any of the requirements of the constitution or the consequences thereof in any way were applicable. As we have seen, under the terms of the original contract, the power to amend the constitution and by-laws was expressly reserved, and the question of good standing at the time of death was to be determined in accord with the provisions of the constitution and by-laws as they then were or might be subsequently amended. The amendments, as applied to Valentine's case were prior to any delinquency and were not such as to impair any vested right. They were mere regulations of the internal affairs of the society, in no degree affecting any right of the insured under his contract or in any way impairing the substance of his contract. They simply put into clear and unambiguous express provisions of the constitution a limitation upon the power and authority of any officer or member of a local camp, or any officer of the Head Camp, to waive any of the requirements of the contract. Perhaps this limitation was fairly inferable before, but in view of the amendments we need not discuss that question. The power of the Head Camp to make such amendments applicable to those already members and to the benefit certificates of such members, in so far as all future conduct was concerned, cannot be doubted. We have in mind the rule enunciated in many states, including this state (see Bornstein v. District Grand Lodge, 2 Cal. App. 624, 628, 84 Pac. 271), to the effect that alterations in the laws will not be construed to operate retrospectively unless the intent that they shall so operate clearly appears. But we give to these amendments in applying them to Valentine's case no real retrospective or retroactive operation. And we further are of the opinion that the intent to make the amendments applicable to every benefit certificate outstanding was clearly and definitely expressed. In addition to these express provisions of the amendments we have the provision of the constitution that was in force when the benefit certificate of Valentine was issued, to the effect that camp clerks are not agents of the Head Camp, but only agents of their local camps and of the several members thereof.

In view of these provisions it cannot be held that the local camp clerk was, to use the language of Marshall v. Grand Lodge, 133 Cal. 686, 692, 66 Pac. 25, 27, "anything more than a special agent of defendant with defined powers which were known to the members." Whatever force there may be in the theory, that, notwithstanding a provision declaring a local camp officer to be the agent of the members, and not of the Head Camp, the law will nevertheless hold him to be the agent of the Head Camp for the transmission of money properly paid him by a member in accord with the law of the society (see Knights of Pythias v. Withers, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762), both principle and the great weight of authority preclude a conclusion that, in the face of the provisions of the constitution we have quoted, the local camp clerk could waive any requirement of the law, or, by any act or course of conduct, create any estoppel against defendant. See Hartman v. National Council, 76 Or. 153, 147 Pac. 931, L. R. A. 1915E, 152. As was held in Northern Assurance Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, it is competent for parties to provide in an insurance policy that the power of agents of the company be limited, and where a limitation is expressed it is binding in the absence of waiver or ratification by the company with knowledge of the facts. This is the settled doctrine in California both as to ordinary life insurance companies (see Elliott v. Frankfort Ins. Co., 172 Cal. 261, 156 Pac. 481, L. R. A. 1916F, 1026) and as to fraternal insurance societies (Marshall v. Grand Lodge, 133 Cal. 686, 66 Pac. 25).

[2-4] The local camp clerk having no power by any course of conduct to waive the requirements of the law of the society as to the time of the payment of the assessments or the consequences thereof, the failure of Valentine to pay assessments as required operated ipso facto to remove him from good standing, and consequently as a suspension of his benefit certificate. See Butler v. Grand Lodge, 146 Cal. 172, 79 Pac. 861; Marshall v. Grand Lodge, supra. This was the situation when he was injured on August 17, 1912. Unless reinstated prior to his death, he was not in good standing at the time of his death, with the result that, under the terms of his benefit certificate, his beneficiary could not participate in the benefit fund. The question, then, is whether there was an effective reinstatement. It seems perfectly clear to us that this question must be answered in the negative. Such a reinstatement could be accomplished only by a full compliance with the law of the society relative to reinstatement. Butler v.

Grand Lodge, supra; Marshall v. Grand Lodge, supra. The law in force at all times required as a condition precedent to reinstatement the presentation of an application including an express warranty of present sound bodily health. As we have seen, the local camp clerk had no power by any act or course of conduct to waive the presentation of the application required by the law. The required application was one in which the member was not only made to declare, "I certify, warrant and represent that I am in good sound bodily health," but also that "I agree that this representation is a strict warranty." The latter provision was not in fact contained in the application presented on behalf of Valentine with the result that the precise application required by the law was not presented. The law providing that "no attempted reinstatement by the clerk of the camp without such reinstatement application shall reinstate a suspended member or entitle his beneficiaries to receive any benefit," it may well be claimed that for this reason alone there was no reinstatement here. Certainly this claim is good if the part omitted was at all material. But we think that the application as presented contained such a warranty in the statement, also required by law, that "I certify, warrant and represent that I am in good sound bodily health." This statement clearly was one upon the literal truth or fulfillment of which the validity of the contract depended, and amounted to a warranty. See Hogins v. Supreme Council, 76 Cal. 109, 112, 18 Pac. 125, 127 (9 Am. St. Rep. 173); Caldwell v. Grand Lodge, 148 Cal. 195, 199, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356. This warranty as we have seen, was absolutely false. "By a warranty the insured stipulates for the absolute truth of the statement made" (Hogins v. Supreme Council, supra), and its falsity is necessarily a defense to the contract procured by the making thereof. There could be no effective reinstatement based upon an application containing a warranty that was in fact false, in the absence of an effective waiver of the falsity by the defendant Head Camp. Plaintiff relies upon the fact that the local camp clerk had knowledge of the falsity of the warranty. In view of what we have said as to the limitations on the power of the camp clerk, it is clear that this knowledge on the part of that officer is an immaterial factor. He could not by any course of conduct or possession of knowledge bind defendant in such a manner as to estop it from defending upon the ground that the warranty was false. This is substantially the effect of what is said in Elliott v. Frankfort Marine Ins. Co., 172 Cal. 261, 266, 156 Pac. 481, L. R. A. 1916F, 1026. In view of his limited powers, his knowledge was not the knowledge of defendant. See Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 751, 91 Pac. 609, 13 L. R. A. (N. S.) 866. No officer of the Head Camp had any knowledge whatever as to the matter, no information even that there had been an attempted reinstatement, until after the death of Valentine. To our minds there is no escape from the conclusion that the attempted reinstatement was ineffective for any purpose, and that Valentine was not in good standing on August 22, 1912, when he died as the result of the injury received on August 17, 1912.

[5] Some reliance is placed upon the retention by the local camp clerk of the money paid by Mrs. Valentine upon the attempted reinstatement, as constituting a waiver of all objections by defendant, or an estoppel on it to dispute its effectiveness. In view of the circumstances of this case we do not see the materiality of this fact. He cannot be held to have received or to hold possession of this money as a representative of the Head Camp; for, in view of his limited authority, he had no power under the circumstances to so receive or hold it. Before information or knowledge came to any officer of the Head Camp, upon which any claim of waiver or estoppel might be based, Valentine had died. As held in Thompson v. Travelers' Ins. Co., 11 N. D. 274, 277, 91 N. W 75, 77, the rights of the parties became fixed upon the death and thereafter "no new contract between the parties by a waiver or estoppel could be created, as one of the contracting parties was dead." Subsequent conduct could not operate so as to affect the right to recover on the benefit certificate. This question is practically decided by what is said in Butler v. Grand Lodge, 146 Cal. 178, 179, 79 Pac. 861. It is proper to add that it does not appear that subsequent to the death of Valentine any Head Camp officer ever did anything or said anything which could by any possibility serve as a basis for a claim of waiver or estoppel, assuming that the necessary waiver or estoppel could be based on matters occurring after the death of the insured, or upon the acts or conduct of individual Head Camp officers.

Our conclusion upon the points we have discussed renders unnecessary a discussion of many other claims of appellant. As is said by appellant's counsel in their brief, the fundamental basis upon which respondent must rest her reliance for an affirmance is that the local camp clerk was the agent of the Head Camp, with power to waive the requirements of its constitution. This basis not existing, her case must necessarily fail.

There was an attempted appeal from the order denying a new trial, but the order was not made until after the change in our law abolishing the right of appeal from such orders. The order, however, may be reviewed upon the appeal from the judgment. In view of what we have said, the motion for a new trial should have been granted.

The judgment is reversed.

We concur: SHAW, J.; LENNON, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.

180 Cal. 185

NEWTON v. JOHNSTON ORGAN & PIANO MFG. CO. (L. A. 4751.)

(Supreme Court of California. April 4, 1919. Rehearing Denied May 1, 1919.)

1. CORPORATIONS 🔑400—OFFICERS—RESTRICTION OF APPARENT AUTHORITY.

Where a corporation holds out to the world as its agents officers apparently clothed with power to transact its ordinary business, third parties will not be permitted to suffer from acts of such agents by corporation's attempted defense that ostensible authority was not in fact conferred, and, where a showing of ostensible agency was very strong, it could not be overthrown by mere proof that the by-laws or minutes of the corporation failed to disclose actual authority.

2. MASTER AND SERVANT 🔑36—BREACH OF CONTRACT OF EMPLOYMENT — TENDER OF SERVICES.

Under a contract of employment whereby employer was to give employé 30 days' notice of time for beginning work, employé could recover for breach of contract, although no formal call to work in 30 days had been sent, where employer wired him that he could go to work at any time and by its silence agreed that a certain time was a proper time and, after employé closed out his business in reliance thereon, countermanded order to report for duty, and it was not necessary that employé make a trip from Boston to California to make an actual tender of his services.

3. CORPORATIONS 🔑432(9)—REPRESENTATION BY OFFICER—EVIDENCE—BY-LAWS.

Where trial court based finding of agency exclusively upon ostensible agency of officers who signed contract, it was not error to exclude minutes and by-laws offered by defendant corporation to show that the officers had not been authorized to execute the contract.

4. CORPORATIONS 🔑57 — BY-LAWS — NOTICE TO THIRD PERSONS.

By-laws of a corporation are of no binding force upon third persons having no knowledge of them.

5. CORPORATIONS 🔑432(8) — AGENCY — EVIDENCE—STATEMENTS OF ALLEGED AGENT.

In an action against a corporation for breach of a contract, statements of a third person were admissible in evidence, over objection that such third person was not connected with the corporation, where the president of the corporation had stated that such third person was representing him.

Department 2.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by W. H. Newton against the Johnston Organ & Piano Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Bryant, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Jas. A. Gibson, Jr., all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued successfully for damages for violation of a contract of employment. Defendant appeals from the judgment.

A contract in writing between the plaintiff and defendant was introduced in evidence. It was dated February 17, 1914, and recited that the Johnston Organ & Piano Manufacturing Company, a corporation organized under the laws of this state, has offered W. H. Newton, of Boston, Mass., employment as general superintendent of the corporation's factory at Van Nuys, for the term of three years, at a salary of $3,000 a year, payable $200 monthly in cash, and $600 in capital stock of the corporation at the end of each year's service; and that, in addition to devoting his time to the corporation's business, Newton was to assign all inventions made by him during his term of employment to the corporation. The agreement also contained the following language:

> "First party hereby agrees to employ second party under the terms hereinbefore expressed. Second party to start work upon thirty days notice by first party. Salary above specified to commence after second party has started to work at the factory at Van Nuys."

The instrument was subscribed by the name of plaintiff, by that of "Johnston Organ and Piano Mfg. Co.," with the corporate seal attached and the signatures of "E. S. Johnston, President," and "A. E. Streeter, Secretary."

It appears from the testimony, without material contradiction, that before and after the execution of the written instrument, the plaintiff, who was an expert in the manufacture, repair, and selling of church organs and pianos, was engaged in lucrative business in Boston, Mass. He was approached by one A. P. Crandall, who represented himself as an employé of the defendant corporation, and they entered into negotiations relative to Mr. Newton's coming to California to become superintendent of the corporation's factory. After Crandall's return to California, plaintiff received a telegram from him asking plaintiff if he would come to California "to look the ground over" with a view to entering the employ of the defendant corporation. This was followed by another message stating the probable amount of the salary of superintendent at the factory in Van Nuys, and asking how much money Mr. Newton would require for the expenses of the trip. Thereafter plaintiff received something more than $200—the amount he had specified as necessary for the expenses of the journey. He then went from Boston to Van Nuys. He was met at the car by Crandall, who escorted him to the factory of the Johnston Organ & Piano Company. There he met Mr. Johnston, president of the corporation, and Mr. Streeter, the secretary. Plaintiff conferred with them and with Mr. Bryant, who appears as counsel for defendant in this action. As a result of these conferences, the written contract drawn by Mr. Bryant was executed. Mr. Johnston told Mr. Newton that he wanted the new superintendent to enter upon his duties as soon as possible, but that the company wanted to get rid of the superintendent then in their employ before doing anything further. While he was in California, plaintiff's hotel bill was paid by the secretary of the defendant corporation. Mr. Newton returned to Boston, and on March 1, 1914, he telegraphed "E. S. Johnston or A. E. Streeter of the Johnston Organ and Piano Co.," asserting his anxiety to know how affairs were shaping themselves at the factory. This message elicited a prompt reply, which was in the following form:

> "Mar. 2, 14.
>
> "Wm. H. Newton, 4 Circuit Sq., Roxbury, Mass.
>
> "Can arrange matters so you can take hold here any time wire when you can be here.
>
> "Johnston Organ and Piano Mfg. Co."

Plaintiff wired in reply that he was closing out his business and would go to work at Van Nuys on April 15th. Thereafter plaintiff busied himself in closing out his business and in making preparations for the contemplated trip to California. On March 6th he received a letter, ostensibly from the company, on its letter paper containing the names of E. S. Johnston, president, and A. E. Streeter, secretary, asking him to use his own judgment about a man seeking employment with the corporation. On March 16, 1914, the plaintiff received a telegram which was as follows:

> "Wm. H. Newton, 4 Circuit Sq., Roxbury, Mass.
>
> "Impossible to arrange matters here by fifteenth hold your affairs in abeyance until you hear further from us we are writing.
>
> "Johnston Organ Co."

No letter reached plaintiff, and on March 25th he sent a telegram to Mr. Bryant, attorney for the corporation, by which he sought information about the promised letter. On the following day Mr. Streeter wired plaintiff that Mr. Johnston was very ill, and that the reason for the previous telegram was the unsettled financial condition. The telegram also contained the following sentence:

> "In fairness to yourself did not wish to have you come on until these conditions are satisfactorily settled which we anticipate shortly."

On March 28th plaintiff wrote to Mr. Streeter, expressing regret at Mr. Johnston's illness. In this letter Mr. Newton informed Mr. Streeter that between March 1st and the 16th of that month he had done many acts, which he described, towards closing out his business in and around Boston. Receiving no answer to this letter, he wrote again on August 3, 1914, to defendant's attorney, informing that gentleman that he must know the true situation at Van Nuys, and requesting an immediate reply. None was ever received.

There was further testimony tending to corroborate plaintiff's representations that he had closed up his business affairs on the strength of his supposed engagement by the organ company.

At the trial the defendant corporation called its secretary, Mr. Streeter, to identify its minutes and by-laws, and sought by him to show that the board of directors had never passed any resolution concerning the contract of employment, and that the president and secretary were not authorized to contract for the services of employés.

[1] It seems to be the theory of defendant's counsel that one dealing with officers assuming to represent a corporation is chargeable with notice of its creation and powers and the real authority of the supposed officers or agents with whom he deals, and that he proceeds at his peril. If this were the true rule, the doctrine of ostensible agency would be swept aside entirely. That Johnston and Streeter were, respectively, the president and secretary of the corporation is conceded by the answer. It is admitted in appellant's briefs that by the introduction of the agreement, and of the names of the officers executing it on behalf of the corporation, plaintiff presented a prima facie case of due execution, but one (so runs the argument) subject to be overthrown by proof of the fact that original authority was lacking. But plaintiff did not merely introduce the contract. He showed that those persons assuming to act for the corporation were in fact in control of its property; that they had custody of and used its corporate seal; that they used its stationery; that they replied with apparent authority to telegrams directed to the corporation; that they, or one of them, paid his expenses while coming to California, while remaining here in

daily consultation at the factory, and while returning to Boston; and that generally they held themselves out as the authorized representatives of the corporation in such manner that the company and its directors could not well have been ignorant of their assumption of ostensible power. Where a corporation holds out to the world as its agents persons apparently clothed with power to transact its ordinary business, third parties will not be permitted to suffer from the acts of such agents by the corporation's attempted defense that the ostensible authority was not in fact conferred. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817; Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 123 Pac. 212; Aigeltinger v. Burke, 176 Cal. 621, 169 Pac. 373. The showing of ostensible agency was very strong and could not be overthrown by mere proof that the by-laws or minutes of the corporation failed to disclose actual authority of the president and secretary to contract for services of employés.

[2] It is argued that plaintiff could have no cause of action until he had received the notice to come to Van Nuys in 30 days and had actually reported there for work; and that he may not recover on the quantum meruit until he has actually and physically tendered his services. Answering the last contention first, it is sufficient to say that this is not an action for wages or for work done, but one for damages for breach of a contract to employ plaintiff. It is governed by the rules declared in such cases as Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. The statement that no formal call to work in 30 days had been sent is met by the fact that defendant wired plaintiff that he could go to work at any time and by its silence agreed that April 15th was a proper time. Evidently, the employment was considered settled because plaintiff was consulted regarding the hiring of one who was to be his subordinate in the factory. By closing his business in Boston and preparing for the trip to California plaintiff made a sufficient tender of his services. It would have been idle for him to make the trip to California after defendant had countermanded the order to report for duty. The gist of his action was his change of position caused by the conduct of defendant. Seymour v. Oelrichs, supra.

[3, 4] As the trial court based its finding of agency exclusively upon the ostensible agency of the officers who signed the contract of employment, it was not error to exclude the minutes offered by appellant to show that the president and secretary had not been authorized to employ a superintendent. Dore v. Southern Pacific Co., supra. The by-laws were also properly excluded for the same reason and for the further one that they are of no binding force upon third persons having no knowledge of them. Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359.

[5] Appellant complains that the court admitted certain statements of one Crandall, and also letters and telegrams of Crandall to respondent, on the ground that Crandall had no connection with the corporation defendant. But there was evidence that the president, Mr. Johnston, told Mr. Newton that Mr. Crandall had been acting as Johnston's representative in the matter. Of course, Crandall's own declarations could not establish his agency; but his course of conduct, coupled with that of defendant's officers and the uncontroverted declaration of the president, justified the court in admitting the testimony and exhibits to which objection is made. Bergtholdt v. Porter Bros. Co., 114 Cal. 681-690, 46 Pac. 738. Besides, there was a complete case without the evidence relating to Crandall.

Plaintiff sued for a sum equal to salary for three years, minus an amount something more than seven hundred dollars. Judgment was for $3,000, which seems to have been correctly fixed by following the rule laid down in Seymour v. Oelrichs, supra.

No other alleged errors require examination.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

40 Cal. App. 62

GARN v. THORWALDSON, Sheriff, et al. (Civ. 2508.)

(District Court of Appeal, First District, Division 1, California. Feb. 25, 1919.)

1. Pleading ⚷129(1)—Admissions—Failure to Deny Allegations of Complaint.

Allegations of complaint were admitted by defendant's failure to deny them.

2. Assignments for Benefit of Creditors ⚷40—Validity of Assignment—Noncompliance with Statute.

Assignment for benefit of creditors, though failing to comply with requirements of Civ. Code, §§ 3449-3473, is valid against the assignor and all creditors assenting to it, and serves to vest the assignor's title to the property in the assignee, being void at most only against creditors not assenting thereto, and against purchasers and incumbrancers in good faith and for value.

3. Fraudulent Conveyances ⚷179(1), 181(1)—Nondelivery—Effect.

Sale of personal property, though not followed by immediate delivery and actual and continued change of possession, as required by Civ. Code, § 3440, is not a nullity, but is good against all the world except seller's creditors, and is good against such creditors, except when attacked in legal proceedings for the collection of their debts.

4. Fraudulent Conveyances 🔑186—Nondelivery—Title of Buyer.

Where sale of personal property is not followed by immediate delivery and actual and continued change of possession, as required by Civ. Code, § 3440, buyer acquires good title as against all the world, except creditors of original seller, and against them also, if he is a purchaser in good faith, for value, and without notice, since the seller, being the owner, can convey title.

5. Assignments for Benefit of Creditors 🔑45—Validity of Assignment—Rights of Assignor's Creditor.

Assignment for benefit of creditors did not become void as to creditor of the assignor, although assignment was not followed by immediate delivery to assignee and actual and continued change of possession, as required of transfer of personal property by Civ. Code, § 3440, since such statute is expressly made inapplicable to assignments for benefit of creditors.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by P. W. Garn against Horace Thorwaldson, as Sheriff of the county of Fresno, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

H. E. Barbour, of Fresno, for appellants. Edmund Tauszky, of San Francisco, and Johnston & Jones, of Fresno, for respondent.

WASTE, P. J. The defendant Thorwaldson, as sheriff of Fresno county, sold a quantity of oil well casing, after third party claim duly made on him by the plaintiff here, under execution issued out of the superior court of that county, on a judgment in favor of one J. W. Moore, plaintiff, and against J. M. Hendrickson et al., as trustees to settle the affairs of the Blair Oil Company, after charter forfeited, defendants. The plaintiff here brought this action against the sheriff and the other defendant, the surety on his official bond, for damages for the conversion. Judgment went for the plaintiffs, and defendants appeal.

On February 12, 1912, the said Blair Oil Company, being indebted to various creditors in an amount in excess of $20,000, duly executed and delivered to Garn, the plaintiff here, an instrument in writing whereby it did "grant, sell, assign, transfer, convey and set over" unto him its real property in Fresno county, together with all the improvements, and personal property, "of whatever kind and nature" thereon, also all its leases, contracts, claims, and accounts connected therewith. This conveyance, or assignment, was made to Garn, in trust, to develop and operate said land; to manage, sell and dispose of any and all of the property transferred to him; to collect the choses in action and settle and compromise all claims and demands—all "for the interest or benefit of the creditors of" the oil company. The instrument further provided that, after payment by the trustee of the expenses of the trust, distribution and payment "of the remainder of the proceeds and income to and among all the creditors of the party of the first part ratably in proportion to their respective debts," any surplus remaining should be paid, and any property unsold or undisposed of should be retransferred, to the oil company.

The assignment was jointly and severally consented to, in writing by each and all the creditors of the company. It was delivered to the trustee but was never recorded. At the time it was so made and delivered the quantity of oil well casing, which was subsequently attached and sold under the execution sale hereinbefore referred to, was in a pile on the real property and near oil well No. 2, thereon. On March 1, 1913, the Blair Oil Company forfeited its charter by failing to pay its franchise tax.

[1] When the present case came on for trial in the lower court, in addition to showing the foregoing facts, the plaintiff introduced considerable testimony tending to show that the transfer of the property, by the oil company to the trustee, was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred. This evidence was offered apparently, for the purpose of showing that the requirements of section 3440 of the Civil Code, relating to fraudulent transfer of personal property had been complied with. The allegations of the complaint setting forth the due proceedings culminating in the execution sale were admitted by failure to deny, and the only issue presented by the pleadings was as to validity of the assignment to Garn, the trustee, and his claim of ownership of the personal property.

Defendants thereupon sought to show that on August 26, 1913, six months after the forfeiture of the charter of the oil company, and a year and a half after the making of the assignment by the company to Garn, J. W. Hendrickson, who at all times, up to the forfeiture of the charter by the corporation, had been its president and one of its directors, and at that time therefore one of its trustees, by operation of law, to settle up its affairs, had employed J. W. Moore to go, and that he did go, upon the real property which was described in the assignment, and take possession and control of the personal property thereon, and watch and preserve the same for, and as the possession of, the Blair Oil Company; that, as the employé and servant of the Blair Oil Company, said Moore remained in possession and control of the personal property until he brought the suit against the trustees of the Blair Oil Company, in March, 1917, and recovered the judgment on which the execution issued which led to the sale complained of here.

Defendants also offered to show that Garn, trustee under the assignment, had never taken possession of the property, or exercised over it any acts of ownership, as required by section 3440 of the Civil Code; that Moore never had notice of the assignment to Garn, and never saw Garn, or any one representing him, in connection with the property until four years after the assignment; that Garn then stated to him that he was not responsible for Moore's wages, and did not know him in the transaction.

Defendants' object in offering the foregoing testimony was to offset the showing of plaintiff as to the delivery of the personal property, transferred by the assignment, to the trustee, and for the further purpose of establishing under the provision of the same section of the Code, that Moore, plaintiff in the suit whence arose the execution sale, became a creditor of the Blair Oil Company (or its trustees settling its affairs), while it remained in full possession of the property.

Sustaining the objections of the plaintiff to the offered testimony, the trial court held that the "only question for the consideration of the court was as to whether the property was put out of the hands of the corporation by the assignment." Defendants rested without further showing, whereupon the court made its finding that plaintiff was owner of the casing and gave him judgment against defendants for its value at the time of the conversion.

Defendants claim that the court erred in its ruling and judgment, and on appeal base their contention on the grounds, first, that the assignment by the Blair Oil Company to Garn was not a valid assignment for the benefit of creditors; and, second, that if the assignment was valid at the time it was made, it was void as to Moore, who later became a creditor while the property still remained in the possession of the oil company and its trustees. They base their argument on their construction of section 3440 of the Civil Code, relating to fraudulent transfers, and section 3449 et seq., of the same Code, relating to assignments for the benefit of creditors.

Section 3440 of the Civil Code, as it stood at the time of making the assignment, so far as pertinent to this discussion was as follows:

> "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer; provided, however, * * * that the provisions of this section shall not apply or extend * * * to any transfer or assignment made for the benefit of creditors generally."

Sections 3449 to 3473 of the Civil Code provide the procedure by which an insolvent debtor may in good faith execute, to the sheriff of the county in which he resides, an assignment of property in trust for the satisfaction of his creditors. One of these sections, No. 3458, provides that the assignment and the transfer by the sheriff must be in writing and properly subscribed, acknowledged and recorded, in the mode prescribed by the chapter on recording transfers of real property. The next section, 3459, provides that unless the provisions of said section 3458 are complied with, an assignment for the benefit of creditors is void against every creditor not assenting thereto.

[2] It cannot be seriously contended that the instrument here complies with the foregoing sections, 3449 to 3473. On the appeal, respondent admits it does not measure up to the requirements of a statutory assignment. An assignment which falls short of the requirements of these sections, however, is valid as against the assignor and all creditors assenting to it, and serves to vest the assignor's title to the property in the assignee. It is, at most, void only against creditors not assenting thereto and against purchasers and incumbrancers in good faith and for value. Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325.

[3, 4] It is likewise the law that a sale of personal property, though not followed by immediate delivery and actual and continued change of possession, as required by section 3440 of the Civil Code, is not a nullity, but is good against all the world except the creditors of the vendor, and is good against them also, except when attacked in legal proceedings for the collection of their debts, and that the vendee, being the owner, can convey title thereto and the purchaser from him will, in any event, acquire a title good against all the world, except the creditors of the original vendor, and against them, also, if he is a purchaser in good faith, for value and without notice. Paige v. O'Neal, 12 Cal. 483; Wilhoit v. Lyons supra; Williams v. Borgwardt, 119 Cal. 81, 51 Pac. 15. Such assignments pass the title to the assignee and the assignment becomes irrevocable. Bryant v. Langford, 80 Cal. 542, 22 Pac. 219.

The Supreme Court of this state has said:

> "If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, * * * in legal effect it is an assignment for the benefit of creditors. * * * The material and essential characteristic of a general assignment is the presence of a trust. * * * The provision that a surplus of proceeds remaining after satisfaction of the claims of the creditors named should be returned to the grantors does not * * * distinguish the contract as one of security only. * * * The reservation of an interest in the possible surplus —not in the property itself—marks the transaction more clearly as an assignment for the benefit of creditors." Sabichi v. Chase, 108 Cal. 86, 87, 41 Pac. 30, 31.

We are of the opinion that the assignment from the Blair Oil Company to Garn was a valid assignment for the benefit of the company's creditors, and divested the company of all title in and to the real and personal property thereby transferred.

[5] Appellant's remaining contention is that even if the assignment was valid at the time it was made it subsequently became void as to Moore, under section 3440 of the Civil Code, supra, by reason of the fact that he became a creditor of the corporation, or its trustees settling its affairs, after forfeiture of its charter, while they remained in possession of the personal property, described in the assignment; that had the defendants been allowed to introduce the proffered evidence, it would have established those facts; that such facts being shown, it would follow as a conclusion of law that the property was rightly seized by Moore in the hands of Garn, the trustee, as though there had been no attempted transfer by the oil company. If the assignment had been executed to effect merely an ordinary transfer of personal property, this contention of appellant would be sound. Watson v. Rodgers, 53 Cal. 401; Rohrbough v. Johnson, 107 Cal. 149, 40 Pac. 37.

But, as already pointed out, the assignment in question was one for the benefit of creditors generally. By its own terms, section 3440 of the Civil Code does "not apply or extent to any transfer or assignment for the benefit of creditors generally."

The testimony sought to be introduced by defendants in the court below was therefore immaterial, and not in response to any issue within the pleadings in the case. The ruling of the court excluding the evidence was correct, and judgment followed accordingly.

Said judgment is therefore affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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39 Cal. App. 710

BUENA VISTA OIL CO. v. PARK BANK OF LOS ANGELES. (Civ. 2860.)

(District Court of Appeal, Second District, Division 2, California. Feb. 13, 1919. Rehearing Denied by Supreme Court April 14, 1919.)

1. APPEAL AND ERROR ⚷1011(1)—REVIEW OF COURT'S FINDING—CONFLICTING EVIDENCE.

The court's finding on conflicting evidence will not be reviewed.

2. APPEAL AND ERROR ⚷1078(5)—ABANDONMENT OF SPECIFICATIONS OF ERROR.

Where, notwithstanding many specifications for insufficiency of evidence, defendant's opening brief complained of but one finding, the other specifications will be deemed abandoned.

3. BANKS AND BANKING ⚷130(3)—DEPOSITING CHECK BY CORPORATE OFFICER—CREDIT TO INDIVIDUAL.

A bank having no previous dealings with a corporation and being unacquainted with its officers or their powers was not warranted in accepting a check payable to the order of such corporation bearing indorsement only of payee's name by its secretary and after collecting the check place the amount to the credit of the person presenting it, without inquiry as to his authority, and permitting him to withdraw the proceeds.

4. CORPORATIONS ⚷414(4)—POWER OF SECRETARY — INDORSING AND COLLECTING CHECKS.

The secretary of a corporation had no authority by virtue of his office to indorse his name on a check payable to the corporation and present it for deposit to be credited to himself.

5. BANKS AND BANKING ⚷130(3)—DEPOSITS OF CHECK—AGENT OF CORPORATION—LIABILITY FOR PROCEEDS.

Where bank received a check payable to a corporation, with the unauthorized indorsement of its secretary, the corporation's title to the proceeds did not pass to the bank when the bank collected the amount, but it became liable for money had and received to the corporation's use.

Appeal from Superior Court, Los Angeles County; Robert M. Clark, Judge.

Action by the Buena Vista Oil Company against the Park Bank of Los Angeles. From judgment for plaintiff, and from an order denying new trial, defendant appeals. Affirmed.

J. Wiseman MacDonald, of Los Angeles, for appellant.

Oscar Lawler and James E. Degnan, both of Los Angeles, for respondent.

THOMAS, J. In this action plaintiff, as successor in interest of American Midway Oil Company, seeks to recover of defendant the sum of $5,000. The facts upon which this claim is based are substantially as follows: On or about July 11, 1911, one A. L. Kemper, the secretary of the American Midway Oil Company at Los Angeles, appropriated a check for $5,000, made and forwarded by the Esperanza Consolidated Oil Company at its office in San Francisco to said American Midway Oil Company—and which will be referred to hereinafter as plaintiff—at Los Angeles. Such check was drawn to the order of the plaintiff. It was sent by mail inclosed in an envelope addressed to plaintiff. A. L. Kemper, in the office of plaintiff, opened the letter, extracted the check, and by the use of a rubber stamp indorsed upon the back of such check the words: "American Midway Oil Company, , Sec'y." In the space following the word "Company" Kemper wrote his own name, and thereunder indorsed the words, "A. L. Kemper, Secretary." He deposited the check, thus indorsed, with the defendant, and the said defendant entered same to Kemper's account, as by him instructed. On the 18th of July, 1911, Kemper withdrew $1,800, and on the 31st of the same month $300 more, of the proceeds of said $5,000 check collected by the defendant bank by check so drawn upon the defendant, and signed as aforesaid. This money was appropriated by Kemper to his own use. The balance of the $5,000 is still retained by defendant. The defendant contends that Kemper was secretary and general manager of said plaintiff from September, 1910, to September 30, 1911, and that the said sum of $2,100 so drawn by Kemper was due him as salary as such secretary and general manager. Plaintiff did not discover the loss of the $5,000 check until the latter part of August, 1911, whereupon demand was made upon defendant for the proceeds thereof. On October 3, 1911, two checks, one for $4,000 and one for $1,000, were drawn against said fund in defendant's bank by plaintiff, and, upon payment being refused, such checks were duly protested. Thereupon plaintiff brought this suit. Judgment went for plaintiff for $5,000, with interest and costs, from which, and from an order denying its motion for a new trial, defendant appeals.

The complaint declared specifically upon the contention aforesaid, and in four separate causes of action asserted claim for money had and received by and for money loaned to defendant for plaintiff's use. The answer, and the several amendments thereto, after admitting the receipt of the proceeds of said check, in substance interposed the following defenses to plaintiff's said causes of action: (1) That the check in question was not deposited with defendant, nor were any moneys received thereon at the time said check was deposited the property of plaintiff; but that prior to the receipt of such check by defendant it had been indorsed in blank by plaintiff, and thereafter, and prior to such receipt, became the property of A. L. Kemper, secretary; that defendant made collection of said check for the account of said Kemper, and, as already hereinbefore set forth, placed said sum to the credit of such account. (2) That plaintiff is estopped from bringing its action. Subsequent to the trial and prior to judgment, and to comply with the proof and theory of the case, plaintiff, by leave of the court, filed the following amendment to the complaint:

> "The plaintiff, by leave of the court, first had and obtained, amends its complaint filed herein in the following respects: By striking out all of paragraph V of the first cause of action in said complaint contained, and inserting in lieu thereof the following: 'That thereafter and on or about the 12th day of July, 1911, said check of $5,000.00 was removed from the office of the plaintiff, in the city of Los Angeles, by A. L. Kemper, secretly and without the knowledge, consent or authority of plaintiff, and was by said A. L. Kemper, without the knowledge, consent or authority of this plaintiff, indorsed as follows: "American Midway Oil Company, A. L. Kemper, Sec'y." That thereafter and on or about said 12th day of July, 1911, said Kemper secretly, and without the knowledge, consent or authority of this plaintiff, delivered said check to the defendant. That the defendant paid no money or other consideration for said check, or the proceeds represented thereby, and parted with nothing of value therefor. That subsequently and prior to the 1st day of August, 1911, there was paid to said defendant by the payee bank in said check named, to and for the use of the plaintiff the sum of $5,000.00, represented by said check.'"

The court found against the defendant upon the material issues. Defendant, by certain specifications, attacks many of said findings as being without "sufficient" evidence to support them.

[1-3] From a careful perusal and consideration of the evidence before us, we are of the opinion that the record contains evidence tending to prove every issue. There was conflict in the evidence, and we will not disturb the findings of the trial court upon such testimony. Porter v. Johnson, 172 Cal. 456, 156 Pac. 1022. Notwithstanding the many specifications for insufficiency of evidence, defendant's opening brief complains of but one finding. It therefore follows that the remaining specifications may be deemed abandoned. Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661. The controversy, therefore, so far as we are concerned, centers upon the question: What was the duty of the defendant bank when the check was presented by Kemper? The question of agency is not here involved. It does not appear from the evidence that there was any delegation of authority, or any "holding out," or any transaction of like character with "any one," or any dealings of any kind with the defend-

ant, to the knowledge of plaintiff. As is so well said by respondents:

> "The latter (defendant) had its selected depositaries. Its by-laws devised, and its directors enforced, a plan for the safeguarding of its funds. The signatures of two of its officers were required to withdraw its funds from such depositaries. Kemper was not one of such officers, nor was the defendant one of such depositaries. The petty cash account is without influence or relevancy in this controversy. Such account was originally kept in the name of L. T. Wells individually. It was continued by means of Wells' individual check to the date of the $5,000 transaction, in the name of A. L. Kemper, secretary. The account was a small one, not exceeding $100 at any time. That checks were drawn against such petty cash account, first by Wells, and later by Kemper, to pay for stamps and other like office expenditures of plaintiff, is without significance. The account so maintained was under the sole control of the individual in whose name it was opened. Deposits to the credit thereof were properly made, because the checks in every case were drawn to the order of, and were indorsed by, the person named in such account. Its name did not appear thereon, nor did it have any interest therein, to the knowledge of defendant. The officers of the latter testified that they did not know, until after the $5,000 transaction, that plaintiff claimed any moneys in their institution. The proof leaves Kemper bare of all power to dispose of the funds of plaintiff. It demonstrates that there was not the slightest basis for defendant's claim of justification, because of Kemper's agency. It forces defendant to the contention that, notwithstanding the utter failure to produce any testimony tending to support its claim, nevertheless the law imposes no penalty upon it. Accordingly, the question for determination may be restated as follows: May a bank, without previous dealings with a corporation, and unacquainted with its officers or their powers, accept a check, by its terms payable to the order of such corporation, bearing the indorsement only of the payee's name by its secretary, collect the amount of such check, place it to the credit of the person presenting it, refrain from making any inquiries as to the authority of such person, permit him to withdraw such proceeds, and escape liability to the payee, in the face of the uncontradicted evidence that such person as secretary had no authority to act, and that the moneys so withdrawn were devoted to his personal use?"

The answer, of course, must be in the negative. The right of said Midway Oil Company to the check in question had not been assigned or transferred by any one authorized so to do.

[4] Viewing this case in the light of all the evidence and surrounding circumstances, it is clear that Kemper had no authority, express or implied, to sign said check; nor did he have any authority by virtue of his office as secretary. Palo Alto, etc., Ass'n v. First National Bank, 33 Cal. App. 214, 164 Pac. 1124; Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435; Alta, etc., v. Alta, etc., 78 Cal. 629, 21 Pac. 373; Asher v. Sutton, 31 Kan. 290, 1 Pac. 535. In the absence of such authority, a secretary cannot transfer his principal's property; his authority will not be presumed, but on the contrary must be affirmatively shown to exist. Palo Alto, etc., v. Bank, supra; Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; California, etc., v. Sciaroni, 139 Cal. 277, 72 Pac. 990. It would appear that any prudent and intelligent person would have been placed on notice by the very presentation of the check in controversy for deposit, as it possessed within itself, as we view it, elements of suspicion and irregularity. Being chargeable with knowledge that the power of such secretary will not be presumed, but must be shown, it was the duty of the bank, before dealing with such check, to establish the evidence of the secretary's power. Defendant contends that it would place a burden upon bank tellers "if they were compelled to exercise judicial functions and ascertain the ownership of funds represented by thousands of checks which were deposited under similar circumstances, before placing the same to the credit of the last indorser. Further, how much patronage would a bank have if it were to challenge the honesty of the man making the deposit?" To our mind it is not a question of the bank's challenging the honesty of any one, but the performance of a duty impressed upon it by law. "Desire for 'patronage,' while commendable, should not be encouraged by the practice of unbusinesslike and irregular transactions"—as respondent so well puts it. From the evidence here it appears that defendant, without making any inquiry whatever—and Kemper was careful not to offer any information—accepted the check for collection, forwarded it to the drawee bank for payment, received the amount, and still, without making any effort to comply with its duty of inquiry, and upon Kemper's instruction, placed the amount to the credit of Kemper, as secretary, and thereafter permitted him to make withdrawals therefrom. The very name of the payee, and the attempted indorsement, cast a "shadow" upon the check, which could have been removed by the performance by the bank of its plain duty under the law—that of inquiry. Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585; Levy v. Irvine, 134 Cal. 664, 66 Pac. 953.

[5] The language of the court in the case of Fresno Canal, etc., v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112, when it is said:

> "The defendant cannot be allowed to shut his eyes and say he did not see, when by opening them he might have seen"

—is very apropos here. There can be no merit in defendant's contention that it was justified in refusing compliance with plaintiff's demand for payment to it of said money because the said check had been generally indorsed. As we have already seen, such was not the case. Because of the unauthorized indorsement of the check by Kemper, plaintiff's title to the proceeds of said check did not pass to defendant when the latter collected the amount thereof from the drawer's bank; but, instead, it became liable to plaintiff for that much money had and received to and for the use of plaintiff. Palo Alto, etc., v. Bank, supra; Knoxville Water Co. v. Bank, 123 Tenn. 364, 131 S. W. 447; Ward v. City Trust Co., supra. As we view the evidence, and construe the law applicable to this case, there was not the slightest excuse for the act of the defendant bank in so accepting said check. As we have seen, there were no previous dealings because of which it might be misled. Kemper said nothing; no inquiry was made of him. Without any fault upon the part of plaintiff its property was taken and attempted to be disposed of by one having no authority so to do. Had the defendant bank performed its plain duty here, it would have been saved from its present predicament, and Kemper would have been thwarted in his unlawful scheme. The whole theory of defendant here, and the very foundation of its argument, is based upon the assumption that Kemper was, at the time the check was received, secretary and general manager of plaintiff. This was not the case. He was secretary, but he was not the general manager, and had not been for many months. He never did have authority to do what he attempted to do here, as the evidence in this case, not only abundantly, but conclusively, shows. Our question is therefore answered by the statement that the bank should have made inquiry.

For the reasons above stated, and many others that occur to us not necessary to mention, we are of the opinion that the evidence amply supports the findings complained of by appellant here. No other point in the record before us merits attention.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

(40 Cal. App. 1)

MURPHY v. RIECKS, Sheriff, et al.

(Civ. 1948.)

(District Court of Appeal, Third District, California. Feb. 18, 1919. Rehearing Denied by Supreme Court April 17, 1919.)

1. Judgments 🔑773—Lien—Conveyance Prior to Entry of Judgment.

Where judgment directed defendant to pay plaintiff specified amount per month until specified date, and subsequent to such date another hearing was had, and a judgment entered directing defendant to pay plaintiff a specified sum per month from such date, the two judgments were entirely distinct from each other, and latter judgment did not become a lien upon property conveyed by defendant prior to its entry, but subsequent to entry of first judgment.

2. Judgments 🔑743(2)—Conclusiveness—Validity of Conveyance.

Judgment decreeing validity of husband's conveyance to wife is conclusive as to validity of conveyance upon wife's subsequent action to restrain sheriff from levying execution upon the land to satisfy a judgment against husband entered subsequent to the conveyance.

3. Execution 🔑171(1)—Action to Enjoin.

Injunction may be issued to restrain sheriff from levying execution upon land to satisfy judgment recovered against grantor subsequent to his conveyance of the land.

4. Quieting Title 🔑7(4)—Cloud Upon Title—Sale of Land upon Execution.

The sale of lands upon an execution issued against the grantor of the person holding legal title will cast a cloud upon the title.

5. Execution 🔑171(4)—Injunction of Sale—Cloud on Title.

Sale of land will be enjoined where its effect will be to cloud the title of the party complaining.

6. Parent and Child 🔑3(1)—Support of Child—Duty of Parent.

Father has legal duty of supporting his daughter who is unable to support herself, where he has ample means for doing so.

Appeal from Superior Court, San Joaquin County; W. H. Langdon, Judge.

Action by Alice K. Murphy against William H. Riecks, as Sheriff of the County of San Joaquin, State of California, and Lulu Mignon Murphy. Judgment for plaintiff, and defendant named appeals. Affirmed.

Walter F. Lynch, of Stockton, for appellant.

John R. Cronin, of Stockton, for respondent.

HART, J. The appeal is by defendant, Lulu Mignon Murphy, from a judgment, entered in the superior court of the county of San Joaquin, restraining defendants from selling, by virtue of a certain writ of execution, at sheriff's sale or otherwise, certain real property of plaintiff.

The defendant Riecks, as sheriff, filed an answer and disclaimer, and upon the trial was permitted to withdraw from the case. The real parties to the action, therefore, are the plaintiff and Lulu Mignon Murphy, who will hereinafter be referred to as the defendant and appellant.

Prior to the 13th day of October, 1908, S. S. Murphy was the owner of the property sought to be sold by virtue of said writ of execution. On said day, by deed of gift, he conveyed said property to his wife, Alice K. Murphy, plaintiff herein, which deed was duly recorded on August 5, 1911, since which time the property has stood in the name of plaintiff.

Appellant is the daughter of plaintiff and her husband, said S. S. Murphy. On the 13th day of March, 1911, she instituted an action (No. 9896) against her father. It was alleged in the complaint that plaintiff was a poor person, afflicted with disease and unable to work and support herself, that she had frequently demanded of her father that he maintain and support her, and that he was financially able to contribute to her support. The demand was for $30 per month, commencing July 15, 1896, and for attorney's fees and costs. The defendant in said action filed an answer, and on the 26th day of April, 1911, a partial hearing was had, and the defendant, upon agreement and stipulation of the parties, was awarded an allowance of $18 per month, payment of which was to begin on the 29th of said month of April and to continue to be made on the 26th day of each and every month thereafter until the 2d day of January, 1912. Thereupon, and upon the agreement between counsel for the respective parties and the announcement in open court that "the interests of the parties might best be served by continuing the further hearing of said matter until Tuesday, the 2d day of January, 1912," the matter was continued by the court for further hearing to said date. On March 21, 1912, another hearing was had, and judgment was entered in favor of plaintiff in said action (defendant herein), directing defendant in said action to pay her the sum of $15 per month from January 5, 1912. In this connection it should be stated that the trial court in this action, in its findings, refers to and treats its judgment of January 5, 1912, as a modification of the order or judgment of April 26, 1911. In other words the phraseology of the recitals in the judgment or order of April 26, 1911, awarding the defendant here a monthly allowance of $18 for a specified limited period seems to indicate that the matter was not on that date fully heard, and that the allowance awarded defendant in this action was intended as more in the nature of a pendente lite provision than as a final judgment, but the theory of the findings herein is that the original award was in the form of a judgment, and that the later or final judgment was a modification of the former.

However, on the 23d day of June, 1913, defendant and appellant brought an action (10814) against both her parents. In the third amended complaint therein, filed September 11, 1915 the judgment in said action 9896 was set out, and it was alleged: That the same is still in full force and effect; that S. S. Murphy has disposed of all the property which was recorded in his name at the time of the filing of the complaint and the rendering of the judgment in said action, and that there is now no property standing in his name on the records of the county of San Joaquin; that for more than two years said S. S. Murphy "has lived in defiance of said plaintiff's afore-described judgment against him, and has paid said plaintiff no money at all, * * * and refuses to comply with the said judgment." It was alleged that "plaintiff believes, alleges, and affirms" that said transfer by said S. S. Murphy to Alice K. Murphy of the aforesaid real estate was made "for the purpose of placing all properties in the name of his said wife, and thereby to endeavor to evade the payment of the afore-described judgment of court and to defraud said plaintiff out of the income awarded her for her maintenance and support"; that said transfer by S. S. Murphy to his wife "was not made and recorded in good faith or for any legal purpose whatsoever, but * * * for the purpose of defrauding said plaintiff out of the afore-described judgment of court and out of the income awarded said plaintiff." The complaint prayed that said deed of gift be declared fraudulent as against plaintiff, and that the same be stricken from the records of said county. Issue was joined by answer, and the court found: That the deed of gift was not made to defraud plaintiff, but was made in good faith; that said deed was delivered to Alice K. Murphy on the 13th of October, 1908, since which date said property "has been the exclusive property of said Alice K. Murphy." Judgment was accordingly entered in favor of defendants in said action. No appeal was taken from said judgment.

S. S. Murphy complied with the terms of the judgment in action No. 9896 until May 5, 1914, when he ceased making payments. On December 5, 1916, execution was issued to recover the sum of $465 then due, and the sheriff levied upon the property conveyed by said deed of gift. Alice K. Murphy served upon the sheriff a "third party claim" in which she notified him that she was the owner of the property levied upon and demanded its release.

On the 12th of January, 1917, the present action (12336) was commenced by Alice K. Murphy against the sheriff and Lulu Mignon Murphy. The complaint alleged: "That S. S. Murphy has no right, title, interest, or claim in said real property," describing it; that the writ of execution referred to required the sheriff to make good "certain sums therein specified out of the personal or real property of S. S. Murphy"; that by virtue of said writ of execution the sheriff has levied upon real property of the plaintiff and is about to sell the same; that on the 3d day of January, 1917, the plaintiff served on the defendant sheriff "her verified claim to said real property, * * * and a demand that said real property be surendered to said plaintiff," which demand was by the sheriff refused. It was then alleged that said writ of execution was issued in said case No. 9896, and reference is made to the judgment therein obtained. The execution, delivery, and recordation of said deed of gift are alleged. Reference is made to action 10814, and the judgment therein rendered decreeing that the property in question is the separate property of plaintiff; "that the defendant Lulu Mignon Murphy holds no judgment against this plaintiff," and that she is well aware that the property stands in the name of plaintiff and that S. S. Murphy has no right, title, interest, or claim therein. The prayer was for an order restraining the sheriff from selling said property.

The answer of defendant denied plaintiff's ownership of the property; alleged that on April 10, 1911, and on April 14, 1911, S. S. Murphy, in his answer in action 9896, admitted ownership of said property; alleged that S. S. Murphy has interest in said property "to the extent of the aforesaid judgment"; that the deed of gift is void as against the judgment secured against S. S. Murphy; "affirms that said plaintiff, by neglecting and failing to record said described and alleged deed of gift prior to said commencement of said action 9896, has waived all right to priority over the judgment in said case," and has waived all right to interfere with the execution; that the judgment in action 9896 became a lien on the property prior to the recording of the deed of gift.

On January 15, 1917, a temporary restraining order was issued and served upon the sheriff. The action was tried on April 10, 1917, findings were filed in favor of plaintiff, and judgment was entered on May 21, 1917, enjoining defendants from selling plaintiff's property.

[1] We think that the theory of the findings in this action that the judgment of March 21, 1912 involved a modification of the said judgment or order of the 26th day of April 1911, awarding the plaintiff in said proceeding (defendant herein) the sum of $18 per month until the 2d day of January, 1912, is not sustainable. The two judgments are entirely distinct from each other. The one was limited to exist, in its operative effect, to a certain specified time, and when the time to which it was so limited lapsed, which was prior to the rendition, and the entry of second judgment, it became functus officio, and assuming that by virtue thereof, a lien attached to the premises conveyed by S. S. Murphy, in October, 1908, to the plaintiff herein, the grant not having been recorded until after said judgment was entered, then said lien passed out contemporaneously with the passing out of said judgment, it appearing that the same was fully satisfied by said S. S. Murphy. It follows that, since the conveyance from S. S. Murphy to the plaintiff herein was of record at the time of the rendition and entry of the second judgment, no lien by reason of said second judgment could attach to the said premises.

[2] As to the charge in the answer herein that the conveyance from S. S. Murphy to the plaintiff herein was fraudulent and made for the purpose of preventing the satisfaction of the judgment herein out of the property so conveyed, the ready reply thereto is to be found in the finding and in the evidence that, in an action instituted by the defendant here in September, 1915, and subsequent to the entry of the second judgment awarding her a monthly allowance for support against her father, S. S. Murphy, the issue as to the alleged fraudulent transfer of the premises involved herein by S. S. Murphy to the plaintiff herein was made by the pleadings, and upon the trial thereof the court found and decided that the charge of fraud in said transaction was without foundation. As seen, no appeal was taken from the judgment in said action, and the finding or decision in said action that said conveyance was not fraudulent or made with intent to defraud the defendant of the fruits of her judgment against her father for maintenance and support is conclusive upon that issue as against her.

[3-5] The claim is made that injunction is not the proper remedy in such a case as this. The contention possesses no force. It is thoroughly settled that a sale of lands upon an execution issued against the grantor of the person holding the legal title will cast a cloud upon the title (Einstein v. Bank of California, 137 Cal. 47, 49, 69 Pac. 616; High on Injunctions [3d Ed.] § 379; Freeman on Executions [3d Ed.] vol. 3, § 438; Pixley v. Huggins, 15 Cal. 133), and it is equally well settled that a sale will be enjoined where its effect will be to cloud the title of the party complaining (High on Injunctions, § 372; Shattuck v. Carson, 2 Cal. 588; Pixley v. Huggins, 15 Cal. 128; Culver v. Rogers, 28 Cal. 520; Porter v. Pico, 55 Cal. 175; Porter v. Jennings, 89 Cal. 440, 26 Pac. 965; Einstein v. Bank of California, 137 Cal. 47, 49, 69 Pac. 616).

The plaintiff was the owner of the legal title to the property involved herein and in possession thereof. Her title to the property was not only presumptively good, but established to be perfectly valid by a solemn judgment of a court of competent jurisdiction in an action where the validity of her title was directly challenged. The sale of the property by the sheriff under the execution issued against the property for the satisfaction of a judgment against her husband, although insufficient to vest title in the purchaser at the execution sale, would nevertheless be sufficient to enshroud the validity of her title in a veil of doubt, and thus cast a cloud upon it. We can imagine no case where the injunctive or preventive function of courts of equity could be more justly or appropriately be called into action than in a case where as here, there was about to be consummated a proceeding, bearing upon its face the insignia of judicial authority, which would, if carried out, involve the validity of a person's title to land in doubt. Certainly it would be a very weak system of remedial justice that would require the owner of the land to stand helpless and mute until after the threatened mischief to his title had been committed, and we know of no other remedy afforded either by the law or by the equity courts than that of the writ of injunction which would prevent the commission of so grievous a mischief upon and against the title to real property.

[6] It is perfectly clear that there is no other possible alternative open to this court but to affirm the judgment, although we are frank to say that so far as we are informed by the record before us of the facts of the controversy giving rise to this litigation, the appellant is entitled to receive assistance from her parents, if they are financially able to render such assistance, in the matter of her maintenance and support. Indeed, such assistance should be provided, not as the result of the coercive power of the law, as it has been written by man, but in ready response to the dictates of the very first and commonest principles of humanity. It is, of course, the legal duty of S. S. Murphy to support the appellant, if for any substantial reason she is unable to support herself and he has ample means for doing so, but, above all, is that natural duty intrinsically reciprocal as between parent and child, involving obligations which should be held none the less sacred and morally binding because in some measure formally recognized by positive law. It is to be deprecated that some substantial relief cannot be afforded the appellant through the processes of the courts if it be true that under the circumstances of her case no such relief be available to her, assuming, of course, that she is for any reason without ability to maintain herself and that her father is. But the law, both substantive and remedial, must be applied according to a well-defined plan to secure that uniformity of operation so necessary to a well-poised system of jurisprudence, and the courts can do no more or no less than to administer the first in the manner prescribed by the latter. Thus we speak, not alone because we see justness in the claim of the appellant that she is entitled to assistance from her parents, but also because, although not a licensed practitioner of the law and undoubtedly, without training therein, it appears that she has been required, probably from paucity of means to employ the services of an attorney, to appear in this cause before this court in propria persona and so present her own side of this controversy. She has filed herein a voluminous brief, prepared, as we are informed, by herself, unaided by a lawyer, and while therein, for one who has not been an habitual student of the law, she has presented her side of this case with singular clearness and force, it is plainly manifest that (as above declared), so far as this particular case is concerned, the law is against her, and therefore her appeal cannot be sustained.

The judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(40 Cal. App. 115)

BOWMAN et al. v. PROVIDENT REALTY INV. CO. et al. (Civ. 2744.)

(District Court of Appeal, Second District, Division 1, California. Feb. 27, 1919.)

BANKRUPTCY 🔑423(1)—DISCHARGE—DEBTS BARRED — MISREPRESENTATIONS — "FALSE REPRESENTATION."

A judgment entered by consent on a complaint alleging that plaintiff as undisclosed principal paid defendant a certain sum for an interest in a land speculation, which was uncompleted because the land was not conveyed to defendant, is not a liability for obtaining property by "false representations," within Bankruptcy Act, § 17, subd. 2, as amended in 1903 (U. S. Comp. St. § 9601), and is barred by the discharge in bankruptcy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Representation.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Henrietta Paul Bowman and another against the Provident Realty Investment Company and S. C. Pratt. From an order denying the motion of defendant Pratt to recall and quash a writ of execution theretofore issued against him, that defendant appeals. Reversed.

Heney & Carr and William F. Adams, all of Los Angeles, for appellant.

W. A. Martin, of Los Angeles, for respondents.

SHAW, J. Defendant S. C. Pratt appeals from an order denying his motion to recall and quash a writ of execution issued upon a judgment theretofore rendered against him in favor of Henrietta Paul Bowman.

The motion was based upon the conceded fact that subsequent to the rendition of said judgment Pratt was duly adjudged a bankrupt by the United States District Court and, in October, 1916, an order was duly made for his discharge as such. The judgment was included in Pratt's schedule of liabilities, and Bowman's claim based thereon allowed in February, 1917. Thereafter, in October, 1917, the clerk of the superior court, as requested by the judgment creditor, issued an execution on the judgment, which was followed by Pratt's motion and an order denying the same.

That appellant's discharge as a bankrupt released him from all liability upon the judgment, must be conceded, unless the indebtedness falls within the exception specified in subdivision 2 of section 17 of the federal Bankruptcy Act (Act Cong. July 1, 1898, c. 541, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. § 9601]), which provides that—

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations."

The question, then, presented for determination is: Was the indebtedness upon which the judgment is founded a liability for property obtained by false pretenses or false representations? The judgment in the case of Bowman v. Pratt and his codefendant, Provident Realty Investment Company, was entered upon defendant filing his consent thereto; hence we must look solely to the complaint to ascertain the nature of the liability. As shown by the complaint, the material facts are as follows:

In September, 1913, C. M. Wood, the City Builders' Investment Company, a corporation, and the Big Five Corporation, a corporation, listed and placed certain real property for sale with one Charles P. Rogers. Thereafter defendants agreed with said Rogers, Wood, the two corporations named, and the Title Guarantee & Trust Company, a corporation, to buy and handle said properties so listed with Rogers, upon certain specified terms, conditions and prices for the sale and handling of same; it being agreed that the properties should, by the owners thereof, be conveyed to the Title Guarantee & Trust Company as trustee for certain beneficiaries, among whom was the defendant Pratt and the Provident Realty Investment Company. After the making of this agreement and the preparation of the trust agreements under which the property was to be conveyed to the Title Guarantee & Trust Company, and before the conveyance thereof, Pratt and his codefendant, the Provident Realty Investment Company, stated to Rogers that they would be unable to consummate the deal and carry out the terms of the agreement, unless they could secure the services of some party to co-operate with them in the handling thereof, and expressed their willingness, for a consideration of $1,250, to execute a contract with such party, giving him an equal right to the participation with defendants in the profits to be derived from the handling of said properties, as set forth in said proposed declarations of trust. Rogers informed Bowman of the proposition so made; whereupon she proposed to advance and pay to said defendants $1,250 for the right to an equal participation in the profits to be derived from the handling of said properties, provided Rogers would accept the position as selling agent to whom the defendants should delegate full authority to act in the matter.

In furtherance of such agreement, Bowman instructed Thomas Ball, as her agent and attorney, to enter into a contract to that effect and pay defendant Pratt and his codefendant the sum of $1,250 when said properties were conveyed to the Title Guarantee & Trust Company. Thereupon, in pursuance of instructions so given by Bowman to Ball, he, on October 14, 1913, in his own name, executed the contract with defendant Pratt and his codefendant and paid to them the sum of $1,250. It is alleged in the complaint that, according to Bowman's instructions (which, in the absence of anything to the contrary, we assume to have been the instructions given Ball, her agent and attorney), the money was not to be paid to defendants until the conveyance was made to the Title Guarantee & Trust Company, "according to the true intent and purpose" of the declarations of trust. After the payment of this money, the City Builders' Investment Company and the Big Five Corporation refused to convey the property in accordance with their agreement so to do, and thereupon Bowman demanded the return of her $1,250. Neither Wood nor either of the corporations ever conveyed the property to the Title Guarantee & Trust Company, nor was either of the declarations of trust ever executed. It is further alleged that the $1,250 was paid to Pratt and his codefendant upon the sole consideration that said properties would be so conveyed, and by reason of the failure of the owners so to do the said Bowman received no consideration for the money so paid by her.

Subdivision 2 of section 17 of the act of 1903, in the plainest language, restricts the fraud which will prevent the release of a discharged bankrupt from provable debts to that of fraud by obtaining property by false pretenses or false representations. Zimmern v. Blount, 238 Fed. 740, 151 C. C. A. 590. There is absolutely nothing disclosed by the complaint from which the slightest inference in support of the contention that Pratt was guilty of obtaining the money of Bowman by means of false pretenses or false representations, can be drawn. On the contrary, it appears therefrom that the agreement was made between Pratt and Ball, each acting in good faith and, so far as shown, the former having no knowledge that Ball, with whom he contracted as a principal, was the agent of Bowman. Looking solely to the complaint upon which the judgment by consent was rendered, we find no allegation of fraud or deceit of any nature practiced by defendant upon plaintiff; indeed, stripped of immaterial and redundant matter, it appears that Ball, acting for an undisclosed principal and with full knowledge of the nature of the proposed and uncompleted speculative venture, paid Pratt $1,250 for a one-half interest therein, which, due to no fault of Pratt, was not consummated, owing to which fact it might be said there was a failure of consideration.

The authorities cited by respondents not only involve the interpretation of prior statutes the provisions of which were broader and entirely different from that under consideration, but the facts made to appear in such cases clearly brought them within the provisions of such statutes.

The order is reversed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 39

HALL et al. v. SOUTHERN PAC. CO. et al.

(Civ. 2705.)

(District Court of Appeal, First District, Division 2, California. Feb. 21, 1919. Rehearing Denied by Supreme Court April 21, 1919.)

1. PARTIES 🔑6(2)—PARTIES INTERESTED IN ACTION AGAINST PARTY CAUSING INJURY TO SERVANT RECEIVING AWARD UNDER COMPENSATION ACT.

An injured employé, having made a claim and received an award under the Workmen's Compensation Act, may, in view of section 31 thereof and Code Civ. Proc. § 378, be joined as a party plaintiff, he having an interest, with his employer, or the latter's insurance carrier, in a suit against a third party whose tort has caused the injury.

2. PARTIES 🔑35—JOINDER—ACTION AGAINST PARTY CAUSING SERVANT'S INJURY—MAKING MASTER DEFENDANT ON REFUSAL TO JOIN AS PLAINTIFF.

Where an employer, after an award under the Workmen's Compensation Act, refuses to join the servant as a party plaintiff against the third party whose tort caused the injury, the servant may maintain the action alone by making the employer one of the defendants, in view of Code Civ. Proc. § 382, providing that, where one who should be joined as a plaintiff refuses to consent thereto, he may be made a defendant.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Betty T. Hall, individually and as guardian ad litem of Frederick William Hall, against the Southern Pacific Company and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Keyes & Erskine, of San Francisco, for appellants.

A. L. Clark and Henley C. Booth, both of San Francisco, for respondent Southern Pacific Co.

Edwin T. Cooper and H. K. Eells, both of San Francisco, for respondent Healy-Tibbitts Const. Co.

HAVEN, J. This action was brought to recover damages for the death of Lucius Endicott Hall, Jr., which is alleged to have been caused by the negligence of the defendant Healy-Tibbitts Construction Company. Plaintiffs are the surviving widow and minor child of said deceased. At the time of the accident which caused his death the deceased was employed by the defendant Southern Pacific Company as a pile inspector and construction engineer, and was performing services growing out of and incidental to such employment. After his death the plaintiffs filed a lawful claim against the defendant Southern Pacific Company for compensation for such death under the provisions of the Workmen's Compensation, Insurance and Safety Act (Stats. 1913, p. 279). Upon that claim the Industrial Accident Commission made an award in favor of the plaintiffs and against the defendant Southern Pacific Company, requiring payment by that company to plaintiffs of compensation in weekly installments; the total liability of the said defendant upon such award being $5,100. After the making of such award, the plaintiffs requested the defendant Southern Pacific Company to commence an action against the defendant Healy-Tibbitts Construction Company to recover damages for the death of said deceased, with the further request that the excess of any amount which might be recovered in such suit, over the liability of the defendant Southern Pacific Company to plaintiffs under the award, be paid to plaintiffs. The said defendant Southern Pacific Company refused to bring such action, whereupon this action was brought by plaintiffs, and the Southern Pacific Company was joined as a party defendant. The prayer is for judgment for the sum of $50,000 "in favor of the Southern Pacific Company, for the use of the plaintiffs."

[1] To plaintiffs' complaint, alleging substantially the above recited facts, the defendants filed separate demurrers, both of which were sustained. Plaintiffs declining to amend, judgment was entered against them, from which they appeal. The sole question presented is whether or not plaintiffs can maintain this action against a third party, whose negligence is alleged to have caused the death, after having made claim against

the employer of the deceased for compensation under the provisions of the Workmen's Compensation Act, and received an award on such claim.

The answer to that question depends on the proper construction to be given to section 31 of the act referred to, which, as far as is here material, reads as follows:

> "The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment to the employer of any right to recover damages which the injured employé or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party, * * * but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employé or other person entitled."

In the case of Marcel Bassot and Ocean Accident & Guarantee Corporation v. United Railroads of San Francisco, recently decided by division 1 of this court, suit was brought by an injured employé and his employer's insurance carrier jointly against the defendant corporation to recover damages caused by the latter's alleged negligence. The compensation due the employé under the Workmen's Compensation Act had been adjusted and paid by the insurance company; after which both joined as plaintiffs against the third party whose negligence was alleged to have been the cause of the injuries received. A motion for nonsuit was granted as against the plaintiff employé on the ground that he was improperly joined as a party plaintiff. The case was twice heard in the District Court of Appeal, and in both opinions the granting of such nonsuit was held to have been erroneous. In the decision on rehearing the court, in referring to section 31 of the above act, and adopting the language of the original opinion, says:

> "Respondent is correct in its contention that this section operates to transfer the legal title to the claim for damages to the employer or his surety, but it is also true that the employé still retains an equitable interest therein as to any surplus that may be recovered over the amount paid him by the employer, and he is therefore a real party in interest in the litigation. Although section 369 of the Code of Civil Procedure provides that 'a trustee of an express trust may sue without joining the person for whose benefit the action is prosecuted,' section 378 of that Code provides that 'all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where otherwise provided in this title.' There is ample authority in this state to the effect that the provisions of section 369 are permissive only, and that the beneficiary of the trust may properly be joined as a party plaintiff with the trustee by virtue of section 378. Daley v. Cunningham, 60 Cal. 530; Cerf v. Ashley, 68 Cal. 419, 9 Pac. 658. It therefore follows that, while Bassot was not a necessary party to the suit, he was at all events a proper party thereto, and that the lower court was in error in granting the motion for a nonsuit and dismissing the action as to him." 26 Cal. App. Dec. 1003, on rehearing 177 Pac. 884.

A petition to have the above case heard and determined by the Supreme Court, after judgment in this court, was denied by the Supreme Court on January 30, 1919. We are in entire accord with the construction of the statute announced in the above case. If we were not, we should be bound to consider that the opinions referred to, and the refusal of the Supreme Court to disturb the same, establish the law in this state to the effect that an injured employé, after having made claim and received an award under the Workmen's Compensation Act, may join as a party plaintiff with his employer, or the latter's insurance carrier, in a suit against a third party whose tort has caused the injury complained of.

[2] The only remaining question in this case is whether, upon the refusal of the employer to join as plaintiff in such a suit, the injured employé, or the heirs at law of a deceased employé, may maintain the action alone by joining the employer as a defendant. If such power does not exist, the right of the injured employé or the heirs of the deceased employé, to protect their equitable interest in the surplus that may be recovered for their benefit, can easily be destroyed by the refusal of the employer to join as plaintiff. In such event, the plaintiffs in this action, having an established right to sue, would be denied that right by reason of the refusal of their trustee to protect their interests. The necessity of preventing such a denial of justice on broader grounds is obviated by the provisions of section 382 of the Code of Civil Procedure:

> "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

Plaintiffs complied with this section and, by virtue of its provisions, are entitled to maintain the action as sole plaintiffs.

The judgment must be reversed, with instructions to the trial court to overrule the demurrers to plaintiffs' complaint; and it is so ordered.

We concur: **LANGDON, P. J.; BRITTAIN, J.**

(40 Cal. App. 38)

ONDANCK v. SOUTHERN PAC. CO. et al. (Civ. 2701.)

(District Court of Appeal, First District, Division 2, California. Feb. 21, 1919. Rehearing Denied by Supreme Court April 21, 1919.)

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight.

Action by Felix Ondanck against the Southern Pacific Company and others. Judgment for defendants, and plaintiff appeals. Reversed, with instructions to overrule demurrers to the complaint.

See, also, 180 Pac. 20.

Charles B. Younger, of Santa Cruz, for appellant.

Chas. M. Cassin and James L. Atteridge, both of San Jose, for respondent Southern Pac. Co.

King, Nibley & Farnsworth and Carroll S. Bucher, all of Salt Lake City, Utah, for other respondents.

HAVEN, J. Plaintiff sued to recover damages for injuries received by him through the negligence of defendant Southern Pacific Company in shunting a car into a truck of lumber, which plaintiff was engaged in moving in the course of his employment by the defendant San Vicente Lumber Company. After the accident, plaintiff received from his employer medical and surgical attendance, and from the employer's insurance carrier, the defendant Guardian Casualty & Guaranty Company, 65 per cent. of his average weekly earnings from the time of the accident until a few days before the commencement of the action, which latter payment is alleged to have been made pursuant to an award by the Industrial Accident Commission. Subsequent to that award, the plaintiff requested his employer and its insurance carrier to join him in the institution of this action, but both of said defendants refused to so join. The action was then commenced by the injured employé as sole plaintiff. All of the defendants demurred to the complaint. Their demurrers were sustained without leave to amend, and judgment was thereupon entered in favor of defendants, from which plaintiff appeals.

The question presented for determination is the same as that involved in the action of Hall v. Southern Pacific Co. (No. 2705) 180 Pac. 20, this day decided. In this case the action is by the injured employé, while in the Hall Case the employé was killed and the action was brought by his heirs at law. Here an insurance carrier made certain payments and is joined as a defendant for that reason, which fact did not appear in the Hall Case. These differences of facts do not differentiate the question involved upon the appeal. For the reasons given in the opinion in the Hall Case, it must be held that plaintiff was entitled to maintain this suit as sole plaintiff, upon joining his employer and the latter's insurance carrier as defendants, and, for that reason, the demurrers of defendants to plaintiff's complaint were erroneously sustained.

It is therefore ordered that the judgment be reversed, with instructions to the trial court to overrule the demurrers to plaintiff's complaint.

We concur: LANGDON, P. J.; BRITTAIN, J.

(39 Cal. App. 753)

COUNTRYMAN v. CALIFORNIA TRONA CO. (Civ. 2511.)

(District Court of Appeal, First District, Division 1, California. Feb. 15, 1919.)

COSTS ⚷254(1)—COSTS ON APPEAL—BILL OF EXCEPTIONS.

Expense of preparing a bill of exceptions before appeal taken, the bill being used in motion for new trial, though prepared in anticipation of use on appeal, is an expense in the conduct of the case in the superior court, and not a part of the record on appeal nor taxable as a disbursement on appeal.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by R. H. Countryman against the California Trona Company. From denial of a motion to tax costs of former appeal (170 Pac. 1067), defendant appeals. Reversed.

Charles W. Slack, Chauncey S. Goodrich, and Perry Evans, all of San Francisco, for appellant.

R. H. Countryman, of San Francisco, for respondent.

WASTE, P. J. On a former appeal by the defendant in this action the judgment of the lower court was sustained. 35 Cal. App. 728, 170 Pac. 1069. Upon the going down of the remittitur the plaintiff duly filed a memorandum of his costs on appeal. A motion to have the costs taxed was made by defendant, which motion was denied, and defendant appeals.

The memorandum of costs is entitled "Memorandum of Costs and Disbursements on Behalf of Plaintiff on Appeal from Judgment, Including the Order Denying Motion for New Trial," and the item therein objected to is as follows:

"1914, April 15. To amount actually expended by plaintiff and respondent in connection with the appeal to the Supreme Court of the state of California from the judgment herein, and including the order denying defendant's motion for a new trial, and the preparation of the record for the said appeal, and actually used in preparing amendments to the proposed bill of exceptions of defendant for use upon said appeal, said amount being paid to J. H. W. Riley, official court reporter of said superior court, $352.80."

The judgment in the cause appealed from was entered in favor of plaintiff on April 3, 1914. Defendant gave notice of its intention to move for a new trial on April 11, 1914, and appealed from said judgment on April 21, 1914. It thus appears from the record that the item of cost in question was a disbursement actually made before any appeal taken.

The notice of intention to move for a new trial specified that said motion would be made "upon affidavits to be made, served, and filed, and upon a bill of exceptions to be thereafter prepared, served, and settled." Within the time allowed by law, and the stipulation of the parties, such bill of exceptions was prepared and settled, and was the one bill of exceptions used on the motion for a new trial (which was denied), on the appeal from the judgment and on the appeal from the order denying a new trial. It is headed "Bill of Exceptions of Defendant on Its Motion for a New Trial and on Its Appeal from Said Judgment.

From the foregoing record appellant contends that the question of the right to recover, as cost of appeal, the amount shown by the item attacked, is to be decided adversely to the plaintiff on the authority of Turner v. East Side Canal & Irrigation Co. (Sup.) 171 Pac. 299, and Eaton v. Southern Pacific Co., 31 Cal. App. 379, 160 Pac. 687. In the latter case one of the items of the cost bill in dispute was $104 paid for a reporter's transcript of the testimony taken at the trial and which respondent there claimed as an expense "for transcript of testimony used by plaintiffs in preparing record on appeal and amendments to defendant's bill of exceptions used upon appeal." The record on the appeal in that case, as here, showed that the reporter's transcript was obtained for the purpose of assisting counsel for the plaintiff in the preparation of amendments to a bill of exceptions prepared by the defendant on its motion for a new trial in the superior court. The appellate court held that "the expense thus incurred was purely an expense in the conduct of the case in the superior court, and was not a part of the preparation of the record for the appeal," and therefore could not be allowed. Eaton v. Southern Pacific Co., supra.

So here, as in the case just cited, while there is no denial of the statement concerning the item of disbursement contained in the verified memorandum of costs, the record discloses that the payment was made after notice of motion for a new trial in the court below (which specified that said motion would be made in part upon a bill of exceptions) and before any appeal taken. Although the bill of exceptions may have been prepared in anticipation of being used, and apparently was used, on the appeal from the judgment, as was done in the Eaton Case, supra, under the ruling of that case, as affirmed by the unanimous decision of the Supreme Court in Turner v. East Side Canal and Irrigation Co., supra, the expense of such preparation must be held to be an expense in the conduct of the case in the superior court, and not a part of the record for the appeal.

The order appealed from is reversed, with directions to the court below to disallow the item of $352.80 paid to J. H. W. Riley, official court reporter of said superior court, and to tax plaintiff's costs on said appeal at the sum of $50.50.

We concur: KERRIGAN, J.; RICHARDS, J.

39 Cal. App. 785

BEAN v. BEAN et al. (Civ. 2545.)

(District Court of Appeal, First District, Division 1, California. Feb. 18, 1919. Rehearing Denied by Supreme Court April 17, 1919.)

Trusts 🔑356(1)—Right to Follow Trust or Proceeds Thereof—Trust Property Transferred to Third Persons.

Where a trust existed, and plaintiff was a beneficiary and entitled to receive a certain sum of money therefrom, he was entitled to a judgment against one into whose possession he traced such funds, and who claimed them as a gift from trustor made subsequent to the trust and to possession of corporate securities purchased with such fund.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit by George Albert Bean against Harry Joel Bean and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Charles Clark, of San Jose, for appellant.

H. E. Wilcox and D. M. Burnett, all of San Jose, for defendants.

H. A. Blanchard, of San Jose, for respondent.

KERRIGAN, J. This is a suit in equity to enjoin the defendant from disposing of certain shares of stock and to compel him to turn over the same, together with certain sums of money claimed to be due plaintiff under the terms of a certain trust created by one James Bean for the benefit of his children with their approval and consent. Judgment went for plaintiff. No adverse ruling against appellant either in the settlement of the pleadings or in the admission or rejection of evidence appears from the record. The principal point relied upon for a reversal is that the findings fail to support the existence of the alleged trust. The case comes up for review upon the judgment roll and bill of exceptions.

The facts necessary for an understanding of the case may be stated as follows: James Bean, being nearly 90 years of age and sick and infirm, was desirous of dividing certain lands owned by him among his three sons. These lands were situated in different counties of this state and were all subject to mortgage. Bean was also the owner of a certain note secured by a deed of trust, upon which there was due the sum of $15,000. To carry out his plan for the division of his estate he proceeded to convey to each son the particular piece of property he desired him to have. He then transferred to his eldest son, James Edwin Bean, the note owned by him. The transfer was made in trust for various purposes, but particularly to pay off the incumbrances on the various parcels of land conveyed by him to his sons, so that as far as possible, each son might have his property clear of indebtedness. The father retained the income from all of the property for his support as long as he lived.

The terms of the trust in relation to the property provided for the following payments:

(1) The income to the father during his life.

(2) To the Bank of San Jose an indebtedness due from the trustor in the sum of $6,500.

(3) A mortgage of $2,000 upon property situated in Alameda county conveyed to the appellant.

(4) An indebtedness of $1,200 due to James Edwin Bean.

(5) A note indorsed by James Bean and James Edwin Bean in the principal sum of $1,200; an indebtedness of $1,500 on property located in San Francisco; and also the payment of a certain mortgage indebtedness then owing by James Bean upon particular property conveyed to plaintiff as far as the fund would permit.

The property alluded to in the last clause was situated in Santa Clara county, and was known as the San Martin ranch, upon which there was a mortgage of $3,500. At the time the trust in the $15,000 note was created the total debts, the payment of which was provided for, amounted to the sum of $16,400. As the payment of the debt of $3,500 on the San Martin property was subordinate to the payment of the other incumbrances and debts, the amount available for this purpose was but the sum of $2,100, which left it subject to a debt of $1,400, which was to be assumed by plaintiff. The various credits provided for plaintiff out of the trust fund were the following: The sum of $2,100 above mentioned; a sum of $1,200 due the Bank of Santa Clara; the sum of $1,500 to liquidate the indebtedness on a lot in San Francisco; and the further sum of $500 to be paid for the release of a mortgage on a lot situated in Gilroy. In addition to these sums, plaintiff is entitled to a further credit of $1,200; he having succeeded to the claim of his brother James Edwin Bean against the trust fund, payment of which was provided for.

At the time of the conveyance of the different parcels of land allotted to plaintiff, one of those parcels, alluded to as the San Martin ranch, was subject to a contract of sale, and was thereafter sold by plaintiff thereunder for the sum of $8,350. The property when sold was still subject to the mortgage as above described. No part of the indebtedness had been released as provided for under the trust agreement, for the reason that the note assigned to the trustees for collection had not as yet been paid. The price paid by the purchaser of this property was made up by him assuming the $3,500 mortgage, the execution of a second mortgage of $2,850 and the payment of $2,000 in cash. With permission of the father, plaintiff retained the second mortgage of $2,850 and the sum of $1,500 in cash, making a total of $4,350, and the balance of $500 was devoted to the purposes of the trust. Thereafter the trustee received a partial payment of $8,250 on the note assigned to him. A part of this was applied to the liquidation of the first mortgage he was directed to pay under the terms of the trust, and he turned over the balance of $1,701.25 to the trustor to distribute as he had directed in his declaration of trust. Some time thereafter the balance of the trust note was collected, and the $2,000 indebtedness against the property situated in Oakland, deeded to appellant, was paid, as was also the sum of $700 on account of the indebtedness of plaintiff to the Bank of Santa Clara. The payment of both of these items was provided for. At this time there were due credits to plaintiff with which the trust fund was chargeable a $500 balance due the Bank of Santa Clara; the sum of $1,200 due the trustee, to which plaintiff succeeded; $1,500 indebtedness on the San Francisco lot; a $500 indebtedness on the Gilroy lot; and the credit of $2,100 on account of the San Martin ranch, together with the sum of $500 paid by plaintiff into the trust fund at the time of its sale. Upon these amounts the plaintiff had been paid the sum of $4,300, leaving a balance to his credit in the sum of $6,300. According to the terms of the trust, these debts should have been paid, but, notwithstanding this fact, a portion of the funds on hand were invested in certain corporate securities, and the father having shortly thereafter died, these securities came into the possession of the appellant, who lived with his father at the time of his death, and he claimed them under a gift, contrary to the trust provisions.

At the trial the amount of the trust fund traced into the hands of the defendant represented by the corporate securities amounted to the sum of $4,625, together with the sum of $330, dividends paid thereon. Plaintiff further proved that the sum of $600 was diverted from the fund for the payment of street improvements or the benefit of the appellant not contemplated or authorized by the trust agreement. The amount of the trust funds so traced was less than plaintiff was entitled to receive under the terms of the trust.

By its judgment the trial court awarded plaintiff the corporate stock, which it found to be of the value of $4,625. It also gave a personal judgment for the sum of $930, being the $600 paid for street work and the dividends accruing upon the stock. Plaintiff having proved, and the court having found, the existence of the trust, plaintiff was entitled to this judgment; he having traced these amounts as being part of the trust funds to which he was entitled.

In conclusion it may be stated that it appears from the record that the appellant received the major portion of the father's estate under the division thereof. From this fact it is argued by respondent that appellant is in no position to question the validity of the settlement. As the trial court found upon sufficient evidence that a trust existed, the discussion of this question becomes unimportant.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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40 Cal. App. 34

WOODS v. BENNETT et al. (Civ. 2395.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1919. Rehearing Denied March 22, 1919; Denied by Supreme Court April 21, 1919.)

1. Covenants 🔑127(2, 4) — **Breach — Incumbrances—Liability.**

Where there is an existing judgment against the land, the grantor is liable upon a covenant against incumbrances, at least for nominal damages, and is contingently liable to pay the amount of a judgment against the land upon its payment by the grantee.

2. Contracts 🔑67—**Consideration—Pre-Existing Liability.**

The liability upon a covenant against incumbrances is extinguished by the intermediate grantee's acceptance of a subsequent agreement by her grantor to pay the incumbrance, and such extinguishing of liability is sufficient consideration for the agreement.

3. Contracts 🔑221(3)—**Conditions—Payment of Judgment.**

A grantor's liability on a subsequent agreement with his grantee to pay a judgment against the land is absolute, not contingent upon prior satisfaction of the judgment by such grantee.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Elizabeth Woods against I. I. Bennett and another. From a judgment for defendant Bennett, plaintiff appeals. Reversed.

John J. Craig, of Los Angeles, for appellant.

Barstow, Rohe & Jeffers, of Los Angeles, for respondent.

CONREY, P. J. Appeal by plaintiff from judgment entered in favor of the defendant Bennett.

The action was brought by plaintiff to recover damages for breach of the following written agreement made by the defendant Bennett:

"Los Angeles, Calif., June 6, 1912.

"I hereby agree to clear title to lot 17 in block 36 in the Central Arlington Heights Tract as per map recorded in Book 30, page 51, Miscellaneous Records of Los Angeles County, within ninety days from above date.

"Details of Above.

"I. I. Bennett having deed to Mrs. Elizabeth Woods the above mentioned property representing the same to be free and clear except a certain trust deed for $1,000.00. It appears upon examination of said title that there appears a judgment of $424.80 and $7.10 costs against G. W. Reilly in favor of G. B. Lohman docketed Sept. 18th, 1911, and recorded in Book 231, page 192, of Judgments. Which the above named Bennett agrees to settle with accrued interest within ninety days from the date above mentioned.

"Original Witness E. W. Knapp, June 6, 1912.
"I. I. Bennett."

On the 16th day of May, 1912, respondent deeded to appellant the land described in the foregoing contract, "free and clear, except a certain trust deed of one thousand dollars (except 1912 and 1913 taxes)." On May 24, 1912, appellant deeded the same property to Ellen B. Crowder, including in said deed like covenants against incumbrances as above noted. On June 5, 1912, the Los Angeles Abstract & Title Company issued a certificate to Crowder showing a judgment lien against said property, being the same judgment lien referred to in the contract above set forth. That certificate was introduced in evidence at the trial of this action, together with admissions sufficient to show that the judgment lien actually existed as recited in said contract. In December, 1912, the plaintiff paid Crowder the amount of said judgment, or perhaps it would be more accurate to say, paid to her by reason of said judgment an amount equal to the amount of the judgment. It does not appear that Crowder ever paid the judgment, but it does appear that Bennett never paid it, and, so far as appears from the evidence, the judgment remained in force until the lien thereof expired by lapse of time. At the time of commencement of this action the lien of the judgment had not yet expired.

The principal defenses urged against the action are that there was no consideration for the agreement, and that the plaintiff has not suffered any damage by reason of any breach thereof. The author of Devlin on Deeds (3d Ed.) § 918, says:

> "It is, I think, well settled that where the incumbrance has not been paid off by the purchaser of the land, and he has remained in quiet and peaceable possession of the premises, he cannot have relief against his contract to pay the purchase money, or any part of it, on the ground of defect of title. The reason is that the incumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way; and then it would be inequitable that any part of the purchase money should be retained."

But, at the end of section 920, he says:

> "If the covenant, however, is in the form of an agreement to pay and discharge the incumbrances, the covenantee, although he has not extinguished them, is entitled to recover the amount of the incumbrances."

These rules, as stated in the text-book, are supported by various cases there cited.

[1] Concerning the rule first stated, it is said in Fraser v. Bentel, 161 Cal. 390, 394, 119 Pac. 509, 511 (Ann. Cas. 1913B, 1062):

> "Inasmuch, however, as the covenant against incumbrances is merely one of indemnity (Rawle's Covenants for Title, § 188), no more than nominal damages can be recovered on account on an incumbrance which has inflicted no actual injury upon the grantee."

It thus appears that at the time when defendant made the agreement of June 6, 1912, the plaintiff was not in a position to have recovered substantial damages growing out of breach of the covenant contained in defendant's deed to the plaintiff, but she was in a position to have recovered at least nominal damages, and there existed a contingent liability to pay the full amount of the judgment upon its satisfaction, by payment by the plaintiff.

[2] This direct liability upon the covenant contained in the deed was extinguished by plaintiff's acceptance of the subsequent agreement made by Bennett, and, in our opinion, this constituted a sufficient consideration for the agreement as made.

[3] Upon the execution of this agreement the right of the plaintiff to have the judgment satisfied by the defendant became absolute, and was no longer contingent upon prior satisfaction of the judgment by the plaintiff. The defendant having failed to perform that agreement, he thereupon became liable to the plaintiff for the amount of the judgment as damages for breach of his agreement.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

40 Cal. App. 111

PATTEN & DAVIS LUMBER CO. v. INMAN.

(Civ. 2551.)

(District Court of Appeal, Second District, Division 1, California. Feb. 27, 1919.)

1. Appeal and Error ⚿766—Briefs.

Where defendant and appellant alleges error in the granting of a codefendant's motion for nonsuit, and the record is presented in accordance with the method provided in Code Civ. Proc. § 953a, the fact alone that appellant omits to print in his brief any portion of the record showing, as required by section 953c, that the court erred in granting the motion, justified affirmance.

2. Appeal and Error ⚿151(6)—Denial of Relief to Another—"Aggrieved."

In a case where appellant's defense was that he acted for another, but he demanded no affirmative relief, but contented himself by asking that such other be brought in by plaintiff, as a party to the action, he is not "aggrieved," and cannot complain of an order granting his alleged principal's motion for nonsuit, since it was plaintiff, not appellant, who was denied relief.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Patten & Davis Lumber Company against Charles T. Inman and others. From judgment for plaintiff, and from an order granting a nonsuit to defendant Richman, defendant Inman appeals. Affirmed.

H. C. Millsap, of Los Angeles, for appellant.

Behymer & Craig, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sued to recover upon a draft drawn by William Durflinger upon and accepted by Charles T. Inman. In his answer Inman alleged that in accepting the draft he acted for and as agent of one F. H. Richman, and asked that he be made a party defendant to the action. Thereupon plaintiff filed an amended complaint making Durflinger, Inman, and Richman parties defendant, and wherein it was alleged that Inman in making the draft acted for and as agent of Richman. Durflinger suffered default. Richman filed an answer putting in issue the question of Inman's alleged agency in acting for him, and the result of the trial was that, at the close thereof, the court made an order granting Richman's motion for a nonsuit and gave judgment in favor of plaintiff as against Inman, from which he has appealed.

While appellant states that he is "unable to find an error which would justify the reversal of the judgment in so far as the plaintiff is concerned," he nevertheless insists that the court erred in granting Richman's motion for a nonsuit.

[1] The record is presented in accordance with the method provided in section 953a, Code of Civil Procedure, but, conceding appellant's right to have the alleged error reviewed, he omits to print in his brief any portion of the record showing, as required by section 953c, Code of Civil Procedure, that the court erred in granting the motion. This alone, upon the authority of Jones v. American Potash Co., 35 Cal. App. 128, 169 Pac. 397, and Anderson v. Recorder's Court, 171 Pac. 812, is sufficient ground to justify an affirmance of the judgment.

[2] It appears, however, that while defendant in his answer alleged that in accepting the draft he acted as agent for Richman, he demanded no affirmative relief, but contented himself by asking that Richman be brought in by plaintiff as a party to the action; hence it is apparent that Inman is not aggrieved by the ruling. He, conceding the ruling erroneous, is in no position to complain because the court denied plaintiff the relief which it asked against Richman.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 100

MICKSCHL v. NATIONAL COUNCIL OF KNIGHTS AND LADIES OF SECURITY. (Civ. 2311.)

(District Court of Appeal, Second District, Division 1, California. Feb. 27, 1919.)

1. INSURANCE ⚷665(3)—EVIDENCE—FALSITY OF REPRESENTATION.

Evidence *held* insufficient to prove that insured's representation that her mother had died from pneumonia was untrue.

2. INSURANCE ⚷646(3)—BURDEN OF PROOF—FALSITY OF REPRESENTATION.

In view of Code Civ. Proc. § 1981, insurer, seeking to avoid policy upon ground that insured misrepresented cause of her mother's death, has burden of proving the falsity of such representation; the truth thereof being presumed.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Brok Mickschl against the National Council of the Knights and Ladies of Security. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Willis and William Guthrie, both of San Bernardino, for appellant.

Allison & Dickson, of San Bernardino, for respondent.

SHAW, J. Plaintiff, as beneficiary therein, sought to recover upon an insurance policy issued by defendant to Norma Grace Mickschl. The answer alleged a breach of warranty on the part of the insured in that she falsely represented that the death of her mother, Mrs. Gould, was due to an attack of pneumonia, whereas, in fact, her death was due to pulmonary tuberculosis. Judgment went for plaintiff, from which defendant appealed.

[1] Appellant's sole contention, in which there is no merit, is that the finding of the court to the effect that the death of Mrs. Gould, the mother of the insured, was caused by an attack of pneumonia, as represented by her, and not from pulmonary tuberculosis, as alleged by the defendant, is not supported by the evidence.

[2] The burden of affirmatively proving the falsity of the representation made by the insured, and upon which the policy was issued, devolved upon defendant (section 1981, Code Civ. Proc.; Penn Mutual L. I. Co. v. Mechanics' Savings Bank, 38 L. R. A. 69), which called Dr. Strong as the only witness who testified touching the cause of Mrs. Gould's death. Referring to the certificate of death prepared by the witness, and wherein the cause of death was given as pulmonary tuberculosis, he stated that he first saw Mrs. Gould on her deathbed, at which time, after breathing not more than half a dozen times after he entered the room, she died as the result of a hemorrhage which he presumed was caused by tuberculosis, from which disease, in his opinion, she was suffering at the time of her death. On cross-examination, however, the witness stated that he was not positive that the deceased had pulmonary tuberculosis, since, in the absence of an autopsy, the only positive test in the determination of such fact would be a miscroscopic examination of the sputum, which was not made, and, when asked the direct question if at the time of her death she had pneumonia, replied: "That I could not say, but the immediate cause of her death was the hemorrhage, and not the tuberculosis." He further stated that he was not willing to swear positively that the woman did not die from the effects of pneumonia. "She may," said the witness, "have had pneumonia, but the

immediate cause of the death was the hemorrhage," and again repeated that he was not prepared to swear that she did not have pneumonia. He further stated the hemorrhage might have been due to other causes than tuberculosis, and that it was not impossible that the hemorrhage was caused from pneumonia.

In view of the fact that Mrs. Gould died almost immediately upon the arrival of this physician, who then saw her for the first time, the testimony given by him was, as determined by the court, insufficient to prove the affirmative allegation contained in defendant's answer, that the warranty made as to the cause of Mrs. Gould's death was untrue, and in the absence of such proof the truth thereof is presumed. Piedmont & A. Life Ins. Co. v. Ewing, 92 U. S. 378, 23 L. Ed. 610; Yore v. Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 75

BUBLITZ v. REEVES et al. (Civ. 2875.)

(District Court of Appeal, Second District, Division 2, California. Feb. 26, 1919.)

1. Quieting Title 🔑47(1)—Nonsuit.

In action to quiet title where there was evidence establishing plaintiff's title to a two-thirds interest in the property, defendant was not entitled to a nonsuit.

2. Appeal and Error 🔑1061(3)—Review—Harmless Error—Denial of Nonsuit.

If upon conclusion of whole case there is evidence on the material issues warranting submission of case to jury, denial of nonsuit, if error, was harmless.

3. Trial 🔑377(2)—Reception of Evidence—Reopening Hearing of Evidence.

Court may reopen hearing of evidence at any time before trial is finally concluded.

4. Trial 🔑377(2)—Reception of Evidence—Reopening Hearing—Discretion.

It is within court's discretion to reopen hearing of evidence and permit introduction of further evidence.

5. Trial 🔑377(2)—Reception of Evidence—Reopening Hearing of Evidence—"End of Trial."

In action to quiet title, court was justified in reopening case before its decision and findings were made and filed and permitting plaintiff to introduce further evidence of his title, as trial is not ended until decision of court by its written findings has been made and filed.

6. Pleading 🔑291(4)—Tax Deed—Verified Denial of Execution—Admission.

Where defendant in action to quiet title claimed property under tax deed and set out deed in his answer and cross-complaint, plaintiff, by failing to file affidavit denying its genuineness and due execution, as required by Code Civ. Proc. § 448, admitted genuineness and due execution of the deed, but could otherwise dispute its validity.

7. Taxation 🔑789(3)—Tax Deed—Proof of Title—Production of Deed to State.

Production of tax deed from state to purchaser is insufficient proof of purchaser's title without production of deed to the state vesting delinquent taxpayer's title in state, though deed from state to purchaser recites that the property was duly sold and conveyed to the state for nonpayment of taxes which had been legally levied and were a lien upon the property.

8. Taxation 🔑810(3)—Tax Deed—Rights of Purchaser.

In action to quiet title in which defendant claimed land under tax deed, but failed to prove good title thereunder, evidence *held* too indefinite and obscure to justify court in reimbursing defendant for payments made in connection with his purported tax title.

9. Appeal and Error 🔑757(1)—Record—Briefs—Evidence.

Where appeal is taken by reporter's transcript, appellant must comply with Code Civ. Proc. § 953c, requiring parties appealing on the typewritten record to print in their brief or in appendix thereto such portions of the record as they desire to call to the attention of the court.

Appeal from Superior Court, Los Angeles County; Clarence A. Raker, Judge.

Action by G. H. Bublitz against W. H. Reeves and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellant.

Carter, Kirby & Henderson, of Los Angeles, for respondent.

SLOANE, J. This was an action by plaintiff to quiet title to a parcel of land in the city of Pasadena, county of Los Angeles. The defendant Reeves was the only defendant answering the complaint. By his answer he denied plaintiff's title, and claimed title in himself under a state tax deed from the tax collector of Los Angeles county, set out in full in a pleading filed as a cross-complaint.

On the trial plaintiff introduced record evidence purporting to show chain of title from United States patent, through mesne conveyances, to himself, and rested. The defendant Reeves moved for nonsuit on the ground that the evidence was insufficient to show title in the plaintiff. The motion was denied, and, no further evidence being offered, the court directed judgment for the plaintiff. Thereafter, and before the decision and findings were made and filed, the plaintiff filed his notice of motion, with affidavit supporting the same, that the hearing be reopened for the introduction of further evidence in support of plaintiff's title, on the ground of inadvertence, mistake, and oversight on the part of plaintiff in failing to introduce at the hearing certain conveyances and other evidence material to plaintiff's case. On the presentation of this motion as noticed, the hearing was reopened, over the objection of defendant, and plaintiff was permitted to introduce, and thereafter and on a day set therefor did introduce, further evidence in his chain of title. Plaintiff also offered record evidence in rebuttal of defendant's tax deed purporting to show that the tax levy on which the sale to the state, under which the tax collector's deed as set out in defendant's cross-complaint was issued, was void. The only evidence offered by the defendant Reeves was his state tax deed executed by the county tax collector and testimony of himself as to consideration for the deed, and that he had been in possession of the property since the execution of the deed under which he claims title. At the conclusion of this additional evidence defendant again moved for a nonsuit, which was by the court denied. Findings were thereafter made in favor of the claim of title of plaintiff, and against the claim of title of defendant, and judgment was made and entered, quieting title in the plaintiff. Appeal was taken from the judgment by the defendant Reeves, under the alternative method.

The record in this case is a voluminous one, covering about 200 typewritten pages, and including all the conveyances, maps, and records constituting plaintiff's chain of title, upwards of 30 documents in all; but as no specification of their insufficiency is contained in appellant's brief, although all the deeds are printed in the appendix thereto, we assume that there is no dispute as to the sufficiency of the record to show title in plaintiff, subject only to defendant's tax deed. The only specifications of error, in fact, presented and argued by the appellant, are on the ruling of the court denying his motion for nonsuit against the plaintiff, the order reopening the trial for the introduction of further evidence after directing judgment for the plaintiff, and failure to require, as a condition of quieting plaintiff's title, a repayment of the money advanced on the tax title.

[1, 2] Whether the state of the evidence at the conclusion of the original hearing entitled defendant to a nonsuit we shall not attempt to determine. Under section 953c, Code of Civil Procedure, parties appealing on the typewritten record are required to print in their brief, or in an appendix thereto, such portions of the record as they desire to call to the attention of the court. The appellant in this case has printed as an appendix to his brief practically the entire record of title, consisting of upwards of 30 conveyances, and other documents constituting plaintiff's chain of title, without calling attention to any alleged error or omission as affecting the vesting or divesting of ownership of this property. Respondent in his brief claims that at the time he rested on the first hearing the evidence established his title to a two-thirds interest in the property in question. There is no reply brief of appellant on file, so this claim is not controverted; and we do not feel like making a search of this complicated record, without aid of counsel, to either prove or disprove the statement. If it is correct, the defendant was not entitled to a nonsuit. Davis v. Crump, 162 Cal. 513, 123 Pac. 294. However, we deem this point immaterial, if the court was justified in reopening the case for further evidence, as on the further hearing evidence was introduced completing plaintiff's chain of title and supporting the judgment in his favor. "If, upon the conclusion of the whole case, there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying nonsuit becomes of no consequence." Peters v. So. Pac. Co., 160 Cal. 48, 116 Pac. 400; Lowe v. S. F., etc., Ry. Co., 154 Cal. 573, 98 Pac. 678.

[3, 4] The court was justified in reopening the case for further evidence. It was within the discretion of the court to reopen the hearing of evidence at any time before the trial was finally concluded, and until the decision of the court, by its written findings, was made and filed the trial was not ended. Warring v. Freear, 64 Cal. 54, 28 Pac. 115; Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60; San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 Pac. 92.

The judgment for the plaintiff, then, must be sustained unless his title is defeated by the tax deed of defendant. The only evidence in support of this adverse claim is the deed from the tax collector of Los Angeles county, purporting to convey to defendant a tax title from the state of California. This deed was set out in defendant's answer and cross-complaint, and no affidavit denying the same was filed, as provided by section 448, Code of Civil Procedure. Its genuineness and due execution were therefore admitted, and it must be taken for what, on its face, it appears to be.

[5-7] But this does not estop the plaintiff from disputing its validity in any other respect. Moore v. Copp, 119 Cal. 429, 51 Pac. 630. It does not imply an admission of title in the state of California, or its authority to convey. The only intimation that the state

had any title to convey is contained in a recital in the deed "that the real property hereinafter described was duly sold and conveyed to the state of California for the nonpayment of taxes which had been legally levied, and which are a lien upon said property under and in accordance with law." As was declared in County Bank v. Jack, 148 Cal. 437, 83 Pac. 705, such recital "cannot be allowed to have the effect of operating as proof of the execution of a previous deed whereby the title of the taxpayer had been transferred * * * to the state"; and it is further there held that the tax collector's deed alone was not sufficient to show that the state had acquired the title of the original owner. The production in evidence of a deed to the state vesting title of the delinquent taxpayer in the state, together with the introduction of a deed from the state to the purchaser, was essential in order to establish that the purchaser had acquired the title of the delinquent taxpayer to the land; and the production of the deed from the state to the purchaser was not alone sufficient. Jones v. Luckel, 174 Cal. 532, 163 Pac. 906.

Respondent in his brief, in further opposition to the claim of appellant under the tax deed, attacks the validity of the proceedings for the tax assessment, levy, and sale upon which the deed in question purports to be based; but, in view of the insufficiency of appellant's showing of title in himself, already pointed out, it is unnecessary to consider this point.

[8] There is nothing in the pleadings presenting any issue for the recovery by defendant of any payments made in connection with his purported tax title, and nothing to show the amount or value of the payments, other than a recital in the copy of the deed attached to the answer that the consideration for the deed was defendant's bid of $301 for the property. Some evidence seems to have been taken on the trial on this point over plaintiff's objections, and appellant in his brief claims that he paid $86.46 delinquent taxes, and also $40 on the taxes under the tax sale, but no reference to the evidence on this point is contained therein, either in the brief itself or the appendix thereto. The showing made is too indefinite and obscure to justify the court in determining the equities that appellant might have in this particular.

[9] Parties relying upon the often cumbersome and intricate record of the reporter's transcript must conform to the provisions of section 953c of the Code of Civil Procedure if they want to insure a satisfactory consideration of the evidence.

The judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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40 Cal. App. 57

HAMER v. ELLIS. (Civ. 2729.)

(District Court of Appeal, First District, Division 2, California. Feb. 25, 1919.)

1. PLEADING 🔑225(2)—SUSTAINING DEMURRER—FURTHER AMENDMENT.

Although the complaint was the third attempt of the pleader to state a cause of action, it was error, upon sustaining demurrer thereto, to refuse to allow further amendment, unless it was clear that the complaint could not be amended to obviate the objections made thereto.

2. LANDLORD AND TENANT 🔑180(3)—EVICTION—PLEADING.

Complaint in action by tenant against landlord *held* to state a cause of action for eviction.

3. APPEAL AND ERROR 🔑900—PRESUMPTIONS.

Every reasonable presumption must be indulged in to support the ruling of the court below.

4. LANDLORD AND TENANT 🔑101—TERMINATION OF LEASE—DESTRUCTION OF BUILDINGS.

A lease of land with buildings thereon is not terminated by the destruction of the buildings, unless it is so provided by contract or by statute.

5. LANDLORD AND TENANT 🔑101—TERMINATION OF LEASE—DESTRUCTION OF BUILDINGS—"THING HIRED."

Although, when a portion of a building is leased, and the whole building is subsequently destroyed by fire, the lease is terminated under Civ. Code, 1933, providing that the hiring of a thing terminates by the destruction of the thing hired, yet the same result does not always follow when a lease covers a parcel of land with several structures thereon, since the buildings destroyed may or may not have been the "thing hired."

6. DAMAGES 🔑157(1)—GENERAL AND SPECIAL DAMAGES—PLEADING.

The pleading of special damages to result from loss of future profits does not preclude the recovery of any other damage sustained by plaintiff.

7. LANDLORD AND TENANT 🔑180(4)—DAMAGES—EVICTION—LOSS OF FUTURE PROFITS.

Loss of future profits of keeper of livery and feed stable and weighing depot, if ascertainable with a reasonable degree of certainty, could be recovered by him from his landlord upon wrongful eviction by the latter.

8. LANDLORD AND TENANT 🔑152(5)—LESSOR'S COVENANT TO REPAIR—"DAMAGE BY THE ELEMENTS."

Landlord's covenant to repair in case of any extensive "damage by the elements" does not obligate the landlord to repair, where the buildings on the premises are destroyed by fire, unless the fire is caused by lightning or other superhuman agency.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Damage by the Elements.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by George L. Hamer against Mrs. W. J. Ellis, a widow. From judgment for defendant, plaintiff appeals. Reversed, with directions.

Lilburn I. Gibson, of Ukiah, for appellant.
Preston & Preston, of Ukiah, for respondent.

HAVEN, J. Defendant's demurrer to plaintiff's second amended complaint was sustained without leave to amend; whereupon judgment was entered for defendant, from which plaintiff appeals.

Plaintiff was lessee, and defendant lessor, under a written lease of certain premises in the city of Ukiah. The second amended complaint contains two counts: The first, for damages alleged to have been suffered by plaintiff by reason of his wrongful eviction by defendant from the leased premises; and the second, for damages alleged to have been suffered by plaintiff by reason of the breach by defendant of a covenant of the lease to repair the buildings therein referred to. In the first count the leased premises are described as follows:

> "That certain property known as the Ellis Stable property, situated on the east side of Main street between Perkins street and Stephenson street, in the town of Ukiah City, Mendocino county, state of California, and including the stable building and all sheds attached thereto, together with the corrals, scales, and all other property belonging to or forming a part of said premises, excepting what is known as the 'back shed' on the northeast portion of said premises, being 15 feet on Perkins street and running back 25 feet."

In the second count the same description is given, but the following allegation is added:

> "And plaintiff here alleges that said premises consisted of one corral, 150 feet long by 90 feet wide, one barn 150 feet long by 60 feet wide, one shed 40 feet long by 24 feet wide, scales 30 feet long by 10 feet wide, all of which were built upon the ground and the ground constituted the only floor of each thereof, and an alleyway 24 feet long by 16 feet wide."

The allegations of the first cause of action are substantially the following: A lease of the above-described premises was executed by defendant to plaintiff on October 5, 1914, for a term of five years, at a monthly rental of $30; it was understood and agreed between the parties to said lease that said premises were to be used as a livery and feed stable, storage sheds, stock corrals, and weighing depot; plaintiff entered into possession of said premises on October 5, 1914, and engaged in the business above referred to; said lease continued in effect until July 5, 1917, upon which date defendant notified plaintiff that the said lease was of no further force or effect and that said plaintiff had no further right on said premises, and would no longer be allowed possession thereof, nor to go on said property; plaintiff notified defendant on said date that he was ready, willing, and able to perform his part of said contract, and tendered the defendant the rent for the month ending on August 5, 1917, which was refused by defendant; on August 5, 1917, defendant took possession of said premises, and thereafter erected a building on a part thereof, and let the same to another tenant, and also repaired the scales thereon, and has since operated them at a profit; as a result of said eviction plaintiff has not entered on said premises since July 5, 1917. Then follow allegations as to the amount of profits which plaintiff had derived from the use of the premises prior to June 18, 1917, "when said premises were damaged by fire," and as to the amount of profits which would have been derived therefrom during the remainder of the term of the lease. The concluding allegation of the first count is:

> "And therefore, because of this eviction as hereinabove set forth, plaintiff has been damaged to the extent of $2,700."

The demurrer was to the whole complaint, and to each cause of action separately, for failure to state facts sufficient to constitute a cause of action, and, specially, on several alleged grounds of uncertainty, ambiguity, and unintelligibility.

[1, 2] Unless it was clear to the trial court that the allegations contained in the first count did not state a cause of action, and could not be amended so as to obviate the objections made thereto, the refusal to allow a further amendment was error. Payne v. Baehr, 153 Cal. 447, 448, 95 Pac. 895; Schaake v. Eagle, etc., Can Co. 135 Cal. 480, 63 Pac. 1025, 67 Pac. 759. In the case last cited it is said:

> "We do not say that there is no limit to the right to amend when such demurrers are sustained, since of several failures, perhaps but one or two may develop a want of facts, or show that the fault cannot be remedied."

The complaint now under consideration is the third attempt of the pleader to state a cause of action; but upon the face of the first count therein contained, and in the absence of the two preceding complaints which are not before us, it does not appear that any defects therein cannot be remedied. On the contrary, we are of the opinion that a cause of action is stated therein which is not obnoxious to a general demurrer. The facts pleaded show an eviction of the lessee by the lessor, without excuse, as far as appears from the allegations of that count. Agar v. Winslow, 123 Cal. 593, 56 Pac. 422, 69 Am. St. Rep. 84; McAlester v. Landers, 70 Cal. 82, 83, 11 Pac. 505; Levitzky v. Canning, 33 Cal. 306.

[3-5] Even if, under the rule that every reasonable presumption must be indulged in to support the ruling of the court below, we assume that the facts pleaded in the second count in the complaint now under consideration were before the court in the original complaint or the first amended complaint, it still does not appear that such eviction was justified. A lease of land with buildings thereon is not terminated by the destruction of the buildings, unless it is so provided by contract or by statute. 24 Cyc. 1345; Nashville, etc., Ry. Co. v. Heikens, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 300. No such provision of the lease is pleaded. The only pertinent statute to which our attention has been called is section 1933 of the Civil Code, which provides: "The hiring of a thing terminates: * * * (4) By the destruction of the thing hired." When a portion of a building is leased, and the whole building is subsequently destroyed by fire, the lease is terminated. Ainsworth v. Ritt, 38 Cal. 89; Harvey v. Weisbaum, 159 Cal. 267, 113 Pac. 656, 33 L. R. A. (N. S.) 540, Ann. Cas. 1912B, 1115. The same result does not always follow when a lease covers a parcel of land with several structures thereon. In such a case the section of the Code cited is not controlling, unless the buildings destroyed were "the thing hired." A comparison of the property leased with that destroyed, as set forth in the second count, does not convince us that such was the fact.

[6, 7] Such eviction entitled plaintiff to the recovery of any damage he may have suffered thereby. The pleading of special damages to result from loss of future profits did not preclude the recovery of any other damage which may have been sustained. And loss of future profits could also be recovered, if ascertainable with a reasonable degree of certainty. Hawthorne v. Siegel, 88 Cal. 159, 167, 25 Pac. 1114, 22 Am. St. Rep. 291; Lambert v. Haskell, 80 Cal. 619, 22 Pac. 327; McConnell v. Corona City Water Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; 24 Cyc. 1135; Clark v. Koesheyan, 26 Cal. App. 305, 308, 146 Pac. 904. The allegations as to the future profits of plaintiff's business were not sufficiently definite to have enabled the court to determine whether or not they can be brought within the rule laid down by the above authorities, for which reason the special demurrer for uncertainty, directed to these allegations, was well taken. But it does not appear that this defect could not be cured by amendment.

[8] The second cause of action is based upon a covenant in the lease, which is thus pleaded:

> "And that by other terms of said lease said defendant was, in case of any extensive damage by the elements, or in case of the falling in of the roof or collapse of the building, to immediately proceed to repair the same for the use of the party of the second part, who is the plaintiff herein, during the term of said lease."

It is then alleged:

> "That on June 18, 1917, said property described by the lease above referred to was damaged by an element, to wit, fire, without the fault of either of the parties hereto, and the said buildings, sheds, fences, and scales, forming a part of said premises, were destroyed."

Appellant claims that, by reason of the above covenant to repair "in case of any extensive damage by the elements," the lessor was bound to rebuild the buildings destroyed by fire. With this we cannot agree. It has been decided in this state that "damage by the elements" is the equivalent of the phrase "act of God," and that "fire does not come within the definition of the term 'act of God,' unless it is caused by lightning or some other superhuman agency." Pope v. Farmers' Union, etc., Co., 130 Cal. 141, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87; Ahlgren v. Walsh, 173 Cal. 35, 158 Pac. 748, Ann. Cas. 1918E, 751. The complaint before us contains no allegation that the fire therein referred to was caused by such superhuman agency, and, without such allegation, no cause of action for breach of the covenant to repair is stated.

The judgment is reversed, with directions to the trial court to sustain the special demurrer for uncertainty to the first cause of action, and also to sustain the demurrer to the second cause of action, with leave to the plaintiff to amend his second amended complaint, if he shall be so advised.

We concur: LANGDON, P. J.; BRITTAIN, J.

39 Cal. App. 755

EDWARDS et al. v. BAKER. (Civ. 1902.)

(District Court of Appeal, Third District. California. Feb. 17, 1919. Rehearing Denied by Supreme Court April 18, 1919.)

1. BROKERS 🔑64(2)—RIGHT TO COMMISSIONS—DEFAULT OF PURCHASER.

Where a broker contracts for compensation only after payment by the purchaser, or a specified portion thereof, he cannot claim commission until such payment is made, and if the agreement is for commission out of the first money received, and none is received, the broker is not entitled to compensation on finding a purchaser.

2. BROKERS 🔑56(1)—RIGHT TO COMMISSIONS—PERFORMANCE OF CONTRACT.

Owners of land gave broker's notes in payment for services, payable only out of the money to be paid by W. (purchaser) or his assigns. The contract between owner and purchaser provided that on default of the purchaser the owner was released and the purchaser forfeited all rights. The purchaser defaulted, and the owner brought suit to quiet title, after which the purchaser assigned his rights to a corporation, and the action was dismissed. The corporation, on ascertaining the forfeiture, instituted independent negotiations with the owner and purchased the property. *Held*, that the brokers were not entitled to commissions.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by J. A. Edwards and others against G. L. Baker. Judgment for plaintiff, and from an order denying motion for new trial, defendant appeals. Judgment and order reversed.

J. M. Walthall, of Modesto, and Roy B. Maxey, of Oakdale, for appellant.

L. J. Maddux, of Modesto, and F. W. Reeder, of Oakdale, for respondents.

HART, J. The action was based upon three certain promissory notes, each for the sum of $266.66, dated Modesto, September 27, 1910, payable, respectively, on the 5th days of April of 1913, 1914, and 1915, executed by defendant and payable to the order of plaintiffs.

It is deemed proper first to explain that the notes sued on were given by Baker to the plaintiffs as the result of the compromise of a suit brought against the latter by the former upon a quantum meruit for the reasonable value of services performed by the plaintiffs in negotiating the sale of certain lands for the defendant to one P. Weisendanger. The following clause was contained in each of the first two notes declared upon:

> "Said note to be paid only out of the money to be paid by P. Weisendanger or his assigns for purchase price of G. L. Baker ranch and not out of interest."

The third note contained a similar clause, with the exception that, instead of "G. L. Baker ranch," it referred to "Gilbert ranch." It appeared that this was a mistake of the party who drew up the notes, the defendant's first name being Gilbert, and the intention being to refer to the Baker ranch. It also appeared that the true name of the party mentioned in the pleadings and notes as "P. Weisendanger" was "Theodore Weisendanger," and that the letter "T," in some of the instruments herein mentioned was so written that it might easily be taken for "P." However, no point is made on this fact.

It appears from the evidence that the plaintiffs, real estate brokers, were employed by the defendant, Baker, to negotiate for him the sale of certain lands embraced within a certain district or territory in Stanislaus county, known as the "Oakdale Colony," and that the plaintiffs procured a purchaser in the person of said Theodore Weisendanger, with whom the defendant entered into a written contract for the sale of said lands on the 24th day of March, 1910. Said contract provided for the sale by Baker to Weisendanger of the several parcels or tracts of land therein described for the aggregate sum of $48,800, to be paid in three substantially equal annual installments, beginning "on or before" the 5th day of April, 1913, with interest at the rate of 6 per cent., payable in advance. The contract, provided, in part, as follows:

> "First party agrees to deliver deeds to any 10-acre tracts any time on receiving sixty-five ($65) dollars per acre, such payments to apply on the time payments falling due next in order of time; second party to receive one-fourth of the crop of 1910, grain in sacks, hay baled, both delivered at Oakdale Warehouse, and to have the benefit of the summer fallowing plowing now done. First party agrees to give T. Weisendanger possession of the ranch on August 1, 1910. And the party of the second part agrees to pay all state and county taxes or assessments of whatsoever nature which may become due on the premises above described after June, 1910.
>
> "In the event of a failure to comply with the terms hereof by the party of the second part, the parties of the first part shall be released from all obligation in law or equity to convey said property, and the party of the second part shall forfeit all right thereto. And the parties of the first part, on receiving such payment, at the time and in the manner above mentioned, agree to execute and deliver to the party of the second part, or to his assigns, a good and sufficient deed."

Weisendanger took possession of the land under said contract, and thereafter entered into contracts with three several parties for the sale of certain subdivisions of the lands to them. It appears that Weisendanger paid the interest on the purchase price of the land down to the date when the first payment on the principal sum fell due, to wit, April, 5, 1913. He, however, defaulted in the payment of the said first installment on the principal sum, and on the 2d day of May, 1913, Baker commenced an action against Weisendanger and others to quiet title to the lands described in the contract between him and Weisendanger and to have said contract declared null and void. Contemporaneously with the filing of the complaint in said action, Baker caused to be recorded in the proper office a lis pendens.

On the 26th day of May, 1913, Weisendanger made a purported assignment of said contract to the Conservative Investment Company of Los Angeles, a corporation. Said assignment recited that—

> "Theodore Weisendanger hereby sells, assigns, transfers, conveys, and sets over unto the Conservative Investment Company, of Los Angeles, a corporation, that certain agreement made and entered into the 24th day of March, 1910, by and between Gilbert L. Baker and Mabel Baker, his wife, and Theodore Weisendanger, together with all rights and interests of every kind and character belonging or accruing to said Theodore Weisendanger under and by virtue of said agreement, and the said Conservative Investment Company, of Los Angeles, by its acceptance of these presents, does hereby assume all of the ditches and obligations of said Theodore Weisendanger under and by virtue of said agreement"—and the property was then described.

On the 2d day of June, 1913, Weisendanger interposed a demurrer to the complaint in the action brought by Baker to quiet title and to nullify the effect of the contract referred to and, on the 17th day of June, 1913, Baker dismissed said action; the reason for the dismissal not being shown by the record herein.

The evidence discloses that Weisendanger was at one time the owner of nine-tenths of the capital stock of the Conservative Investment Company, above mentioned, but that, after transferring or assigning to said company his contract to purchase the Baker lands, he sold all of said stock to a number of persons who had formed themselves into a syndicate for the purpose of taking over said stock and the business of said company. It appears that after said transaction the new owners of said company found, upon looking into its assets, the assignment made by Weisendanger to the company of the contract for the sale to Weisendanger of the Baker lands. Mr. Rupp, then the secretary of the investment company, testified that the corporation desired to buy some land in the Oakdale section of Stanislaus county, and upon finding that the contract between Weisendanger and Baker had been assigned to it, the company, through its representatives, immediately took steps looking to the purchase of the lands involved and described in said contract. An attorney of the company was first sent to Oakdale to look into the proposition, and he thereafter reported to the company that when Weisendanger made the purported assignment mentioned he had nothing to assign; his contract with Baker having been forfeited because of his failure to pay the first installment on the purchase price of the lands called for by the said contract. Negotiations were then entered into with Baker by representatives of the investment company for the purchase of the lands, and the same were consummated by the execution on June 5, 1913, of a deed by Baker and his wife conveying substantially the same lands described in the Weisendanger contract to the investment company. The latter paid Baker, on the purchase price, in June, 1913, the sum of $20,400, and in January, 1914, and August, 1915, the further sums of $750 and $14,750, respectively.

The court found, as to each of said notes:

> That the defendant made the note and delivered the same to plaintiffs, who are the lawful owners and holders thereof; "that before the making of said note defendant employed plaintiffs as his agents to secure a buyer for his, defendant's, lands, and that pursuant to such employment plaintiffs secured one P. Weisendanger as such buyer; that before the making and delivery of said note P. Weisendanger contracted, by an instrument in writing, by himself or assigns, to buy the land referred to in said note from defendant, G. L. Baker; that P. Weisendanger, in said note mentioned, sold and assigned, on or about the 26th day of May, 1913, all his right, title, and interest in and to the Baker land in said note mentioned to the Conservative Investment Company, a corporation, of Los Angeles, Cal., and said company, since said assignment, have paid defendant, G. L. Baker, about $30,000 on the purchase price of said land mentioned in said note, which note was given by defendant to plaintiffs in payment of agent's commission for securing buyer for said land; that all of the conditions of said note have been carried out, and said note is now due and payable."

Judgment was accordingly awarded the plaintiffs in the sum of $799, and the defendant appeals from said judgment and the order denying his motion for a new trial.

[1] The instruments sued on are not, strictly speaking, promissory notes, since they do not involve an unconditional promise to pay the amounts therein agreed to be paid. They are rather contracts for the payment of money upon a certain condition, and could become or be converted into an unconditional promise to pay only when the condition upon which it became obligatory upon the defendant to pay happened. The condition is, as seen, that payment shall

be made only upon the payment on the principal of the purchase price by Weisendanger to Baker. If, therefore, the condition upon which the obligations were to be satisfied has not happened, then the plaintiff cannot recover; for it is well-settled law that, where a contract between a real estate broker and the owner of real estate authorizing the former to effect a sale of real estate for the latter contains a stipulation that the broker shall be entitled to compensation under the contract only after the payment by the purchaser of the purchase price or a certain specified portion thereof, or unless the purchaser has performed some other acts material or vital to the contract of purchase, the broker cannot claim the compensation or commission until the purchaser has made the stipulated payment or performed the specified conditions. As is said in Lindley v. Fay, 119 Cal. 239, 243, 51 Pac. 333, 334, a case precisely similar to this, so far as the position of the plaintiffs herein is concerned:

> "It [the evidence] tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to entitle him to recover. It is so nominated in the bond."

See, also, Boysen v. Frink, 80 Ark. 254, 96 S. W. 1056; Inge v. McCreery, 60 App. Div. 557, 69 N. Y. Supp. 1052; 4 R. C. L. 331.

As supporting his position that the rule above stated applies to the facts of this case, the appellant contends that the sale of the lands to the Conservative Investment Company involved a transaction wholly independent of and distinct from the transaction involving the agreement of sale between him and Weisendanger; that is to say, that the purchase of the property by the investment company was solely by virtue of a contract between him and said company which had no relation to or connection with the Weisendanger agreement or the assignment thereof by the latter to the investment company, and that the purchase by it of the lands was therefore not as an assignee of Weisendanger. The basis of the contention is, of course, that Weisendanger, having defaulted in the payment of the first installment on the purchase price of the lands under his contract prior to the time at which he assigned his contract to the investment company, forfeited all his rights under said agreement, and therefore then had nothing to assign. In further support of the contention, reliance is had on the testimony of the defendant and the witness Rupp, the officer of the corporation, who conducted the negotiations culminating in the sale to the investment company, that the transaction resulting in said sale had no relation to the Weisendanger assignment, and that it was not made in pursuance of the Weisendanger agreement, but independently thereof.

Much of the testimony last above referred to involves the mere opinions or legal conclusions of the witnesses. Whether the sale to the investment company was the result of a transaction wholly independent of the assignment to it of the Weisendanger agreement must be determined, of course, upon the facts and circumstances of the transaction, and not upon the mere bald statement of the witnesses that the two transactions had in legal effect no relation to or connection with each other. We are of the opinion, however, that there is other evidence which clearly discloses that the Weisendanger agreement had lost all its force and vitality at the time of the purported assignment thereof to the investment company. In other words, it is very clear, from the documentary evidence and the admitted fact of the default, that Weisendanger, when making the pretended assignment, had nothing he could assign, and that, this fact having been discovered by the company before it bought the Baker lands, the company proceeded upon its own initiative and without reference to the purported assignment to negotiate with Baker for the purchase of the property, and so ultimately effected the purchase.

It will be noted that the agreement between Baker and Weisendanger provided that, upon failure on the part of the party of the second part (Weisendanger) to comply with the covenants of the agreement, "the parties of the first part shall be released from all obligation in law or equity to convey said property, and the party of the second part shall forfeit all right thereto." Therefore when, on the 5th day of April, 1913, Weisendanger defaulted in the payment of the first installment on the purchase price as stipulated in his agreement, he thereupon and ipso facto, so far as the face of the agreement was concerned, forfeited the right he acquired under the agreement to purchase the property, and the vendor was likewise released from any and all obligation under said agreement to convey the property to the former. The situation then in legal effect was the same as if the agreement had never had existence. His default, and as a consequence the forfeiture of his agreement, had taken place. Prima facie his agreement had then become functus officio, and therefore without obligatory force either in law or in conscience. It therefore rested with him to show, if he could do so and desired to resuscitate and perpetuate the life of the agreement, that his default should not, in equity and good conscience, operate as a forfeiture of the right to purchase the property upon the terms specified. It is not made to appear from the record before us that he made any attempt to do this. It is not shown, nor is it claimed or pretended, that he at any time after his default offered any excuse for his default or to pay the installment, or in any way attempted to make any showing, if it was within his power to do so, that upon a consideration of the facts of the transaction or the circumstances under which the default occurred by the light of appropriate equitable principles Baker was not, in good conscience, justified in claiming and asserting his legal right to treat the agreement as having been forfeited because of such default. As to the action brought against Weisendanger by Baker to quiet title as against the former to the lands involved in the transaction, the purpose, and indeed the only purpose, under the circumstances, that it was necessary for it to accomplish, was to get rid of the cloud which otherwise might have existed upon and embarrassed the title to said lands by reason of the said agreement between Baker and Weisendanger, which stood of record in the office of the county recorder. The action was not necessary to render effectual the forfeiture of Weisendanger's right under the agreement to buy the property. As before stated, the forfeiture was worked by the very terms themselves of the agreement, upon the failure of Weisendanger to pay the first installment when it became due and payable. And if it be the theory that the act of dismissing the action operated as a waiver of the forfeiture, we answer that such theory is wholly untenable under this record. The effect of the dismissal, which took place after the investment company had purchased and obtained a conveyance of the lands, said company then being the assignee of the Weisendanger agreement, to remove the effect of which upon the face of the title was the sole object of the action, was not to change the situation with respect to the said agreement from what it was and had been at all times from and after the time the forfeiture took place by Weisendanger's default in carrying out his obligations under the agreement, but, if anything at all, it was to restore the situation to precisely what it was after his default which worked the forfeiture and before the action was brought.

[2] It follows that, since, Weisendanger's agreement had lost all its force, and he, consequently, the right to purchase the land before he made the purported assignment (and here it may be suggested that, as he was the owner of nine-tenths of the stock of the investment company, the attempted assignment was practically to himself), he had, so far as said agreement was concerned, nothing that he could assign. The investment company, in other words, acquired by virtue of the pretended assignment no interest in the property or the right to purchase it upon the terms of said agreement or under the agreement at all. It must therefore be held that the purchase of the property by the investment company was the culmination of a contract of its own making, and not as an assignee of Weisendanger or by virtue of the purported assignment to it of the Weisendanger agreement, and the payments made by said company to Baker on the purchase price of the land, therefore, were not made by the former as assignee of Weisendanger. The result is that, since Weisendanger, neither by himself personally nor by "his assigns," ever paid anything on the purchase price of the lands, there is legally no ground justifying a recovery by the plaintiffs upon the notes or contracts declared upon.

It may be, and probably is, true that the investment company never would have known of the property involved in the Weisendanger agreement or purchased it but for the knowledge thereof and of the fact that it was for sale acquired by it through the said agreement. This, however, does not help or aid the plaintiffs in any manner. They deliberately made payment for their services in negotiating the contract for the sale of the land to Weisendanger wholly contingent upon the payments by the latter "or his assigns" on the principal of the purchase price, and upon that proposition alone they were and are required to stand or fall.

The judgment and the order appealed from are reversed.

We concur: BUCK, Presiding Justice pro tem.; BURNETT, J.

39 Cal. App. 764

HACKELBERRY v. SHERLOCK LAND & CATTLE CO. (Civ. 1752.)

(District Court of Appeal, Third District, California. Feb. 17, 1919.)

1. MASTER AND SERVANT 🔑77—INJURIES TO SERVANT—MEDICAL AID.

Instruction *held* erroneous in assuming master was under a legal liability to furnish medical aid for the injured servant.

2. MASTER AND SERVANT 🔑295(3)—INJURIES TO SERVANTS—ACTIONS—INSTRUCTIONS—ASSUMPTION OF RISK.

An instruction upon defective appliances and assumption of the risk by a servant working upon a farm handling horses and machinery *held* erroneous in stating that plaintiff was entitled to recover irrespective of alleged fault on the part of defendant.

3. MASTER AND SERVANT 🔑125(1)—INJURIES TO SERVANT—TRIAL—INSTRUCTION—UNSAFE APPLIANCES—KNOWLEDGE OF DEFECT.

An instruction that the plaintiff, who was injured while driving horses, was entitled to recover irrespective of whether or not the defendant knew that the team "was untrustworthy and unsafe" *held* erroneous.

4. TRIAL 🔑194(19)—INSTRUCTIONS—PROVINCE OF JURY—INJURIES TO SERVANT.

In a servant's action for injuries, an instruction that to be rendered liable the master need not have had actual knowledge of the unsafeness of the horses used by the servant, and that proof is sufficiently made out by plaintiff showing that the team and appliances were defective and unsafe, since such would have been discovered by the master's proper inspection in time to prevent injury, and if conspicuous, such knowledge would be presumed, was improper, as instructing the jury to draw conclusions from presumptions imposed by the court.

5. MASTER AND SERVANT 🔑204(1) — INJURY TO SERVANT—ASSUMPTION OF RISK.

Although the Employers' Liability Act excludes from the benefit of its provisions any employé engaged in farm work, a servant injured by defective team while working upon a farm cannot be *held* to have expressly or impliedly assumed the risk, in view of the Roseberry Act, which is not repealed by St. 1915, p. 1081, § 12, subd. 3(c), except as to matters included within the latter act.

Appeal from Superior Court, Modoc County; Clarence E. Raker, Judge.

Action by Charles Hackelberry against the Sherlock Land & Cattle Company. Verdict and judgment for plaintiff, and defendant appeals. Judgment reversed, and cause remanded for new trial.

Jamison & Wylie, of Alturas, for appellant.
J. T. Sharp and J. S. Henderson, both of Alturas, for respondent.

BUCK, Presiding Justice pro tem. Plaintiff, while engaged in farming work in the employ of the defendant corporation in October of 1916, was injured by being trampled upon by a horse, claimed to be vicious, which plaintiff was in the act of unhitching from a harrow team furnished him in his work by the defendant. Upon the trial a verdict and judgment thereon in the sum of $600 was rendered against the defendant, who appeals therefrom upon the grounds that the court erred in denying defendant's motion for nonsuit, and also erred in giving and refusing to give certain instructions.

In his complaint, after alleging the employment and work thereunder (which is not denied), and that he was injured by a vicious horse owned and furnished him in his work by the defendant, plaintiff charges that the defendant's manager at all times well knew that said horse referred to was "an outlaw, wild, vicious, and treacherous, and was likely at any moment to become vicious and unruly." The complaint also alleges that, after plaintiff was injured by being trampled upon by the horse, he "was unable totally to help himself or to procure medical or other assistance, all of which the said manager of said ranch well knew, and failed, refused, and neglected without cause therefor to procure for said plaintiff a doctor of medicines, or to provide a way or means by which said plaintiff could procure such medical aid, all of which said medical aid and treatment was necessary and proper for said plaintiff in his said condition, and without which he could not recover from his said condition of lameness," and that the ranch on which he was injured "is a distance of more than ten miles from the town of Alturas, which was the nearest place where plaintiff could procure medical or other assistance."

No demurrer or motion to strike out was filed by defendant. And defendant's answer, though it specifically denies the allegations in the complaint, does not set up any affirmative defenses.

The evidence was in sharp and decisive conflict in regard to the alleged dangerous and vicious character of the horse in question, and the defendant's knowledge in regard thereto and its consequent negligence in the premises.

[1] The following is one of the instructions, the giving of which by the court is assigned as error:

> "The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case that the plaintiff was disabled, as it is alleged in his complaint, and unable to procure medical aid for the length of time, and that the defendant herein carelessly neglected to procure medical aid and assistance as alleged in the complaint, and the evidence shows you that the plaintiff suffered damages from said negligent act, it is your duty to find for the plaintiff in such amount as you may deem reasonable from the evidence, regardless of the cause leading up to the accident."

The giving of the foregoing instruction constituted error, which, in view of the record as a whole, was also prejudicial error. The instruction, without warrant, assumes that a legal liability can exist and constitute a cause of action in the absence of a corresponding legal duty.

> "Soon after the commencement of the nineteenth century it was definitely laid down, as a rule applicable to all descriptions of servants except apprentices, that a general obligation to provide medical attendance is not an implied incident of a contract of hiring. In one point of view this rule involves the consequence that the master is not bound to defray the expenses of such attendance upon a servant who falls sick or receives personal injuries in the course of the employment, unless he has expressly or impliedly agreed to do so. Under another aspect it operates so as to exempt the master from liability for refusing or neglecting to provide such attendance. By nearly all the American courts this rule has been adopted without any qualifications." Labatt, Master and Servant (2d Ed.) vol. 5, par. 1999, p. 6180.

The apparent harshness of this rule has, of course, been modified by statutory workmen compensation acts. But, as will be noted later, this case has not been brought within, and does not fall within, the act.

In the case of Davis v. Forbes, 171 Mass. 548, 51 N. E. 20 (also reported 47 L. R. A. 170), the court holds that an employer is not liable for injuries resulting from failing to promptly furnish medical attendance to one injured in his employment, even though he is responsible for the original injury, and the court sustained the ruling of the lower court in not allowing any recovery upon a count in the complaint "for failure to furnish suitable medical attendance to plaintiff after the injury, although plaintiff was unable by reason of his injuries to secure it for himself, and that, although knowing that plaintiff was suffering great pain and was in need of immediate surgical attention, defendant's servants wrongfully permitted plaintiff to remain for a period of 37 hours without such assistance, by reason of which he alleged that he suffered great pain and permanent injury." See, also, Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222.

This instruction was particularly prejudicial in this case, and must have influenced the jury to mulct the defendant in damages, because the plaintiff testified in detail to the effect that after his injury he was furnished no medicine and no attention, and after a couple of days "I told Mr. Soares I wanted to come in town and see a doctor. He did not say anything. He never gave me an answer, and he drove to town, and I did not know it. * * * Soares came again in a day or two, and he brought me a bottle (of liniment) and I put that on—they provided no nurse or any accommodations. They did not even bring me a cup of water. I had to crawl on a chair the best I could. On November 12th I was taken to the town of Alturas. The foot was getting worse and worse."

[2, 3] The court erred in giving the following instructions at the request of the plaintiff:

> "Instruction No. 10. The court instructs you, gentlemen, that a servant is not barred from recovering in every case as a matter of law when he knows a defect exists in the appliance, and that there is a certain amount of danger surrounding its use, and if you believe from the evidence in this case that the plaintiff knew that a defect existed in the appliance which he used in course of his employment, he is nevertheless entitled to recover in this action unless you are convinced by the evidence that the risk was so great that a man of ordinary prudence would have been impelled by reason thereof to discontinue his work."
>
> "Instruction No. 16. The court instructs you, gentlemen of the jury, that the employer must in all cases indemnify his employé for losses caused by the employer's want of ordinary care, and if plaintiff necessarily suffered loss and injury in direct consequence of his obedience to the directions of his employer, and if you believe from the evidence that the team, with which the said plaintiff in this case was untrustworthy and unsafe as alleged in plaintiff's complaint, and if you believe from the evidence that the proximate cause of plaintiff's injury, if any he received, was caused by the unsafeness of said team, then you should find for the plaintiff, and he is entitled to recover in this action, yet the amount for which you may find must not exceed the amount prayed for in the complaint."

Instruction No. 10 is erroneous, in that it instructed the jury that the plaintiff was "entitled to recover in this action," irrespective of alleged fault on the part of the defendant. And the giving of instruction No. 16 was error, in that it directed the jury that they "should find for the plaintiff, and he is entitled to recover in this action" irrespective of whether or not the defendant knew or had knowledge of the alleged fact that the team "was untrustworthy and unsafe as alleged in plaintiff's complaint."

As stated in the case of Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695:

> "If it be conceded that the horse was vicious, yet the gist of the action against defendant was keeping the horse with knowledge by the defendant of his vicious propensity. * * * The common law makes the owner of vicious domestic animals with notice of their vicious propensities responsible, for the reason that under such circumstances it is the duty of the owner to anticipate that such animals will commit such vicious acts as opportunity affords, and it is the duty of the owner to guard against such acts."

[4] Instruction 22, as follows, should not have been given, for the reason that it takes from the jury the decision of questions in fact, and instructs the jury to draw conclusions from presumptions imposed by the court:

"The court instructs you, gentlemen of the jury, that to render defendants liable to plaintiff in damages, it is not necessary that they should have had actual knowledge of the unsafeness of the team used by plaintiff; the proof is sufficiently made out by plaintiff when it is shown that the said team and appliance was defective and unsafe in such respect that if a proper inspection of it had been made by defendant, such unsafeness and defectiveness would have been ascertained in time to prevent the injury. If the unsafeness was conspicuous, defendants will be presumed to have had knowledge of it."

[5] Defendant assigns as error the giving of instructions Nos. 23 and 24, requested by plaintiff, and also assigns as error the refusal by the court to give instructions Nos. 6 and 7, requested by defendant. Each of these instructions relates to the question of assumption of risk; and, as the case must be remanded to the trial court for a new trial, it will be necessary to consider to what extent the doctrine of assumed risk is applicable in the case at bar.

Furthermore, defendant's motion for nonsuit also invokes the defense of assumption of risk. And plaintiff, in his complaint, anticipating assumption of risk as a defense, seeks to meet and combat this defense by alleging as follows:

"That upon the commencement of said work this plaintiff ascertained by the actions of one of the horses of said team was treacherous and tricky, and that it was necessary for said plaintiff in the course of said employment in hitching up and unhitching said team to tie the said horse to a post or other safe place in order to safely handle such horse, and said team, and thereupon said plaintiff notified said Frank Soares that said team was not trustworthy, and was untrustworthy by reason of the fact that said horse was vicious, and would kick and would at every opportunity attempt to run away, and requested of said Frank Soares to furnish said plaintiff with a trustworthy and reliable horse in place and stead of said vicious horse, and thereupon said Frank Soares informed plaintiff that said horse was merely slightly nervous, and would within a day or two become quiet and trustworthy, and refused to furnish said plaintiff with a gentle horse in place and stead of said vicious horse.

"That said plaintiff continued to work said horse as a part of said four-horse team in the course of his said employment up to and until the 19th day of October, 1916, during all of which said time said horse acted viciously and untrustworthy, and it was necessary for plaintiff to and he did watch said horse at all times during his said employment."

And in order to further support this defense, plaintiff, at the trial, without objection on the part of the defendant as to its immateriality so far as the complaint was concerned, testified as follows:

"Q. You did not believe that that horse would do anything after you received the instructions that you had from Mr. Soares except to act a little nervous at times. A. I took his word for it.

"Q. You did not believe that you were assuming any risk that a prudent man would not at that time, did you? A. No, sir.

"Q. In continuing to work with that horse you relied absolutely on the assertion made by Mr. Soares as to the reliability of the horse, did you not? A. Yes, sir."

The trial court, upon a new trial of this case, will therefore be directly confronted with the question of whether assumption of risk can be invoked as a defense in this case.

At the trial and in their briefs each side in this case seems to have relied upon section 1970 of the Civil Code, as amended in 1907, for a statement of the law in regard to assumption of risk. But in July of 1916, in the case of Lassen v. S. P. Co., 173 Cal. 72, 159 Pac. 143, which arose out of an accident in August of 1912, our Supreme Court held as follows:

"At the time of the injury complained of the Employers' Liability Act of 1911 was in force. Stats. 1911, p. 796. That statute abolished the previously available defenses of an employer, in an action by an employé for damages from personal injuries, that the plaintiff had assumed the risk of the hazard from which he was injured, and that the injury was caused by the negligence of a fellow servant. Consequently, the case must be decided upon the principle that the employer was responsible for the negligence of his employés when such negligence caused injury to another of his employés, and for all injuries caused by dangers arising from the work itself or from the place where it is carried on. That statute also provided that contributory negligence of the employé should not bar his recovery if it was slight and that of the employer or fellow servant was gross, in comparison, and that in such cases the jury may diminish the damages according to the proportion of negligence chargeable to the employé."

To the same effect is the case of Terry v. S. P. Co., 34 Cal. App. 330, at page 333, 169 Pac. 86, at page 87, where the court says:

"The alleged injuries suffered by the plaintiff were caused on the 14th day of June, 1913, at which time the statute of this state denied to a defendant a defense based upon any alleged assumption of risk by its employé, and also provided that the contributory negligence of an employé 'shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé. * * *' Stats. 1911, p. 796."

In the case of Reynolds v. E. Clemens Horst Co., 35 Cal. App. 711, 170 Pac. 1082, where the accident to the employé, as shown by the record, occurred in 1913, this court used the following language:

"But, after all, this contention of appellant resolves itself into the legal proposition that she assumed the risk of a known hazard, but this fact, as pointed out in Crabbe v. Mammoth Channel Gold Min. Co., 168 Cal. 500, 143 Pac. 714, and other cases, affords no defense under the Employers' Liability Act (Stats. 1911, p. 796), in effect at the time of the accident."

In that case, however, "the case was tried upon the theory that the so-called Roseberry Act of 1911 and section 1970 of the Civil Code were and are applicable to the cause." And the argument was not presented that section 1970 was repealed by the Roseberry Act.

In the case of Crabbe v. Mammoth Channel Gold Min. Co., 168 Cal. 500, at page 504, 143 Pac. 714, at page 715, where the "injury which resulted in Crabbe's death befell him on the 13th day of September, 1911, when the Employers' Liability Act was in force," our Supreme Court, speaking through Mr. Justice Henshaw, states as follows:

> "But even if it be said that the station as used by Crabbe was in an unsafe condition, and that he knew it, this amounts to no more than a declaration that Crabbe assumed the risk of a known hazard. But this fact, by the very terms of the Employers' Liability Act, no longer affords the employer a defense. Employers' Liability Act, § 1, subd. 1."

Also, in the case of Perry v. Angelus Hospital Association, 172 Cal. 311, at page 314, 156 Pac. 449, at page 450, our Supreme Court used the following language:

> "In this connection it should be noted that at the time of the accident the Employers' Liability Act of 1911 (Stats. 1911, p. 796) was in force, providing that the fact that the employé had assumed the risks of danger from the employment should be no defense in such cases, and that the contributory negligence of the employé should not bar a recovery where his negligence was slight and that of the employer gross, in comparison."

Also, in the case of Hughes v. Warman Steel Casting Co., 174 Cal. 556, at page 565, 163 Pac. 885, at page 889, our Supreme Court uses the following language:

> "When the injury to plaintiff occurred on April 9, 1913, the Employers' Liability Act of 1911 (Stats. 1911, p. 796) was in force. Section 1 of that act provided (stating only its terms pertinent here) that in any action for personal injury sustained by an employé in the course of his employment in which recovery is sought on the ground of want of ordinary or reasonable care on the part of the employer, it shall be no defense that the employé either expressly or impliedly assumed the risk of the hazard complained of. The court in harmony with these provisions of the act instructed the jury that under said Employers' Liability Act, the defense of assumption of risk or hazards of the work did not apply; that it was no bar to recovery on account of injury caused by the use of unsafe tools or appliances that plaintiff merely with knowledge of their lack of safety accepted or continued the employment. The provisions of the Employers' Liability Act warranted this instruction by the court. This section 1 as to all defenses which are mentioned therein, including the defense of assumption of risk, declared rules of substantive law which applied in all actions brought by employés against employers. It is claimed by defendant the act has no application between employers and employés, unless where both parties had elected to come under its provisions. There is nothing in this point. The act, as far as the defense of assumption of risk (the only one we are now considering) is concerned, applies to all employers and employés and in all actions where the negligence of the employer is the basis of the suit by the employé. As we have said, section 1 lays down rules of substantive law governing all actions by employés against employers for injuries resulting from the negligence of the employer. It is only as to other matters that the election of the parties to come within its terms have relation."

As already noted, the accident in this case occurred in October of 1916. The present Employers' Liability Act went into effect January, 1914. By its express terms it excludes from the benefit of its provisions "any employé engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising, or any household domestic service." The act also provides that "all acts or parts of acts inconsistent with this act are hereby repealed."

Now, it is true that this court, in the case of Reynolds v. E. Clemens Horst Co., 35 Cal. App. at page 722, 170 Pac. at page 1087, uses the following language in referring to this act:

> "The said act of 1913 was intended to present and embody a complete scheme for the enforcement of a cause of action like that before us, and it is apparent that all prior legislation on the subject is inconsistent with the provisions of said act."

But, as above noted, this act of 1913, now in force, does not present or embody any scheme for the enforcement of a cause of action like that before us in the present case. In fact, a cause of action like that before us now is expressly excluded from the provisions of this act.

Furthermore, the act specifically provides (see section 12, division "c" of subd. 3, Stats. 1915, p. 1081) that "in all other cases where the conditions of compensation do not concur, the liability of the employer shall be the same as if this act had not been passed." Therefore, since the conditions of compensation referred to in the act do not concur to affect the plaintiff herein, since he is a farm laborer, it follows that the liability of the defendant employer herein "shall be the same as if this act had not been passed." Also, since section 1 of the Roseberry Act lays down rules of substantive law finally governing all classes of employés, it can be inconsistent with and repealed by the present act only to the extent that the present act includes, and does not exclude, such classes of employés. For these reasons the defendant herein cannot be permitted to urge as a defense that the plaintiff, either expressly or impliedly, assumed the risk of the hazard complained of.

In this connection it may be noted that the case of Barrett v. Cont. Co., 172 Cal. 116, 155 Pac. 645, referred to by this court in the recent case of Fererira v. Silvey, 176 Pac. 371, was not a case involving the relation of employer and employé, and no question was raised therein concerning any Employers' Liability Act. In fact, the relation of employer and employé did not exist between the plaintiff and defendant; the plaintiff being in the employ of the city.

The court, therefore, did not err in refusing to give instructions 6 and 7, requested by defendant, to the extent that said instructions recognize the defense of assumption of risk in this case; and, for the same reason, the court did not err in refusing to grant defendant's motion for a nonsuit. Also, it was error, though not prejudicial to the defendant, to give instructions 23 and 24, which were given upon the theory that assumption of risk was a defense in this action.

But, for the reasons already given, the judgment is reversed and cause remanded for a new trial.

We concur: BURNETT, J.; HART, J.

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40 Cal. App. 11

ABRAHAMS v. HAMMEL, Sheriff, et al.

(Civ. 2620.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1919. Rehearing Denied by Supreme Court April 18, 1919.)

1. Appeal and Error ⚿928(2)—Presumption as to Proper Instructions Given.

Where contrary is not shown, the appellate court may assume proper instructions were given.

2. Fraudulent Conveyances ⚿147(4) — Conditional Sales—Assignment of Contract—Possession of Goods.

Where the purchaser of an automobile on conditional sale assigned the contract, and the assignee received a bill of sale, but without taking the car into his possession released to the original purchaser's wife, and the assignee afterwards transferred his interest to plaintiff, who without obtaining possession gave such wife an option to purchase, such transfers are invalid under Civ. Code, § 3440, creating a presumption of fraud in sales without immediate delivery and continued change of possession.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action for conversion by A. L. Abrahams against W. A. Hammel and another. From a judgment for defendants, and from an order denying plaintiff's motion for new trial, he appeals. Judgment and order affirmed.

Tyrrell, Abrahams & Brown and Chas. W. Fricke, all of Los Angeles, for appellant.

Strong, McCormick & Green, of Los Angeles, and Strong & McCormick, for respondents.

SHAW, J. Under a writ of attachment, issued in an action wherein F. W. Cole was plaintiff and G. G. Gillette was defendant, W. A. Hammel, as sheriff, levied upon and took possession of a certain automobile, title to which the plaintiff claimed was vested in Gillette. Thereupon plaintiff in this action filed a third party claim with the sheriff and demanded delivery of possession of the property, which was refused. This action for conversion followed, and judgment was entered in accordance with the verdict of a jury in favor of defendants. The appeal is from the judgment and an order of court denying plaintiff's motion for a new trial.

The sole contention of appellant, which he presents without incorporating in the record the instructions given the jury, is that the verdict is not justified by the evidence; hence it is said the court should have granted his motion for a new trial. The evidence, in which there is some conflict, tended to show that on October 5, 1912, a conditional sale contract was made by the California Motor Company to Gillette, under which it, reserving the title to the car subject to the making of certain deferred payments thereon, when title was to vest in the vendee, delivered possession thereof to Gillette. On October 24th following, Gillette sold the car and, with the consent of the motor company, assigned the contract to J. A. Phillips as purchaser, who assumed the payments specified therein. On March 15, 1913, Phillips made the payments in compliance with the contract and received a bill of sale and receipt in full therefor, at which time he, without having taken the car into his possession, made an arrangement with Gillette whereby the latter was to retain possession thereof. Thereafter, on August 19, 1913, Phillips executed a lease of the car to Gillette's wife, but, in so far as disclosed by the evidence, she neved acquired or took possession thereof, but the same continued in Gillette. On July 31, 1914, Phillips executed a bill of sale transferring his interest in the automobile to plaintiff, who at the time, without obtaining possession thereof from Gillette, gave Mrs. Gillette an option to purchase the car, which option, however, she never exercised.

[1] It is alleged in the answer that all these transfers affecting the interest of Gillette in said car were made fraudulently, without consideration, and with intent to hin-

der and delay the creditors of Gillette, which, upon proper instructions, since the contrary is not shown, we may assume were given, the jury upon the evidence might have found true. However this may be, it clearly appears that at the time the conditional sale was made to him by the motor company, Gillette acquired possession of the car, which subject to the amount due thereon, he sold to Phillips, who thereafter by payments made extinguished the conditional sale contract, thus terminating all rights of either party and their assigns thereunder. Section 3440, Civil Code (excluding certain exceptions not here involved), declares that—

> "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession. * * *"

[2] Under this provision, since the sale by Gillette to Phillips was "not accompanied by an immediate delivery, and followed by an actual and continued change of possession," the sale and purported transfer to Phillips must, as to the attaching creditor, be deemed fraudulent and void. This being true, it follows that at the time Phillips sold the automobile to plaintiff the former had no title thereto, and hence the bill of sale to plaintiff was ineffectual as a transfer of the same. Conceding that he might have acquired title by taking the property into his possession, nevertheless plaintiff admits that he did not do so, but allowed Gillette to retain and control the same. The acts of the parties render the purported sale and transfer void as to the attaching creditor.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 44

FORRINGTON v. SAN LUIS OBISPO COUNTY. (Civ. 2290.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1919.)

1. Appeal and Error 🔑757(3) — Brief — Statement of Evidence—Printing.

Under Code Civ. Proc. § 953c, a resolution terminating plaintiff's employment, on appeal from a judgment for plaintiff's salary, will not be considered unless brought to the attention of the court by printing in the brief.

2. Counties 🔑75(3)—Employé's Compensation—Evidence.

Evidence that plaintiff was employed by a resolution of county supervisors to maintain an exhibit at the Exposition "during the Exposition year" at $150 per month is sufficient to support finding that plaintiff's employment was for a definite period, and the county therefore is liable for salary during such period.

Appeal from Superior Court, San Luis Obispo County; J. A. Bardin, Judge.

Action by Nellie M. Forrington against the County of San Luis Obispo. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles A. Palmer, Dist. Atty., and L. A. Enos, Asst. Dist. Atty., both of San Luis Obispo, for appellant.

Lamy & Putnam, of San Luis Obispo, for respondent.

CONREY, P. J. The defendant appeals from the judgment, which covers three months of salary claimed by the plaintiff as an employé of the county of San Luis Obispo, under the designation of commissioner for the county at the Panama-Pacific International Exposition in 1915, being at the rate of $150 per month, for the months of July, August, and September, 1915.

A typewritten clerk's transcript on appeal and a typewritten transcript of the phonographic report of the trial have been filed. Appellant has not caused to be printed with its brief, or as a supplement thereto, any part of the record, but has made a narrative statement of the pleadings. The brief for appellant discusses, without quotation thereof, certain items of evidence, which fall under the claim that the evidence was insufficient to justify the decision.

By certain evidence printed in respondent's brief, we learn that by resolution of the board of supervisors three "commissioners" were selected "to represent the county in collecting and installing an exhibit of the resources of the county at the Panama-Pacific International Exposition, and maintaining the same during the Exposition year."

[1] Appellant contends that the employment of respondent was not for a specified term, and that therefore it was terminable upon notice or at the will of the employer. It also claims that the board of supervisors did, by resolution of June 8, 1915, terminate plaintiff's employment. The briefs do not contain any copy of that supposed resolution. It should have been presented in printed form if counsel desired to bring it to the attention of the court. Code Civ. Proc. § 953c; Hepler v. Wright, 35 Cal. App. 567, 575, 170 Pac. 667; Jones v. American Potash Co., 35 Cal. App. 128, 169 Pac. 397.

[2] The omission above mentioned, however, is not very important; for we think that the evidence quoted in respondent's brief, as above noted, is sufficient to support the court's finding that plaintiff's em-

ployment was for a definite period, including the months covered by the demand made in this action. It is not denied by counsel for appellant that, if the liability exists, the amount of the judgment is correct; they admit that (prior to the time of plaintiff's acceptance of the employment) the salary of plaintiff was by resolution fixed at the monthly rate of $150 "from January 15, 1915, to December 15, 1915."

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

40 Cal. App. 102

REED v. REED. (Civ. 2048.)

(District Court of Appeal, Second District, Division 2, California. Feb. 27, 1919.)

1. Divorce 🔑214(2) — Order for Alimony and Suit Money—Notice.

Where a husband had appeared in his wife's action for divorce, so that the court had acquired jurisdiction of subject-matter and his person, court had power to order ex parte, without previous notice, payment of any reasonable sum to wife for alimony and suit money.

2. Divorce 🔑209—Order for Alimony—Appearance or Service.

The obligation of a husband to support his wife is personal, and therefore an order for alimony, in effect a final judgment for money, is a judgment in personam, and void unless the husband has voluntarily appeared or been duly served with notice.

3. Divorce 🔑223, 286—Suit Money—Discretion of Court—Statute.

Under Civ. Code, § 137, a discretion is vested in trial court as to amount to be allowed a wife suing for divorce as suit money to enable her to prosecute or defend, and only a plain abuse of discretion is subject to correction by an appellate court.

4. Divorce 🔑285 — Order Allowing Suit Money — Appeal — Showing of Abuse of Discretion.

Where it is contended no evidence was adduced at hearing showing necessity for allowance to wife suing for divorce of particular sum as suit money, it is incumbent on husband, appealing from order, to bring up so much of record as will show, either that no amount whatever should be allowed, or that sum is so excessive as to indicate an abuse of discretion.

5. Appeal and Error 🔑757(1)—Permission to File Typewritten Transcript—Duty of Appellate Courts to Examine.

Permission given to appellant to file a typewritten transcript in lieu of a printed bill of exceptions casts no burden on the appellate courts to examine the typewritten documents, as enough should, under Code Civ. Proc. § 953c, be printed in the brief to illustrate the points.

6. Divorce 🔑215 — Alimony for Maintenance and Support—Award for Time Before Application.

There are cases where it is proper to make a wife suing for divorce an allowance of alimony for maintenance and support from the date of the commencement of action to the time of application, as well as thereafter, as where the wife has managed to exist only by borrowing money to pay for the necessaries of life, etc.

7. Divorce 🔑286—Order for Alimony and Suit Money—Appeal—Presumption.

Every reasonable intendment and presumption must be indulged on appeal in favor of correctness of trial court's proceedings and regularity of its order awarding plaintiff wife suing for divorce a monthly amount as alimony and a sum as suit money.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Rose L. Reed against William R. Reed. From an order requiring defendant to pay plaintiff an amount monthly as alimony for her support pendente lite, and another sum as suit money, defendant appeals. Order affirmed.

J. R. Dorsey, of Bakersfield, for appellant.

R. H. Wilson, of Bakersfield, for respondent.

FINLAYSON, P. J. This is an appeal from an order requiring defendant to pay plaintiff a certain amount monthly as alimony for her support pendente lite and another certain sum as suit money to enable her to prosecute the action.

The action was commenced by plaintiff to obtain a divorce. Her complaint, filed January 9, 1915, contained allegations showing her indigent circumstances and defendant's possession of community property worth several thousand dollars, and prayed for alimony for her support and suit money. On March 22, 1915, defendant answered. On June 16, 1915, plaintiff served and filed a notice that on June 21, 1915, she would apply to the court to have the cause set for hearing on the issues tendered by her complaint as to alimony pendente lite and suit money. Thereafter, by consent of both parties in open court, the motion was continued to June 28, 1915. On the last-mentioned date the matter again was continued, by consent of both parties in open court, this time to July 2, 1915, on which date the matter duly came on for hearing, witnesses were sworn and testified, and on July 29, 1915—the matter having regularly been continued to that date—the court made an order directing defendant to pay plaintiff $750 as and for suit money, for the purpose of defraying the expenses that she may be put to in producing her evidence, taking the depositions of her witnesses, and other expenses connected with the litigation; and likewise directed defendant to pay plaintiff $50 per month for her maintenance, commencing January 9, 1915, the date when the action was brought.

Defendant contends: (1) That the court was without jurisdiction to make the order, for the reason that there was no proper application for alimony or suit money; (2) that there was no evidence showing a necessity for the allowance of $750 as suit money; and (3) that the court had no power to allow plaintiff alimony for her support during the period intermediate to the commencement of the action and the date of her application for an allowance. On the record, as it comes to us, none of these objections is tenable.

[1, 2] 1. We think the notice served and filed June 21, 1915, and the subsequent stipulations relative to continuances, together with the issues tendered by the complaint relative to alimony and suit money, were sufficient to empower the court to make the order for suit money and support pendente lite, even if jurisdiction were dependent upon any formal notice. However, contrary to appellant's assumption, no notice was necessary. The defendant had appeared in the action, so that the court had acquired jurisdiction, not only of the subject-matter of the action, but of the person of the defendant. Having acquired such jurisdiction, the court had the power to order, ex parte, without any previous notice the payment of any reasonable sum for alimony and suit money. Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114; Ex parte Joutsen, 154 Cal. 541, 98 Pac. 391; Glass v. Glass, 4 Cal. App. 604, 88 Pac. 734. "Such order may be made ex parte, and is usually so made." Glass v. Glass, supra. Appellant cites Baker v. Baker, 136 Cal. 302, 68 Pac. 971. That case can have no application here, for there the court undertook to make an allowance to the wife before it had acquired jurisdiction of the person of the husband, either by service of process or by his voluntary appearance. That it could not do. The obligation of a husband to support his wife is personal, and therefore an order for alimony—in effect a final judgment for money (Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709)—is a judgment in personam, and void unless the husband has voluntarily appeared in the action or has been duly served with process (14 Cyc. 745).

[3-5] 2. It must be conceded, and indeed it is not questioned, that a discretion is vested in the trial court as to the amount to be allowed the wife as suit money to enable her to "prosecute or defend the action" (Civ. Code, § 137), and that only a plain abuse of discretion is subject to correction by an appellate court. Where, as here, it is contended that no evidence was adduced at the hearing showing a necessity for the allowance of a particular sum as suit money, it is incumbent upon the appellant to bring up so much of the record as will suffice to show, either that no amount whatever should be allowed, or that the sum allowed is so excessive as clearly to indicate an abuse of discretion. Here the appeal is taken under the alternative method. Much evidence was adduced in the lower court. The hearing extended over three or four days. The reporter's transcript covers some 200 typewritten pages. None of the evidence is printed in the briefs, or in any supplement appended thereto, as required by section 953c of the Code of Civil Procedure, save a very small part designed to show that, under the doctrine of such cases as Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, and White v. White, 86 Cal. 212, 24 Pac. 1030, the $750 cannot be deemed to include counsel fees for the reason that respondent's counsel had agreed to prosecute her action for a contingent fee. But even if the $750 did not include any allowance for counsel fees—and we shall assume it did not—nevertheless it is incumbent upon appellant to print in his briefs so much of the evidence as will enable us to say that there was no necessity for any suit money whatever or that the sum allowed was so excessive as to amount to an abuse of discretion. This appellant has failed to do. The permission given to an appellant to file a typewritten transcript in lieu of a printed bill of exceptions casts no burden upon the appellate courts to examine the typewritten documents. California Sav. Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395.

Though no burden rests upon us to do so, we have looked into the typewritten transcript and there learn that the pleadings tendered issues respecting property rights of considerable value; that it will doubtless be necessary to take the deposition of a witness in Texas, one Paggi, whose desposition was used at the hearing on the motion for alimony; and that this witness has some knowledge respecting appellant's stockholdings and his general financial condition. The trial court was justified in indulging the inference that, before a trial on the merits, the deposition of this witness should be taken again, and his knowledge of important facts thoroughly probed. If such deposition be taken in Texas upon oral questions and answers—and it is possible that that course will best subserve the ends of justice—the employment of counsel in Texas, or the traveling expenses of respondent's present counsel, necessarily will use up quite a considerable part of the total allowance of $750. This, though but one illustration of a possible item of expense that may have been in the mind of the lower court, will serve to show the impossibility of an intelligent consideration of appellant's point in the absence of a printed transcript of so much of the evidence as will at least negative the presumption of regularity in the order complained of.

[6, 7] 3. In support of his contention that the court erred in allowing alimony from the date of the commencement of the action, instead of from the date of respondent's application therefor, appellant relies upon the rule announced in Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87, where it is held that an allowance to the wife of suit money to enable her to prosecute or defend the action can only be made as to expenses necessary to be included in the future prosecution or defense of the action, and cannot be made for the payment of past expenses, "except where such payment is necessary to be made in order to enable the wife to further prosecute or defend her case."

Assuming, for the purpose of this decision only, that the rule as to alimony for maintenance and support is the same as that respecting suit money for expenses, nevertheless there are cases where it is proper to make an allowance of alimony for maintenance and support from the date of the commencement of the action to the time of the application therefor. For example, if application for alimony is not made until some months after the commencement of the action, and if, in the meantime, the wife has managed to exist only by borrowing money wherewith to pay for the necessities of life, or if, during this period, because of her indigent circumstances, she has gone without many things suitable to her condition in life, it is manifest that, to place her in such a situation that in the future she may be enabled to live upon the allowance provided to be paid for her future support—if that amount is no more than sufficient for that purpose—provision ought likewise to be made for her past expenses incurred subsequent to the commencement of the action, otherwise she would be compelled to pay out of the allowance for her future support the money she had previously borrowed, or purchase with the money allowed her for her future support the things she should have had in the past, but which, because of her poverty, she was unable to purchase at the time. Gay v. Gay, 146 Cal. 237, 79 Pac. 885. In the Gay Case it is said:

> "If, then, it be conceded that * * * the rule laid down in Loveren v. Loveren, with reference to reimbursement for costs and expenses of the wife in an action for divorce, should apply to an application by the wife for support and maintenance, still * * * the rule that payments for past expenses shall not be allowed is not absolute, but is subject to the qualification that such an order may be made whenever it appears that such payment is necessary to enable the wife to further prosecute or defend her case. And the same qualification as to the rule should apply to applications by the wife for support. If it should appear to the court that it was necessary, in order to insure the support of the wife upon the amount to be paid to her periodically in the future, that existing wants or expenses incurred by her should be provided for, the court, within the qualification announced above, would have the right to do so." 146 Cal. 242, 243, 79 Pac. 888.

Whether the evidence adduced before the trial court did or did not present a case showing a necessity for an allowance for past support in order to insure respondent's future maintenance out of the sums to be paid to her in the future, we have no means of knowing, for none of the evidence has been printed in the briefs, saving that which relates exclusively to the agreement of respondent's counsel to prosecute her action for a contingent fee, and every reasonable intendment and presumption must be indulged in favor of the correctness of the proceedings below and the regularity of the order.

Order affirmed.

We concur: SLOANE, J.; THOMAS, J.

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40 Cal. App. 113

WHITE v. GREENWOOD et al. (Civ. 2716.)

(District Court of Appeal, Second District, Division 1, California. Feb. 27, 1919.)

1. VENDOR AND PURCHASER 🔑67—PERSONALTY "NOW" SITUATE UPON SAID REALTY.

Under contract providing that vendees were to have, with other enumerated personal property "now" situate upon the purchased premises, all trays, vendees were not entitled to trays not upon the premises when the contract was made, though they assumed and agreed to pay, as part of the purchase money, an existing mortgage on vendor's trays, which mortgage included those trays in question.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Now.]

2. CONTRACT 🔑147(2)—CONSTRUCTION—INTENT.

When a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone, if possible.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Controversy between S. J. White and B. S. Greenwood and another. From the judgment rendered the former appeals. Reversed.

W. R. McQuiddy, of Hanford, for appellant.

Harris & Hayhurst, of Fresno, and John G. Covert, of Hanford, for respondents.

SHAW, J. This controversy grows out of a contract made by the parties for an exchange of real and personal property whereby defendants claimed plaintiff sold and agreed to deliver to them, with the ranch so conveyed, some 2,000 fruit trays which at the time of the making of the contract were, and for a period of one year or more had been, in the possession of a third party upon another ranch, and which trays defendants thereafter took into their possession.

Findings were waived, and the court gave judgment for defendants, from which plaintiff appeals. Upon the record the only rulings that can be considered are those involving the interpretation of the written contract between the parties, and the admission and rejection of certain testimony. The clause of the contract upon which respondents relied and which the court construed as entitling them to the trays is as follows:

> "The following described personal property now situate upon said real property in Kings county is to go with the said property in this transfer and to be considered a part of the same, to wit: Four mules and harness for the same, one spraying outfit and its truck, all trays and boxes, two (2) sows, one (1) cow, one section harrow, one rotary harrow, two twelve-inch plows, one ten-inch plow, one small gang plow, one four-horse wagon, capital wagon, one vineyard truck, all tree props and hooks, all hay in barns, all panels and woven wire fences now on the ranch, also one light buggy, yellow gear."

[1, 2] In construing the contract to include the 2,000 trays in question the court erred. By the express terms thereof the only personal property which was to go with the realty so agreed to be conveyed was "the following described personal property now situate upon said real property in Kings county." The word "now" had reference to the date of the contract, at which time there was pointed out to the defendants for their inspection several thousand fruit trays piled upon the dry ground. They were not led to believe, and since they had no knowledge that plaintiff owned the 2,000 trays elsewhere located could not have believed, that they would receive other than the trays on the ranch. If one contracts to buy a ranch with all the cattle thereon, his right to such live stock would, in the absence of a fraudulent removal, be restricted to those located thereon at the date of the making of the contract. He could not be heard to insist that such contract included cattle elsewhere located, because owned by the vendor. In our opinion, there is no ambiguity in the contract, but, conceding it ambiguous, there is nothing in the evidence which, upon applying the rules for interpretation found in title III, Civil Code, could justify the conclusion of the trial court in the interpretation thereof. It is true that in making the purchase defendants assumed and agreed to pay, as a part of the purchase money of the whole property transferred, an existing mortgage on the trays, numbering in all approximately 15,000, but such fact is unimportant as a means of interpretation. It cannot be said that merely because one, as part of the consideration of a purchase, assumes and agrees to pay a mortgage on personal property, he is entitled to the property. There is no uncertainty in the contract, and, applying the rule that "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, * * *" we have no difficulty in reaching the conclusion that the court erred in construing the contract to cover and include the 2,000 trays owned by plaintiff and located elsewhere than on the ranch so conveyed by plaintiff to defendants. This view renders it unnecessary to discuss other alleged errors.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 45

HAMMOND et al. v. HAZARD et al.

(Civ. 2040.)

(District Court of Appeal, Second District, Division 2, California. Feb. 21, 1919.)

1. APPEAL AND ERROR 🔑2—DECISIONS APPEALABLE—DENIAL OF NEW TRIAL.

Where notice of attempted appeal from order denying motion for new trial was filed after the amendment of 1915 to Code Civ. Proc. § 963, the appeal attempted to be taken from the order must be dismissed.

2. APPEAL AND ERROR 🔑757(1)—RECORD—BRIEFS—EVIDENCE.

Where appeal was taken under the alternative method, it is incumbent upon appellants to print in their briefs or in a supplement thereto so much of the record as is necessary to enable the court intelligently to pass upon the questions presented, under Code Civ. Proc. § 953c.

3. MASTER AND SERVANT 🔑330(3)—AGENCY OF DRIVER—SUFFICIENCY OF EVIDENCE.

That owner of automobile was seated with driver while car was being driven, apparently acquiescing in its operation, justifies inference that driver was owner's agent.

4. MASTER AND SERVANT 🔑330(3)—AUTOMOBILE ACCIDENT—OWNERSHIP OF AUTOMOBILE.

That one sued for injuries caused by driving of automobile was registered as owner under St. 1913, p. 641, §§ 3, 4, warrants a finding that she was in fact the rightful owner.

5. MASTER AND SERVANT ⚷330(3)—AUTOMOBILE ACCIDENT—OWNERSHIP OF AUTOMOBILE —SUFFICIENCY OF EVIDENCE.

Where defendant claimed that she was not the owner of the automobile and that its driver at time of collision was not her agent, evidence *held* to justify verdict for plaintiffs.

6. APPEAL AND ERROR ⚷757(1)—RECORD—TYPEWRITTEN MANUSCRIPTS.

The alternative method of appeal, though permitting parties to file typewritten transcripts of the evidence, casts no burden upon appellate courts to examine the typewritten documents.

7. MASTER AND SERVANT ⚷330(2)—AUTOMOBILE ACCIDENT—OWNERSHIP OF AUTOMOBILE —EVIDENCE.

Evidence that defendant, at the time of the collision, remarked, "My car is hurt just as much as the other car," was admissible on the question of ownership; it being for the jury to say whether defendant referred to ownership or was simply making comparison of damages to the cars.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Justin Hammond and another against E. L. Hazard and another. From judgment for plaintiffs and an order denying a motion for new trial, defendants appeal. Appeal from order denying motion for new trial dismissed. Judgment affirmed.

G. R. Freeman, of Willows, for appellants.
E. R. Simon, of El Centro, for respondents.

FINLAYSON, P. J. This is an action for personal injuries to the plaintiff Adel Hammond, caused by a collision of the automobile that defendant Hazard was driving—alleged to be the property of the defendant Cronkhite—with the automobile that plaintiff Justin Hammond was driving, and in which his wife, Adel Hammond, was riding with him.

While plaintiffs, in the automobile in which they were riding, were ascending a narrow mountain road between San Diego and El Centro, in Imperial county, on November 5, 1914, the automobile that the defendant Hazard was driving—on the front seat of which Mrs. Cronkhite sat—collided, at a curve in the road, with the automobile in which plaintiffs were riding, breaking Mrs. Hammond's arm and causing her serious injuries. The trial, which was before a jury, resulted in a verdict in favor of plaintiffs against both defendants. From the judgment and an order denying their motion for new trial defendants appeal.

[1] Notice of the attempted appeal from the order denying defendants' motion for a new trial having been filed after the amendment of 1915 to section 963 of the Code of Civil Procedure, the appeal attempted to be taken from that order must be dismissed.

It is alleged in the complaint that the automobile in which defendants were riding was the property of defendant Cronkhite and that defendant Hazard was operating it at the time of the accident with her consent and as her agent. Upon this allegation the answer joined issue, and the principal point urged on the appeal is that the evidence is insufficient to justify a verdict against Mrs. Cronkhite for the reason that, so it is argued, the evidence is insufficient to justify the jury's implied finding that she owned the automobile that Hazard was driving and that the latter was operating it as her agent.

Both defendants testified that the automobile was not the property of Mrs. Cronkhite. Defendant Hazard testified that about June 28, 1913, it was purchased from or through the Crown Garage & Machine Works by one Stansbury, upon whose ranch he was working as foreman; that, on the day of the alleged sale to Stansbury, Mrs. Cronkhite gave to the Crown Garage & Machine Works her personal check for $575; and that when she gave this check he said to her: "This is your car until I give you back your money."

[2] Though the record is somewhat voluminous, the facts presently to be referred to, together with those already mentioned, constitute the substance of all the evidence printed in the briefs relative to the questions of ownership and agency, notwithstanding the appeal was taken under the alternative method, and it is incumbent upon appellants to print in their briefs, or in a supplement thereto, so much of the record as is necessary to enable us intelligently to pass upon the questions presented. Code Civ. Proc. § 953c.

[3, 4] There was sufficient evidence to support the verdict and the jury's implied finding that, at the time of the accident, Hazard was driving the car as the agent of Mrs. Cronkhite. If Mrs. Cronkhite owned the car, then the fact that she was sitting on the front seat with Hazard while he drove, apparently acquiescing in its operation by him, was amply sufficient to justify the inference that the agency, as alleged in the complaint, existed. So that the sufficiency of the evidence to justify a finding of agency depends upon its sufficiency to justify a finding that the car was the property of Mrs. Cronkhite. That the evidence was sufficient to justify such a finding we have no doubt. Though Hazard gave direct testimony as to the ownership of the car, and testified that it did not belong to Mrs. Cronkhite, nevertheless the jurors were justified in disbelieving this part of his testimony, for the reason that discredit was cast upon it by the evidence of an impeaching witness produced in rebuttal by respondents, one Kemp, who testified that

on the day after the accident Hazard told him that "he did not want to get Mrs. Cronkhite mixed up in this, as she has furnished the car." Hazard admitted that when Mrs. Cronkhite gave the Crown Garage & Machine Works her personal check for $575—this was at the time when he says he purchased the car for Stansbury from the Crown Garage & Machine Works—he may have said to her: "This is your car until I give you back your money." Mrs. Cronkhite likewise gave direct testimony that she did not own the car. But, according to the testimony of witnesses for respondents, she declared, at the time of the accident, that she would "settle all damages." According to respondents' witnesses, Mrs. Cronkhite, immediately after the collision, took the names of witnesses to the accident, while Hazard sat in the car apparently indifferent; and, at the same time, she made the statement, "My car is hurt just as much as the other car." Her conduct in thus busying herself with the names of witnesses, and her statements about "my car," and that "I will settle all damages," clearly evidence the interest of one who is conscious of liability as the owner of the car. This, in connection with the fact, admitted at the trial, that the car was registered in her name for the year 1914, was amply sufficient to justify the jury in disbelieving the direct evidence of herself and Hazard that she was not the owner of the car on November 5, 1914, the day of the accident. The Motor Vehicle Act requires the owner of every automobile to cause an application for registration to be filed, and the automobile to be registered, in the name of the owner. Stats. 1913, p. 641, §§ 3, 4. Such legislation warrants a finding that the person in whose name an automobile is registered is in fact the rightful owner. Com. v. Sherman, 191 Mass. 439, 78 N. E. 98; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161, and note on page 1163 et seq.

[5, 6] For the foregoing reasons we hold that the evidence, as disclosed by such parts of the record as have been printed in the briefs, was sufficient to justify the verdict. It is possible that there may be evidence in the record which, if printed in appellants' brief, and thus properly called to our attention, would necessitate a different conclusion. The alternative method of appeal, though permitting parties to file typewritten transcripts of the evidence, casts no burden upon appellate courts to examine the typewritten documents. California Sav., etc., Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395.

It is next contended that there is a fatal variance between the case alleged in the complaint and the proof, in that—so it is argued—the complaint alleges "willfulness" and the evidence shows only "negligence," citing in support of this contention Tognazzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540, where the distinction between "willfulness" and "negligence" is clearly pointed out. Assuming, for the purpose of this decision only, that the complaint tendered an issue of willfulness only, and not negligence—an assumption which, we think, is not borne out by the language of the pleading—nevertheless, we have no means of knowing whether the evidence fell short of establishing willfulness on the part of appellants, since they have failed to print in their briefs a sufficient record. Where, as here, the appeal is taken under the alternative method, "the law requires * * * that enough must be printed [in the briefs or in a supplement thereto] to illustrate the points made and to enable the court to determine those points." California Sav., etc., Bank v. Canne, supra. See, also, McLaren v. Hards, 178 Pac. 332; Lutz v. Merchants' Nat. Bank (Sup.) 177 Pac. 158.

[7] There was no error in overruling the objection to the question propounded to the witness Fuller, who, being asked if, at the time of the collision, he heard Mrs. Cronkhite make any statement with reference to the accident, answered that she said, "My car is hurt just as much as the other car." It was for the jury to say, from a consideration of all the evidence, whether, in using the words "my car," Mrs. Cronkhite referred to the matter of ownership or was simply making a comparison of the damage to the respective cars.

Finding no reversible error disclosed by any of the record printed in the briefs, we are of the opinion that the judgment should be affirmed, and the appeal from the order denying a new trial dismissed.

It is ordered accordingly.

We concur: SLOANE, J.; THOMAS, J.

39 Cal. App. 654

PEOPLE v. CARROLL. (Cr. 732.)

(District Court of Appeal, First District, Division 1, California. Feb. 8, 1919. Rehearing Denied March 10, 1919; Denied by Supreme Court April 7, 1919.)

1. PERJURY 🔑5—RECALL ELECTION—FALSE AFFIDAVIT TO PETITION.

Pen. Code, § 64b, subds. 1, 5, forbidding the making of false affidavit concerning petition or signatures thereto provided for by the laws of the state, applies to false affidavit as to signature to a petition for recall election in city whose charter expressly makes all general laws of state applicable to city elections.

2. PERJURY 🔑19(2)—FALSE AFFIDAVIT—PETITION FOR RECALL ELECTION—INDICTMENT.

An indictment, under Pen. Code, § 64b, subd. 5, forbidding the making of false affidavit concerning petition or signature thereto authorized by state law, need not allege that defendant caused, consented, or permitted the affidavit to be used or filed; it alleging that he made it and that it was filed.

3. INDICTMENT AND INFORMATION 🔑159(4)—AMENDMENT—NAME OF ACCUSED.

Under Pen. Code, § 1008, amendment of indictment at beginning of trial changing name of defendant as inadvertently used in one part to correspond to other parts of the indictment *held* proper.

4. CRIMINAL LAW 🔑1166½(6)—HARMLESS ERROR—QUESTION TO JUROR.

Error in ruling on question put to prospective juror *held* not to warrant reversal of conviction, where defendant did not exhaust his peremptory challenges.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

A. P. Carroll was convicted of making false affidavit in violation of Pen. Code, § 64b, and his motion for new trial denied, and he appeals. Judgment and order affirmed.

U'Ren & Beard and C. A. Linn, both of Napa, and J. Early Craig, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. Defendant was charged by indictment with the violation of section 64b of the Penal Code. He was tried, convicted, and sentenced. This appeal is from the judgment and from an order denying his motion for a new trial.

The indictment in part alleges that the defendant made a false affidavit which was attached to a section of a petition for a recall election; that the affidavit was knowingly false in averring that no person signed said section of the petition except in the presence of the deponent; and that to the best of his knowledge and belief each signature to the petition was the genuine signature of the person whose name purported to be thereunto subscribed, whereas, according to the charge of the indictment, said signatures were in fact procured, solicited by, and made in the presence of a person other than the defendant. It also alleges that the affidavit attached to said section of the recall petition was filed in the office of the registrar of voters of the city and county of San Francisco.

Section 64b declares a number of acts to be unlawful, subdivision 1 thereof making it unlawful for any person who circulates any petition authorized or provided for "by the Constitution or laws of the state of California regulating the initiative, referendum or recall" to misrepresent or make any false statement concerning the contents or effect of any such petition to any person to whom it is presented for signature. Other subdivisions of the section are immaterial to the question involved in this case, but subdivision 5, upon which this indictment is based, reads as follows:

> "It shall be unlawful for any person to make any false affidavit concerning any petition mentioned in this section or the signatures appended thereto."

[1] We cannot agree with appellant in his contention that a reading of section 64b, and particularly of subdivision 1 thereof, shows that the Legislature intended that the act should apply exclusively to state initiative, referendum and recall elections. The section is broad in its terms; and we perceive no reason for holding that it is not as general in its application as any other section of the Penal Code. Moreover, the charter of the city and county of San Francisco, under which the contemplated election was to be held, is, like section 64b of the Penal Code, a state law. In the case of Sheehan v. Acott, 145 Cal. 684, 79 Pac. 350, it was held that a municipal charter is "a legislative act * * * and has the same effect as * * * a law which is passed by bill, under the provisions of section 15 of article IV," of the state Constitution. We may add that a complete answer to this contention of the appellant is found in the San Francisco charter itself, which expressly provides that—

> "All provisions of the general laws of the state, including penal laws respecting elections, * * * shall be applicable to all elections held in the city and county of San Francisco."

[2] Appellant further contends that the indictment is defective for the reason that it nowhere appears therein that the defendant ever caused, consented, or permitted the affidavit to be used or filed. It does allege, however, that the defendant made the false

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

affidavit and that it was filed. This, we think, was sufficient under the terms of section 64b. The distinction between this case and that of People v. Robles, 117 Cal. 681, 49 Pac. 1042, relied upon by the appellant, is this: There it was held that an indictment for perjury, charging the making of a false affidavit for the purpose of enabling a litigant to obtain a new trial, but not also alleging that the affidavit was delivered to be used, failed to state facts sufficient to constitute a public offense. That case comes under the provisions of section 124 of the Penal Code, which do not make the perjury complete until the affidavit has, with the consent of the affiant, been used or delivered to be used. Section 64b has not such requirement. It is enough that it appear—as it does in the instant case—that the affidavit was made with the intention and under the circumstances set forth in the statute.

[3] At the beginning of the trial the court permitted the district attorney to amend the indictment on its face by striking out the name Harry Hood, and inserting in place thereof the name A. P. Carroll. In this there was no error. It is apparent that it was but the correction of a typographical error. All through the rather lengthy document the defendant was referred to by the name A. P. Carroll, except in one instance near the end thereof the name Harry Hood was used, although clearly referring to the same person who had theretofore been repeatedly called A. P. Carroll. It is quite apparent that this was an inadvertence, the correction of which did not in any manner prejudice the rights of the defendant. The amendment was such as is clearly authorized by section 1008 of the Penal Code.

No other point made by the appellant based upon the indictment merits consideration.

[4] Appellant also complains of a ruling of the court upon a question put to a prospective juror. While it is true that the appellant was not bound to adopt the suggestion of the trial court to learn whether or not the prospective juror entertained any bias or prejudice against him, still he was not injured by the suggestion nor prevented from learning the true condition of the juror's mind as to any matter bearing on the trial. Again, it does not appear from the record that the defendant exhausted his peremptory challenges, nor that he was required to accept an objectionable juror; hence, even if the ruling complained of be erroneous, it would not warrant the reversal of the judgment. People v. Kromphold, 172 Cal. 512, 157 Pac. 599; People v. Shafer, 161 Cal. 573, 119 Pac. 920.

Judgment and order affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

39 Cal. App. 779

PEOPLE v. RICHAUD. (Cr. 613.)

(District Court of Appeal, Second District, Division 1, California. Feb. 18, 1919.)

1. Homicide ⚷250—Manslaughter—Evidence—Sufficiency.

Evidence *held* to sustain conviction of manslaughter.

2. Criminal Law ⚷1170(2) — Excluding Evidence of Flight of Another—Harmless Error.

Any error in excluding evidence of flight of a third person, who was present at the homicide, was harmless, where other evidence showed that such person had worked in the vicinity until a recent date, when he had enlisted in the army.

3. Witnesses ⚷388(2) — Impeachment by Former Testimony—Foundation.

Question to a witness, "Did you ever make any statement to that effect when you were on the former trial of this case?" was properly excluded, where defendant did not lay proper foundation for the question by calling the witness' particular attention to any former testimony given by her.

4. Criminal Law ⚷1170½(5) — Harmless Error—Cross-Examination.

Any error in a ruling curtailing cross-examination was harmless, where the question was asked, and answer favorable to defendant made and not stricken out.

5. Criminal Law ⚷1170½(5) — Evidence Impeaching Witness—Harmless Error.

In a prosecution for homicide, cross-examination to show that an impeaching witness who testified to contradictory statements of state's witness had a husband then in jail awaiting trial for homicide, if incompetent, *held* not reversible error.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Emile Richaud was convicted of manslaughter, and appeals. Affirmed.

E. J. Emmons and Rowen Irwin, both of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. Appeal from a judgment of imprisonment after conviction of the crime of manslaughter.

[1] Defendant was charged by the information of the district attorney with the crime of murder, alleged to have been committed on or about the 29th day of April, 1917, in the city of Bakersfield. The jury determined by its verdict that the defendant was guilty of the lesser crime of manslaughter. The points made by appellant are that error was committed by the trial judge in sustaining objections of the prose-

cution to certain testimony offered by the defendant, and in admitting other testimony over the objection of the defendant. No point is made as to the sufficiency of the evidence to sustain the verdict, and indeed any such contention would be without the least validity. Under the testimony heard at the trial the jury would have been fully justified in finding the defendant guilty of murder in the first degree.

The person killed was Anna Gerardat, who at the time of her death was about 28 years of age. She was employed as a waitress in a restaurant in the city of Bakersfield. Defendant was well acquainted with her; in fact, the reasonable inference to be drawn from the testimony is that the relations between the defendant and the woman had, prior to the day of the shooting, been of a very intimate nature. A man named Carter was also a friend of the woman. Admittedly the feeling between Carter and the defendant was not friendly. The shooting occurred on Sunday morning. On the evening previous both defendant and Carter had eaten their dinner at this restaurant and had been served by Anna Gerardat. Carter ate his meal quietly and left the place considerably in advance of the defendant, without any words being exchanged between the two. One of the waitresses employed in the place testified that defendant, near 9 o'clock of that evening, while in the restaurant, was seen to throw some money forcibly on the table in front of Anna Gerardat, and that she (the witness) went to him and asked him not to create a disturbance—"not to start anything there." The defendant replied and told this witness that she did not know what was behind it all; "that he had been putting up money and had been made a boob of long enough." At about 9 o'clock Anna Gerardat and the defendant left the restaurant together. Evidently they went together to the room of Anna Gerardat in a hotel. The clerk of this hotel testified that shortly after 9 o'clock he heard loud talking in Anna Gerardat's room, and heard a man's voice say, "I am going to settle this; my God, I am going to settle this," or words of that substance and effect; that he (the clerk) entered the room and ordered the defendant to leave; that the woman put on her wraps and the two went out of the hotel; that some time before 12 o'clock that night the woman returned and went to her room; that shortly afterwards the defendant came in, and was about to go to the same room, when he was stopped by the clerk; that after some talk between the defendant, the clerk and the proprietress of the hotel, defendant, upon the latter's order, left the place, and was seen no more that night. On the following morning at about 7 o'clock, according to another witness' testimony, defendant appeared at a bar and there requested the return to him of a revolver which he had previously loaned to the witness. Defendant inquired of the witness as to whether the revolver was loaded, and, receiving a negative response, asked for loaded cartridges, and the witness gave him five loaded shells which were of the proper caliber and of a number to completely fill the chambers of the revolver. Not long after this the defendant made his appearance at the restaurant where Anna Gerardat was employed. The woman had already arrived, and there was in the place another waitress named Howie, and the proprietor named Jan. Defendant took his seat at the table, facing toward the kitchen, and shortly afterwards Carter came in and took a seat three or four tables distant from defendant and directly at his back. Anna Gerardat proceeded to wait upon the two men. Waitress Howie testified that she was in the kitchen and the proprietor was further toward the rear of the kitchen and Anna Gerardat was toward the front part of the premises, at some place not known to the witness, when several shots were fired; that she (the witness) immediately pushed open the door leading from the kitchen into the rear of the dining room, and there found Anna Gerardat lying face downward on the floor, and the defendant standing five or six feet away; that defendant, upon observing the witness, said to her to look out; "you'll get yours." This witness testified that she retreated and ran around to a telephone to notify the police; that upon going back into the kitchen she saw Carter in one of the kitchen rooms, evidently making his way to the rear of the building. Police officers arrived upon the scene very quickly, and the first officer testified that he informed the persons in the restaurant that no one should leave until he had found out who had done the shooting, and that defendant, who was there replied: "You need not look any further; I am the one that done it." The second officer testified that similar response was made by the defendant to him, and that defendant said he did not know why he had "done it"; that defendant was heard by this officer to make the further remark: "I wish I had got that other s—— b——." The revolver with which the shooting was done was pointed out by the defendant at the time; he having placed it in the kitchen. Five bullets were found, all of the caliber fitting this revolver, one in the body of Anna Gerardat, one on the floor, and the others in different parts of the room. No one saw Carter have a revolver on that morning at the restaurant. Carter's deposition was read in evidence, and his testimony showed that Anna Gerardat was just coming through the swinging door from the kitchen when shots were fired, and that she fell immediately; that the defendant came from behind a piano that was placed in the center of the room between the main front and the rear dining room, and that he (Carter) immediately fled, going through the side passageway and out of the rear of the building. The trial occurred in February, 1918. At this trial the defendant in his testimony claimed Carter had made threats against him, and that on the morning in question Carter was the aggressor and attacked him before he (the defendant) fired any shots. He disclaimed any intention to kill Anna Gerardat. There was further testimony, on behalf of the defense, given by one witness, of a letter delivered to this witness by Carter prior to the day of the tragedy, and which Carter requested the witness to mail to his mother at a distant point. The witness testified that he had read the letter and had returned it to Carter at the latter's request the day afterwards. He was allowed to testify to the contents of it, which, as he stated them, were generally to the effect that when the letter was received by the mother the writer would be dead, as "he couldn't live without Anna." This witness testified further that after the shooting Carter had suggested to him that he had better forget "that he had had that letter"; further, that on another occasion prior to the shooting, Carter had told the witness that he was out of luck, and, when asked what was the matter, said "he had lost his girl and lost his car." This witness further stated, "I asked him what was the matter, and he said, a French s—— b—— had beat him out of them"; also, that at that prior time Carter wanted to borrow a gun, but did not secure one from the witness.

[2] Appellant assigns as prejudicial error the ruling of the trial judge in sustaining an objection to testimony sought to be elicited from the district attorney, who was called by the defense as a witness. The district attorney was asked, referring to the time when the trial of the case was set, as to whether he had issued a subpœna for Harry Carter. This was objected to on behalf of the prosecution, and the following dialogue occurred:

> "The Court: I don't see what it is for; I cannot understand it.
>
> "Mr. Irwin (for defendant): I want to show that Harry Carter ran away.
>
> "Mr. Conway (for the prosecution): Just a moment. He ran away, where to, the army?
>
> "Mr. Irwin: I don't care where he went. I want to show as an independent fact that Harry Carter left the county after he had been subpœnaed, without notifying the district attorney where he was going. I want to show flight on the part of Harry Carter."

The court sustained the objection, and struck out the testimony of the district attorney as given up to that point. We think that the ruling was without prejudice. The Attorney General has cited several authorities from another jurisdiction which hold that evidence of flight of another person is not admissible on behalf of a defendant accused of crime. However, even though we concede that it was competent for the defendant to show such flight of Carter, there was other evidence in the case (and, by the way, it was objected to by the defense), which showed that Carter was working in the vicinity of Bakersfield up to November, 1917, when he enlisted in the army. This testimony was not contradicted in any way, and it fully accounted for the whereabouts of Carter and the circumstances of his leaving.

[3, 4] The second error assigned is that the court improperly curtailed the cross-examination of the witness Howie (the waitress who was in the kitchen at the time of the shooting). After the witness had given her testimony in the main, the substance of which has been hereinbefore stated, the following occurred: Question by defendant's attorney:

> "As I understand, you didn't see any of the shooting, or didn't see anybody do the shooting? A. No, but I saw the—
>
> "Q. You didn't see— A. I saw one flash back of the electric piano.
>
> "Q. This is the first time you have mentioned that?
>
> "Mr. Conway: Object to that as incompetent, irrelevant, and immaterial; it doesn't appear she was ever asked the question before.
>
> "Mr. Irwin: She wasn't asked the question now.
>
> "The Court: Objection sustained.
>
> "Q. Did you ever make any statement to that effect when you were on the former trial of this case? A. No, sir; you asked—"

A further objection was interposed by the prosecution and sustained. In the first place, the defense did not lay the proper foundation for the question by calling the witness' particular attention to any former testimony given by her; and, in the second place, the answer of the witness, which was favorable to the defendant, was made and not stricken out.

[5] A Mrs. Mathews was called as a witness for the defense and gave testimony concerning alleged conversations had with the waitress Howie subsequent to the day of the shooting. The testimony of this witness was to the effect that waitress Howie stated to her that she had not seen any of the shooting, as she was in the rear part of the kitchen at the time. For the purpose of showing the interest and bias of this witness, the district attorney was allowed to show on cross-examination that the witness' husband was then in jail and being prosecuted by the district attorney on a charge of murder; that the witness was in constant touch with her husband. While it may be the subject of question as to whether this testimony was competent, yet it was not such as to impute disgrace to the witness personally, and therefore did not fall within those cases where judgments have been re-

versed because of incompetent questions asked a witness which would have a direct tendency to degrade. It cannot be said that it is probable that the jury rejected the testimony of the witness Mrs. Mathews upon the ground that she had a husband who was in jail untried on a criminal charge at the time of the giving of the testimony. In other words, the prejudicial effect of the ruling of the court does not appear.

We have now answered all of the contentions urged by the appellant as ground for reversal. We are satisfied that appellant has had a fair trial, and, moreover, was dealt with most leniently by the jury.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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40 Cal. App. 22

PEOPLE v. CARD. (Cr. 817.)

(District Court of Appeal, First District, Division 1, California. Feb. 19, 1919. Rehearing Denied March 21, 1919; Denied by Supreme Court April 18, 1919.)

1. Homicide 🔑228(1) — Evidence — Sufficiency—Corpus Delicti.

In a prosecution for murder, evidence *held* sufficient to establish the corpus delicti by showing that the death of the victim was due to a criminal abortion not necessary to preserve the victim's life.

2. Homicide 🔑234(1) — Defendant's Connection with the Crime—Evidence—Sufficiency.

In a prosecution for murder in which death was caused by a criminal abortion, evidence *held* sufficient to justify the finding of the jury holding defendant responsible for decedent's death.

3. Criminal Law 🔑511(1) — Accomplice Testimony —Corroboration—Sufficiency.

In a prosecution of a physician for murder, where the victim's death resulted from a criminal abortion, evidence of an accomplice *held* sufficiently corroborated by other testimony.

4. Criminal Law 🔑1137(3) — Appeal—Accomplices— Corroboration—Instructions —Estoppel to Allege Error.

Where defendant in a criminal prosecution submitted instructions that a certain witness was an accomplice, which were refused because covered by other instructions, the defendant is in no better position to complain that the court instructed that such witness was an accomplice than he would have been had his instructions been granted.

5. Criminal Law 🔑448(12), 1170(4)—Witnesses 🔑248(2) — Evidence—Deceased's Former Attempt at Abortion — Conclusion.

In a prosecution for murder in which death resulted from a criminal abortion, the answer of a physician to question whether examination disclosed a previous attempt to commit abortion, that deceased admitted a previous attempt was properly excluded, being a conclusion and not responsive to the question, and no prejudice arose where witness subsequently stated the result of his physical examination.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

William S. Card was convicted of murder in the second degree, and he appeals. Judgment affirmed.

Nathan C. Coghlan, R. P. Henshall, and Samuel M. Shortridge, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen. (Louis H. Ward, of San Francisco, of counsel), for the People.

RICHARDS, J. This is an appeal from a judgment upon conviction of the defendant of the crime of murder in the second degree, claimed to have been committed by the defendant in the performance of an abortion upon the person of one Mabel Solomonson, who died shortly thereafter.

The main facts of the case which it is the claim of the prosecution were sufficiently established by the evidence to justify the defendant's conviction, are these: On May 21, 1918, the deceased girl, accompanied by a female friend named Edna Swanson, came from Turlock to San Francisco, registering at the Argonaut Hotel, where they remained overnight, occupying the same bed. The following morning they removed to the Keystone Hotel, where they took a room. While there the decedent disrobed in the presence of her companion and took a sponge bath. She was then apparently in good physical condition and had no menstrual flow. At about half past 11 in the morning of that day the two girls went to the Westbank Building in this city, where the defendant, who is a physician, had his offices. They entered his reception room, and were there met by an assistant of the defendant named Mrs. Hunt, who, being informed which of them was the patient, directed Miss Solomonson to go to another room down the corridor, said to be the defendant's private office. In a few moments the deceased returned and asked her friend for $20, upon receiving which she went back in the direction whence she had come. This was shortly before 12 o'clock. At 1 o'clock Mabel Solomonson was assisted into the reception room from an adjoining room by a nurse named Mrs. Morgan, who was also one of the defendant's assistants on that day, and was delivered into the care of Miss Swanson, with the instruction to take her to her home or room and give her a dose of salts, which instruction the defendant had just directed her to give. At this time the Solomonson girl was greatly distressed, was weak and pale, moved with great difficulty, and had to be assisted to her room in the hotel, which was about half a block away. Upon reaching her room she was so weak that her companion helped her into bed. She was then discovered to be bleeding profusely; a towel, identified as being of the same kind used in the defendant's office, was found upon her person. Her condition being alarming another physician was called in, who recommended that the girl be taken to the Emergency Hospital. Before the ambulance arrived the girl died, and the autopsy surgeon found that she had bled to death as a result of an operation for abortion which had very recently been performed upon her. The defendant's arrest and trial for murder followed, and resulted in his conviction of murder in the second degree.

[1] The appellant makes several points, upon each of which he relies for a reversal. His first contention is that the corpus delicti was not proved. This contention is without merit. The autopsy surgeon who conducted the autopsy on the day of her death testified that except for her pregnancy and the abortion she was in the normal healthy physical condition for a young woman of her years, and that she had died as the result of the operation performed only a few hours before her decease. Miss Swanson, her companion during every hour of the time she was in San Francisco, except the hour or so when she was in the private office of the defendant, testified that the deceased was in good health and was not flowing up to the time she entered the defendant's offices, and that she emerged therefrom weak and distressed and hardly able to walk, and that on reaching her room a short distance away her bandages and clothing were saturated with blood. We think this evidence abundantly sufficient to establish that the death of this girl was due to an operation performed upon her which was criminal in its character as not necessary to preserve her life.

[2] The next contention of the appellant is that there was not sufficient evidence connecting the defendant with the commission of the crime. It is true that the deceased went from the offices of the defendant to an all too speedy death to permit her statement as to what had occurred while she was in the defendant's offices to be given in the form of a dying declaration, but we think that there is sufficient evidence otherwise to point unerringly to the defendant as the person performing the operation which produced her death. The evidence shows that the defendant maintained offices as a physician and surgeon in the Westbank Building with several connecting rooms, one of which was his private office, and another was his reception room to which those seeking his services were in the first instance admitted; that between these two rooms was a system of bells so arranged that a button touched in the reception room conveyed the information to the occupant of the private office that a patient was in waiting, and the touching of a button in the private office by its occupant informed the assistant in the reception room that the patient should be sent to the private office. The evidence shows that these responding bells were rung shortly after the deceased and her companion were admitted to the defendant's reception room. The evidence further showed that no other physician than the defendant occupied his private office. The evidence proceeds to show that when the defendant's assistant was thus advised that the defendant was in his private office and ready for the patient, the deceased was directed to his door; that she returned in a few moments to the reception room to get a sum of money, upon receiving which she went back into the defendant's private office; that she remained away from the reception room, where her friend remained in waiting, for the space of about an hour, when she was helped into the reception room by one of the defendant's assistants, and there given over to her friend with the instruction that the patient was to be taken to her home or room and given a dose of salts. She was then in a condition indicating to the point of certainty that during the hour spent in the defendant's private office something had been done to her which had destroyed her immediately preceding state of normal health, and left her weak, distressed, hardly able to walk, and bleeding to an extent which within a short while sapped her life; upon reaching her room, less than a block away, she had to be put to bed, and there was then found upon her a towel identical with those in use in the defendant's office; she died within a very few hours, and, as we have seen, her death was due to an abortion performed that day. When the defendant was interviewed by a detective officer, shortly after the girl's death, his demeanor, words, and actions were very far from those of an innocent man. We think this evidence was sufficient to justify the finding of the jury holding the defendant responsible for the decedent's death by means of a criminal abortion.

[3] The appellant's next contention is that the witness Edna Swanson was an accomplice of the defendant in procuring the operation to be performed upon her friend, and that her testimony was not sufficiently corroborated to have justified its acceptance by the jury as the basis of its verdict. The question whether the witness was or was not an accomplice within the purview of the law relating to this class of cases was removed from consideration by the court's instruction that she was such accomplice; but, conceding this, we are satisfied that her evidence was sufficiently corroborated as to all

of its essential parts. Her story as to what occurred within her knowledge and observation while in the office of the defendant is supported by the testimony, reluctantly drawn from them, of the two witnesses who were acting as the defendant's assistants on that fatal day. It is shown sufficiently by their halting and hesitating admissions that the defendant was in his office at the time, fixed by the witness Swanson, of the presence of herself and companion there; the system of bells as testified to by one of them agrees with the statement of the alleged accomplice as to the sounding and significance of the bells, while her evidence as to the return of the deceased to her with the statement that she was to be taken home and given a dose of salts is supported by the admission of the witness Mrs. Morgan that such an instruction was received by her from the defendant and was conveyed at that time. The witness Swanson's testimony as to the physical condition of the deceased immediately before and immediately after the visit to the defendant's office is supported by the evidence of the autopsy surgeon as to the normality of the deceased's woman's physical condition outside of her state of pregnancy. We think the foregoing constitutes sufficient corroboration of this witness, assuming her to be, as the court instructed the jury, an accomplice.

[4] With respect to the next contention of the appellant, to the effect that the trial court committed reversible error in giving an instruction as to a matter of fact, by its instruction that the witness Swanson was an accomplice, little need be said. The record before us discloses that throughout the trial and upon this appeal it has been the defendant's consistent position that the witness Swanson was an accomplice whose testimony required corroboration. In harmony with this position the defendant requested a set of instructions upon the subject of accomplices and their corroboration which could only have had reference to the witness Swanson. These requested instructions were not given by the court for the reason that the subject was covered by its own instruction upon the subject to which the appellant now urges this objection. He cannot therefore be in a better position than he would have been had his own requested instruction been given, in which event he could not here be heard to urge his present objection.

As to the other instructions which the appellant requested, and which for the same reason were not given, no special emphasis is laid upon them upon this appeal; but we are satisfied from a careful reading of the entire body of the court's instructions that the jury were fairly, fully, and correctly instructed as to the law of the case.

[5] The final contention of the appellant is that the trial court committed prejudicial error in striking out the testimony of one Dr. Sarkasian, who undertook to give evidence as to statements which the deceased girl had made to him some weeks prior to her death while she was in Denver, Colo., and while he was treating her for anæmia. The answer of this witness which was stricken out was given in reply to the following question asked by counsel for the defendant: "Q. Did you discover from your examination of her whether or not there had been an attempt made previously to bring about an abortion?" to which the witness replied: "A. Well, she admitted that herself." The court properly ordered that answer stricken out. It was not responsive to the question. It was merely the conclusion of the witness as to the effect of whatever statement the deceased had made to him, and did not purport to be such statement. Moreover, the defendant was not prejudiced by the ruling of the court in this regard, since the record shows that the witness proceeded to answer the question correctly and fully by stating that as a result of his physical examination of the deceased while his patient upon this occasion, he found that an abortion had previously been attempted, apparently by herself. We therefore find no reversible error in the record before us.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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39 Cal. App. 748

WALBERG v. UNDERWOOD et al.
(Civ. 2859.)

(District Court of Appeal, Second District, Division 2, California. Feb. 15, 1919.)

1. Injunction 🔑159—Notice to Opposite Party—Waiver.

In proceeding to obtain injunction pendente lite staying execution of judgment in favor of defendant, *held* that appearance made by defendant's attorney was such as to constitute a waiver of the notice to the opposite party required by Code Civ. Proc. § 527.

2. Appeal and Error 🔑843(2)—Review—Questions Presented.

The notice required to be given the opposite party by Code Civ. Proc. § 527, in proceeding for injunction pendente lite, having been waived, as it may be, in view of Civ. Code, § 3513, it is unnecessary for the court on appeal to determine what power the lower court possessed under Code Civ. Proc. § 532, to dissolve or modify without a hearing on the merits an injunction granted without notice.

3. Attorney and Client 🔑70—Authority to Appear—Presumption.

It will be presumed, in the absence of a showing to the contrary, that an attorney who appeared for defendant was authorized to do so.

4. TRIAL ⚷105(1)—QUESTIONS OF INADMISSIBILITY—WAIVER.

Parties who permit a fact to be proved by incompetent evidence without objection waive all question of inadmissibility.

5. INJUNCTION ⚷159—NOTICE TO OPPOSITE PARTY—WAIVER.

An injunction granted on waiver of notice is the same as one granted with notice duly served, and Code Civ. Proc. § 532, as to motion to vacate or modify injunction granted without notice, does not apply.

Appeal from Superior Court, Kern County; M. T. Farmer, Judge.

Action by Carl A. Walberg, etc., against Charles D. Underwood and others. From an order dissolving a temporary injunction, plaintiff appeals. Reversed.

Charles J. Kelly, of Los Angeles, for appellant.

Stahl & Sayles, of Los Angeles, and Boyce R. Fitzgerald, Kaye & Siemon, and Erwin W. Owen, all of Bakersfield, for respondent.

SLOANE, J. Appeal from an order dissolving a temporary injunction. The plaintiff, it is claimed, without giving notice as required by section 527, Code of Civil Procedure, obtained an injunction pendente lite staying the execution of a judgment in favor of defendant. The injunction was granted by the judge in chambers. The record discloses that the defendant Underwood was represented by attorney at the hearing of the application. The order appealed from, dissolving this injunction, was granted without a hearing on the merits, on the alleged ground that the original order granting the injunction was made without notice.

[1, 2] Two points of law are involved in this appeal: First. Was the appearance made by defendant's attorney such as to constitute a waiver of the statutory notice? Second: Had the court jurisdiction to dissolve the temporary injunction without a hearing on the merits? It appears from the bill of exceptions that Mr. Kelly, attorney for plaintiff and appellant here, appeared in court before Hon. Howard A. Peairs, one of the judges of the superior court for the county of Kern, where the matter was pending, and asked for this temporary injunction. Mr. Fitzgerald, an attorney, and who afterwards appears as attorney of record for the defendant and respondent, was in court at the time, and stated that he desired to be heard in opposition to the application. The hearing was thereupon postponed to a later hour, at which time plaintiff's attorney and Mr. Fitzgerald, who was present on behalf of the defendant and respondent Underwood, appeared in chambers before Judge Peairs. Mr. Brown, another defendant in the action in which the injunction was sought, was also present in person. The application for an injunction was presented on the verified complaint in the action, and, after discussion, and objection to granting the writ on the part of Mr. Fitzgerald, the exact nature of which is somewhat in dispute, the temporary injunction was granted, and contains the following recital:

> "On reading the said complaint in said action, duly verified by the oath of Carl A. Walberg and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given; it is therefore ordered," etc.

The record pertaining to the issuance of the injunction contains no recital of notice of the hearing, or of appearance by the defendant. It is also conceded that no previous notice of the proposed application for this injunction had been served on the opposite parties, and that Mr. Fitzgerald was present by virtue of information that the matter was to be presented, which he had received indirectly from some outside source. The application to dissolve this temporary order was heard in court, after due notice, and on affidavits, and the oral testimony of Judge Peairs, before Hon. Milton T. Farmer, another judge of the superior court for Kern county.

Judge Peairs testified, in substance, as follows:

> "At the time Mr. Kelly made the application to me for a restraining order herein, Mr. Fitzgerald, who is an attorney, and who is here in court, also appeared, and stated that he desired to be heard in opposition to the application on the part of Mr. Kelly; and I arranged to hear the matter at a later hour, and told Mr. Fitzgerald he would be heard at that time if he so desired. At a later hour on the same day, Mr. Kelly and Mr. Fitzgerald appeared before me on the application for the order. The defendant Brown appeared also in person. I asked Mr. Fitzgerald for whom he appeared, and he stated that he appeared in behalf of the defendant Underwood. Mr. Fitzgerald argued in opposition to the granting of any order, and referred to certain allegations in the complaint. No request was made by Mr. Fitzgerald, or any one else, for further time upon said hearing, and no objection was made by him to having the matter heard at that time; nor was any exception taken thereto. After the order was granted, Mr. Fitzgerald stated that his client could not be protected unless a large bond was given, and was heard by me upon the question of the amount. It was upon the appearance of the defendant Underwood, the adverse party to the application, that the order was granted."

This statement of the facts is fully corroborated by the affidavit of Charles J. Kelly, plaintiff's attorney, used on the hearing.

Mr. Fitzgerald testified in rebuttal in effect as follows:

"I was present at the time the order was granted, to see that a proper undertaking was fixed. I did not intend to waive notice of the application, or waive notice at all; my only object was to see that an undertaking in a proper amount was fixed by the court. I do not remember that I told the court that I appeared for the defendant Underwood. I did tell the court that I had represented Mr. Underwood in the action to foreclose the mechanic's lien. I did not read any affidavits to oppose the application for the order. I had not prepared anything to oppose the application. I did not tell Judge Peairs that I appeared for the defendant Underwood. Brown did some talking, and said he would be injured if the execution sale was stopped. I did not appear for the purpose of contesting the application. I had no affidavits. I would say that I told Judge Peairs I appeared only to have the undertaking fixed. That was my intention. I did not make any application to Judge Peairs for a continuance. I did not request that the hearing be delayed. I made no objection to the matter being heard at that time."

[3] There is no room for question, under this showing of facts, that Mr. Fitzgerald appeared on the occasion of the application for a temporary injunction, and requested an opportunity to be heard thereon; that at the adjourned hearing before the judge in chambers he was present, representing the defendant Underwood in the matter, and that the application for a temporary injunction was there presented on the allegations of the verified complaint; and that he took some part in the discussion, and that he did not object to the hearing, or to want of notice, and made no request for further continuance. He does qualifiedly deny that he said he was appearing for the defendant Underwood, but does not deny that he did appear for him, or that he was authorized so to do; and, in the absence of any showing to the contrary, his authority is, in any event, presumed. Hayes v. Shattuck, 21 Cal. 51; Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352. It may be conceded that the requirement for notice under section 527, Code of Civil Procedure, is mandatory, but such an appearance and participation in the hearing as shown here was a waiver of the statutory notice, and gave the judge in chambers jurisdiction to act in the premises. Any one may waive the advantage of a law intended solely for his benefit. Civ. Code, § 3513. Where the object of a notice was accomplished it is immaterial whether there was notice or not. When both parties appear, no notice whatever is necessary to be shown. McLeran v. Shartzer, 5 Cal. 70, 63 Am. Dec. 84; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Millard v. Hathaway, 27 Cal. 119; Shay v. Superior Court, 57 Cal. 541; Acock v. Halsey, 90 Cal. 215, 27 Pac. 193; Mallory v. See, 129 Cal. 356, 61 Pac. 1123. The decision last cited, and a line of authorities following it, lay down the rule that where written notice is required it would seem to be necessary that if waiver of notice is relied upon, such waiver should be evidenced by some act or acquiescence of the party in open court, or in the proceedings in the case, appearing from the records, files, or minutes.

[4] No point is raised on this appeal as to the incompetency or inadmissibility of the evidence on the hearing to establish waiver of notice, and the issue was there presented on evidence outside the record, without objection or exception. We do not, therefore, deem it necessary to determine whether the rule above cited is applicable to this case or not. Parties who permit a fact to be proved by incompetent evidence, without objection, waive all question of inadmissibility. This is true even under the statute of frauds, and as to witnesses incompetent to testify. Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; McDonald v. M. V. Homestead Ass'n, 51 Cal. 210; Steinburg v. Meany, 53 Cal. 425.

[5] It is unnecessary to determine what power the court possessed, under the provisions of section 532 of the Code of Civil Procedure, to dissolve or modify an injunction granted without notice, without a hearing on the merits. In this case we have held that notice was waived. An injunction granted on waiver of notice is the same as granted with notice duly served. The provisions of section 532 do not apply. The judge, under the appearance of the defendant, having acquired jurisdiction to make this temporary order of injunction, defendant's remedy, if he was aggrieved thereby, was on appeal from the order. Ots v. Superior Court, 10 Cal. App. 168, 101 Pac. 431; United Railroads v. Superior Court, 170 Cal. 755, 151 Pac. 129, Ann. Cas. 1916E, 199.

The order appealed from is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

39 Cal. App. 776

ROSSI v. CAIRE et al. (Civ. 2587.)

(District Court of Appeal, First District, Division 1, California. Feb. 17, 1919. Rehearing Denied March 19, 1919; Denied by Supreme Court April 17, 1919.)

APPEAL AND ERROR ⚿1201(1)—PROCEEDINGS AFTER REMAND—REVERSAL.

A decision of the Supreme Court that the interlocutory judgment for plaintiff was unsupported by the facts, and reversing that judgment without directions, does not authorize judgment for defendants, but plaintiff can amend his pleading and have another trial.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Edmund A. Rossi against Arthur J. Caire and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded for new trial.

D. Friedenrich and Ambrose Gherini, both of San Francisco (O. K. McMurray, of Berkeley, of counsel), for appellant.

Ambrose Gherini, of San Francisco, for respondent Capuccio.

Joseph F. Bluxome and Frank P. Deering, both of San Francisco, for other respondents.

WASTE, P. J. Appellant attacks a judgment entered in the lower court on motion of the defendants, upon filing the remittitur, after decision by the Supreme Court, in a former appeal. Rossi v. Caire et al., 174 Cal. 74, 161 Pac. 1161.

Plaintiff brought the action to enjoin the defendants from carrying on the business of a corporation, and prayed for an order directing them to wind up its affairs and distribute its assets to the stockholders according to their respective interests. After issue joined, and due trial had, findings of fact and conclusions of law were filed, and a preliminary and interlocutory judgment entered, declaring that the charter of the company was forfeited; that its directors had thereby become trustees of the corporation and its stockholders, and generally granting plaintiff the relief prayed for.

Subsequently, two orders were made and filed, one directing the distribution of certain assets of the corporation and the other directing the said trustees, respondents here, to sell the real and personal property of the corporation. After entry thereof these orders were appealed from, and were the subject of consideration in the former decision. The Supreme Court held these orders appealable as final judgments, and further that upon such appeal there might be a review of the previous proceedings, including the sufficiency of the findings to support the interlocutory judgment. Rossi v. Caire, supra.

The Supreme Court begins its review of the findings with this sentence:

> "The findings do not show any ground for the intervention of a court of equity to supervise or direct the proceedings of the trustees."

After an exhaustive consideration of the subject, including a discussion of authorities cited, the court says:

> "The consequence of these conclusions is that the interlocutory judgment and all the subsequent proceedings and orders are unsupported by the facts and without authority. On the facts found the judgment should have been for the defendants."

After disposing of other questions discussed in the briefs, the decision concludes:

> "The orders appealed from are reversed, and the interlocutory judgment and all subsequent proceedings vacated."

Upon the going down of the remittitur, defendants, basing their motion on the decision of the Supreme Court, and the portions thereof hereinabove quoted, moved the lower court for judgment in favor of defendants, and against plaintiff. The court granted this motion, at the same time refusing plaintiff permission to file an amended and supplemental complaint. The sole question engaging our attention is the correctness of the court's ruling in entering judgment, based on the higher court's decision and in not allowing plaintiff to proceed further in the action.

Under the uniform authorities in this state we are of the opinion that the lower court erred in so doing. The effect of the reversal of the orders, and the vacation of the interlocutory judgment and all subsequent proceedings, was that the cause was remanded to the lower court for a new trial of all the issues made by the pleadings. Davis v. Le Mesnager, 155 Cal. 520, 101 Pac. 910; Stein v. Leeman, 161 Cal. 502, 119 Pac. 663. In reversing the case the Supreme Court might have directed what issues should again be tried, and what should be deemed finally settled by the first trial. However, it did not do so, and the judgment was merely in general terms. This clearly left the whole case to be tried anew, as if it had not been tried before. Glassell v. Hansen, 149 Cal. 514, 87 Pac. 200. It was not necessary to give express directions that the cause be remanded for a new trial, since the unqualified reversal had that effect. Falkner v. Hendy, 107 Cal. 54, 40 Pac. 21, 386, and early cases therein cited. The effect of the reversal in the case at bar, on the former appeal, was to leave the parties where they stood before the interlocutory decree was made, the parties having the same rights that they originally had. Stearns v. Aguirre, 7 Cal. 448; Phelan v. San Francisco, 9 Cal. 16; Argenti v. City of San Francisco, 30 Cal. 462.

A case analogous to the one at bar arose in Stein v. Archibald, 151 Cal. 220, 90 Pac. 536, which was a case for specific performance. Judgment went for plaintiff. On appeal the Supreme Court concluded its opinion in the following language:

> "The court in the application of this principle of equity should have refused a decree for specific performance. The judgment and order are reversed."

On the second appeal (Stein v. Leeman, substituted as defendant, supra) the Supreme Court said:

> "There is no force in defendant's contention that the decision of that appeal by the court required the lower court, upon the going down of the remittitur, to enter judgment for the defendant without trial, and no merit in the motion of defendant to enter such judgment."

The judgment is reversed and the cause is remanded for a new trial in the court below.

We concur: RICHARDS, J.; KERRIGAN, J.

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40 Cal. App. 8

COOMBS v. BURK. (Civ. 2490.)

(District Court of Appeal, Second District, Division 1, California. Feb. 18, 1919.)

1. CONTRACTS ⚷116(1) — VALIDITY—PUBLIC SERVICE CORPORATIONS—GAS—PUBLIC POLICY.

A contract whereby a gas company agreed to furnish and install for defendant specified irons, burners, ranges, pipes, etc., in consideration of which defendant agreed to purchase from the company all gas he might use for any purpose at the place where the articles were installed, or pay to the company $330 for the articles so installed immediately on breach of agreement, was contrary to public policy and void, as restraining competition.

2. CONTRACTS ⚷116(1) — VALIDITY—PUBLIC SERVICE CORPORATIONS—GAS COMPANIES—"BUSINESS OF PUBLIC CHARACTER."

A company engaged in supplying gas for use of people generally is engaged in business of a public character, within the rule forbidding contracts tending to stifle competition.

Appeal from Superior Court, Los Angeles County; Edgar G. Pratt, Judge pro tem.

Action by J. W. Coombs against James H. Burk. Judgment for defendant, and plaintiff appeals. Affirmed.

H. C. Beach, of San Francisco, and S. W. Guthrie, of Los Angeles, for appellant.

Hibbard & Kleindienst, of Los Angeles, for respondent.

SHAW, J. Action by plaintiff, as assignee of Los Angeles Gas & Electric Corporation, to recover money upon a contract. At the trial defendant interposed an objection to the reception of any evidence on the part of plaintiff upon the ground that the complaint did not state facts sufficient to constitute a cause of action in that it appeared therefrom that the contract made the basis of the action was illegal and contrary to public policy. This objection was sustained and judgment entered for defendant, from which plaintiff appeals.

[1] It appears from the complaint wherein the document is set out in full, that on June 1, 1916, the Los Angeles Gas & Electric Corporation (hereinafter designated the Gas Corporation), then engaged in furnishing a supply of gas to the city of Los Angeles and its inhabitants, entered into a contract with defendant whereby, for $1 and the covenants therein contained on the part of defendant, it agreed to furnish and install, for his use in said city, three No. 124 waffle irons, three 3-burner hot plates, one Eclipse hotel range, three 3-burner arcs, four single reflex lights, and 266 feet of pipe; in consideration of which defendant, during the life of the agreement, agreed to purchase from said Gas Corporation all gas which defendant might use, for any purpose, at the place where said articles were installed, and in case of his failure so to do, and the purchase of gas from any other person, concern, or corporation, he would pay to the Gas Corporation $330 in settlement for the articles so installed: Provided, however, that if he ceased to occupy the premises, or permanently discontinued the use of gas at said address, the agreement should terminate upon his returning the property (title to which until paid for should remain in the vendor), so installed, in good repair and condition, reasonable wear excepted. The contract further provided that, upon defendant's failure to purchase his supply of gas from the Gas Corporation, the $330 should become immediately due and payable. It is alleged that on the 4th day of August, 1916, defendant, without any fault on the part of the Gas Corporation, discontinued using the gas of said corporation, and purchased gas from another company supplying gas in said city of Los Angeles, in violation of said agreement.

> "Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful." Greenhood on Public Policy, p. 180.

Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; West Va. T. Co. v. Ohio R. P.

L. Co., 22 W. Va. 600, 46 Am. Rep. 527; Gwynn v. Telephone Co., 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819; Salt Co. v. Guthrie, 35 Ohio St. 672. As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced.

[2] Concededly in the instant case the Gas Corporation was engaged in a business impressed with a public character (Gibbs v. Cons. Gas Co., supra), and from a reading of the contract it is apparent that its purpose in making the same was to prevent defendant from discontinuing the use of gas furnished by it, and, in lieu thereof, obtaining a supply from another company engaged in supplying gas to the inhabitants of the city. That the contract was not only in restraint of trade, but if upheld would tend to stifle competition and give plaintiff's assignor a monopoly of the business of furnishing a supply of gas in the city, and hence be detrimental to the public welfare, admits of no controversy.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

40 Cal. App. 80

CONSOLIDATED LUMBER CO. v. BOSWORTH, Inc., et al. (Civ. 2867.)

(District Court of Appeal, Second District, Division 2, California. Feb. 26, 1919.)

1. Mechanics' Liens 🔑132(4)—Date of Filing Claim—Notice of Completion of Contract.

The time for filing a claim for mechanic's lien begins to run, not from the date of completion, but from the date of owner's filing of notice of completion of the contract, and is in sufficient time, if filed within 30 days thereafter.

2. Appeal and Error 🔑1170(10)—Reversal—Technical Error—Finding.

In mechanic's lien case, a finding that notice was filed on or about a stated date, if indefinite, is not reversible error, under Const. art. 6, § 4½, where in fact there was a leeway of several days in which notice might have been filed, and the evidence showed that notice was filed in time.

3. Mechanics' Liens 🔑277(6)—Purchase of Lumber—Contract to Open Market—Variance Between Proof and Lien Claim.

In action to foreclose a mechanics' lien, where there was a price named for lumber per thousand feet between the parties, which was the reasonable market price, but the contractor did not order his full bill of lumber, and it is not shown that he was in any way obligated to buy all the material from the said dealer, a variance between the lien claim and proof as to whether the lumber was bought from time to time upon the market or under a contract is not fatal.

4. Mechanics' Liens 🔑47—Materials for Which Lien May be Had—Lumber Consumed in Making Concrete Forms—"Materials to be Used or Consumed."

Where the nature of the concrete work contracted for is such as to require the use of forms to hold it in place while hardening, and the materials from which the forms are made are consumed in the process, such material comes within the definition of "materials to be used or consumed" in the construction of a building as contained in Code Civ. Proc. § 1183, and a mechanic's lien may be had on the structure therefor.

5. Mechanics' Liens 🔑290(2)—Finding—Materials—Amount of Depreciation—Lumber Consumed in Making Forms for Cement Work.

A finding that lumber purchased and used for making concrete forms for the construction of the cement work of a building had depreciated to the extent of 90 per cent. of its value, if justified by the evidence, accurately fixes the measure of value of the material which, through the use of these forms, went into the defendant's building, for which a mechanic's or materialman's lien may be had.

6. Mechanics' Liens 🔑281(3)—Foreclosure—Proof of Contract That Materials were to Go into Building—Circumstantial Evidence.

In a suit to foreclose a mechanic's lien, while it must be proved that all the material set forth in the lien was to be used in the erection and construction of the buildings in question, such proof may be established by circumstantial evidence of the contract and delivery of the material, sufficient to give rise to a legal inference that the parties had such an agreement (Code Civ. Proc. §§ 1832, 1959, 1960).

7. Mechanics' Liens 🔑281(3)—Use of Material in Building—Contract to Furnish for Such Building—Evidence—Sufficiency.

In an action to foreclose a mechanic's lien, evidence as to the delivery of lumber and records of seller *held* sufficient to show that there was an agreement or understanding between the seller and contractor that such lumber should be used in the construction of the buildings in question.

8. Mechanics' Liens 🔑277(6)—Trial—Variance Between Complaint and Proof—Number of Contracts for Materials.

In a foreclosure suit under mechanics' lien law of 1911, where it does not appear that any bond was executed, and there is therefore no limitation of the liability of the owner for lien claims, it can make no difference to him whether the liens chargeable against this property arise under one or the other of the contracts, and where the evidence shows three contracts for buildings or parts of buildings to be erected on the same property as a part of a single enterprise, the allegation in the complaint of one contract is not at fatal variance with such evidence.

9. Mechanics' Liens ⚷50—Material—Charge for Cartage—Lienable Claim.

In action to foreclose mechanic's and materialman's lien upon a building for materials furnished to contractor, items for cartage *held* properly incorporated as a part of the price of the total bill for materials furnished and included in the lien claim.

10. Appeal and Error ⚷1177(6)—Disposition of Case—Failure of Evidence on Essential Matter—Necessity of Remanding.

In a suit to foreclose a mechanic's lien, where the court found that all but 10 per cent. of the value of lumber used in concrete forms was consumed in such use, but did not determine the amount or value of the material so used, and neither the value nor the quantity appears in evidence, the cause must be remanded for trial upon such issue.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Suit by the Consolidated Lumber Company against Bosworth, Incorporated, and another. From a judgment foreclosing a mechanic's lien, defendant Bosworth, Incorporated, appeals. Remanded for new trial as to one issue.

Samuel Poorman, Jr., H. C. Beach, W. N. Goodwin, and Hunsaker & Britt, all of Los Angeles, for appellant.

Richard A. Turner, of Los Angeles, and Frank D. McClure, of Minneapolis, Minn., for respondent.

SLOANE, J. This is an appeal of the defendant Bosworth, Incorporated, from a judgment foreclosing upon said defendant's real property a mechanic's lien for materials alleged to have been furnished to and used by the contractor in the construction of buildings on said premises. Appellant asks that the judgment be reversed on the following grounds:

(1) That the claim of lien was not filed in time.

(2) That there is a fatal variance between the lien claim and the proof as to the terms of the contract of sale.

(3) That the lumber used for forms for pouring cement for the buildings is not the basis of a valid lien.

(4) That the proof fails to show that the materials furnished were expressly contracted for the buildings in question.

(5) That the finding as to the date of filing claim of lien is indefinite and insufficient.

(6) That the complaint alleges, and the court finds, that the buildings in question were erected by virtue of *an* agreement, whereas the proof shows that the buildings were erected under *three separate* agreements.

(7) That items of charges sought to be recovered are not covered by the claim of lien.

[1, 2] 1. We will consider the first and fifth alleged grounds of error together, as both are directed to the time of filing claim of lien. The court finds that notice of completion of these buildings was filed *"on or about"* the 27th day of August, 1914, and that thereafter, and *"on or about"* the 21st day of September, 1914, the claim of lien was filed. It is alleged in the complaint, and not denied in the answer, that the claim of lien was recorded *"on"* September 21, 1914. The proof showed that the notice of completion was filed *"on"* the 27th day of August, and the claim of lien *"on"* the 21st day of September. It also appeared in evidence that the buildings were actually completed and accepted on the 21st day of August. Appellant argues that the time for filing claim of lien began to run from the date of completion, and that more than 30 days elapsed before the filing of the lien claim, if it was filed September 21st, and that, in any event, the finding is too indefinite in fixing the time "on or about" the dates mentioned. Whatever merit this contention might have, if under the facts the last day for filing the claim had been on the 20th or 21st of September, it is without force under the recent decisions that a lien claimant for materials furnished a contractor may make his filing within 30 days after the date of filing notice by the owner of completion of the contract. Hughes Mfg. & L. Co. v. Hathaway, 174 Cal. 44, 161 Pac. 1159; Pioneer Paper Co. v. Hathaway, 179 Pac. 221. In this case the claimant had several days remaining after September 21st, in which he might file his claim of lien, and with this margin of time a finding that the notice of completion was filed "on or about" the 27th of August, and the notice of lien "on or about" the 21st of September, is probably sufficiently definite as a finding that the lien claim was made within a period of 30 days, particularly as there is no question under the evidence as to that fact. If we were to concede that, as to this question, appellant's position were well taken, nevertheless, since we could not say upon this record that it was made to appear that justice had miscarried, it would be a proper case for the application of section 4½ of article 6 of the Constitution.

[3] 2. There is more room for dispute on appellant's second proposition. The complaint alleges, and it is set forth in the claim of lien, as follows:

"That all of said materials were sold and delivered from time to time upon open account, commencing on the 28th day of April, 1914, and ending on the 29th day of July, 1914; that there was no express agreement as to the price to be paid for said materials, nor was there any time expressly agreed upon for the payment thereof; but that said materials, at the time of the sale and delivery thereof, were of the reasonable market value of fourteen hundred fifty-eight dollars ($1,458.00), upon which said sum has been paid two hundred fifty dollars ($250.00), and no more."

It is appellant's contention that the proof shows a specific agreement between Dowell, the contractor, and respondent, as to the price for which this lumber was sold and delivered—namely, a fixed and agreed rate per thousand feet. If the record shows, as contended, that a specific sum of money, distinguishable from and independent of the market price, was agreed upon between the parties as the consideration of this sale, there can be no question, under the repeated rulings of the Supreme Court, that such fact would establish a fatal variance between the lien claim and the proof. Reed v. Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; Wagner v. Hansen, 103 Cal. 104, 37 Pac. 195; Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008; Robinett v. Brown, 167 Cal. 735, 141 Pac. 368; Buell & Co. v. Brown, 131 Cal. 158, 63 Pac. 167.

In the case last cited the contract was the same as here claimed by appellant. The court there says:

> "The court found that the claim of lien set forth a contract to deliver the materials at the reasonable market rates, but that the contract was an express one, to wit, $26.50 per thousand for lumber, and $2.50 per thousand for shingles. This was a fatal variance and prevents a recovery by plaintiff."

The substance of the evidence given on this point in the case at bar is as follows:

> "They were to furnish lumber for certain prices per thousand, and they furnished that lumber. I would say that the price that was paid for the lumber was the market price at that time. There was an agreement to a certain amount. It was practically the market price at that time. It was a certain amount per thousand; it was not a lump sum. There was an amount fixed and agreed upon for each class of lumber per thousand feet, on the first order. We had our understanding as to the price per thousand feet when we first went there. Q. And they agreed that they would furnish you certain lumber at so much a thousand feet? A. For that list of lumber that I submitted to them for prices. After that I simply sent in orders for additional lumber, and they furnished it. Q. And at the same prices which you had previously agreed upon? A. I couldn't say they charged the same prices in each case. I think they did. I do not remember that they deviated from the prices they had agreed upon. My understanding at the start was that the plaintiff would sell the lumber at so much per thousand feet for certain classes of lumber, and afterwards I sent in orders for more lumber, and it was furnished, and they charged on their bills the same prices originally agreed upon. The prices would run from $14 to $20, or some intermediate sum fixed on the first order which I submitted to them for a price. Q. I understand you to say that there was an agreement as to the price of the lumber. Did you have a contract? A. I had no contract; the agreement was the market price. It was listed off to me at the market price. I went to the representative of the lumber company, and I asked him for the prices on this material. He said it would be the market prices, and he gave me a list of the market prices."

The evidence further shows that on the occasion of entering into the agreement for this lumber only a small quantity of the lumber ultimately required was ordered. The deliveries covered a period of three or four months, and are evidenced by orders consisting of 37 separate sheets. The aggregate amount of lumber purchased under these orders was 78,898 feet, and the price as charged to the contractor was a total of $1,458. The evidence, we think, fairly shows that the prices charged by the lumber company were the fair market price, as well as the amount that would be arrived at from the prices per thousand feet as shown by the price list referred to by the parties when the first order was made. The construction of the agreement then entered into depends upon whether the price list referred to was used and accepted by the parties as determining the price of all the lumber to be ordered on this contract, or merely as fixing the market price on the order for that date, to be subject to any fluctuation in the market that might occur during the period covered by the subsequent orders.

There can be no question under the evidence that the contractor was offered what lumber he wanted at the market price, and was then shown a list purporting to contain the market price at that date. Had he ordered all his lumber at that time it could conclusively be said that the list bound the parties to a fixed and definite price per thousand for the various sorts of lumber. But the contractor did not order his full bill of lumber; he only ordered a thousand or two feet. Nothing appears in the record to show that he was in any way obligated to buy another foot of material from this company. Was the company, then, under any agreement to continue this list price in the event there should be an advance in the market price of lumber; or could it say:

> "We will still furnish you lumber at the market price, but here is a new list showing the advanced price in the market?"

If it had such right, then the rates per thousand were not fixed, and the mere fact that there was no change in the market during the period covered by the purchases would not alter the relations of the parties, or make the contract one for a fixed and unalterable price. Under an interpretation of the evidence as last indicated the facts would distinguish this case from the Supreme Court citations above given.

There has been a growing tendency in the decisions to as much liberality in the construction of the more technical requirements of the mechanic's lien law as is consistent with just regard for the rights of property owners. Corbett v. Chambers, 109 Cal. 178, 41 Pac. 873; McGinty v. Morgan, 122 Cal. 103, 54 Pac. 392. And it has been repeatedly held, that where the price named and the reasonable market price are the same, a variance between the lien claim and the proof in this particular is not fatal. Acme Lumber Co. v. Wessling, 19 Cal. App. 406, 126 Pac. 167; Lucas v. Gobbi, 10 Cal. App. 648, 103 Pac. 157; Star Mill & Lumber Co. v. Porter, 4 Cal. App. 470, 88 Pac. 497; Blanck v. Com. W. Amus. Co., 19 Cal. App. 720, 127 Pac. 805. The following language from the opinion in California P. C. Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 709, 118 Pac. 103, 110, is very applicable to the suggested construction of the evidence as to the terms in this case:

> "The appellant contends that the evidence does not sustain the findings of the court. Considered as a whole, the evidence received in support of this claim, in our opinion, does sustain the findings of the court. One of the witnesses testified that the price of $9 per ton was quoted at the time some of the plastering material was ordered, and that this price was accepted; but it also reasonably appears from the evidence that it was contemplated by the parties that this material should be ordered from time to time as needed, and that the price to be paid therefor was not necessarily a uniform price of $9 per ton, but such a price as might be indicated by the state of the market at the particular time the merchandise was ordered."

Here, as in the case cited, the trial court found in accordance with the declarations of the claim of lien, and we think the finding was warranted by the evidence.

[4] 3. The next point presented is as to the application of the lien law to lumber furnished to the contractor by respondent and used in making forms for concrete work in the buildings.

This matter was argued on the apparent assumption that no case in point had been decided in the appellate courts of California. This was true at the time of filing the briefs, but the question has since been definitely passed upon in a well-considered opinion by Mr. Presiding Justice Chipman of the Third appellate district, in the case of Olson-Mahoney L. Co. v. Dunne Inv. Co., 30 Cal. App. 332, 344, 159 Pac. 178. A rehearing was asked in the Supreme Court and denied, on June 30, 1916. This decision, therefore, so far as applicable under the facts, will be taken as controlling the issue here. It was there held that in a concrete building, the construction of which required the use of lumber forms for sustaining the concrete in place until it hardened, and where the contract showed the indispensability and intimate connection of the forms with the erection of the building, and the lumber so used was of no value thereafter and was not used for another job, but some of it given away and some advertised for sale as fire wood, the material so furnished and used was, within the contemplation of section 1183 of the Code of Civil Procedure, used in the construction of the building, and subject to claim of lien.

In the present case it appears that the contracts called for concrete structural work in the buildings to be erected; and, although the specifications are not given, and it is not shown what was required in the way of forms for the cement, in any event, the evidence discloses that the forms were required; and the use of concrete for building purposes and the methods employed in such use are now so generally and systematically followed as to be a matter of common knowledge. It is apparent that, under the prevailing methods of constructing reinforced concrete buildings, material for the forms is almost as much a necessity as the cement itself. Under these conditions we are in entire accord with the conclusion reached by Justice Chipman in the opinion cited. It is true that this opinion expressly disclaims the statement of any rule of general application, but the general rule that may logically be deduced from the conclusions reached is, that where the nature of the concrete work contracted for is such as to require the use of forms to hold it in place while it hardens into a self-sustaining and permanent structure, and the materials from which the forms are made are consumed in the process, such material comes within the definition of "materials to be used or consumed" in the construction of a building, as contained in section 1183 of the Code of Civil Procedure.

The language of this section of our Code provision, so far as pertinent to the point at issue here, is:

> "Materialmen * * * furnishing materials to be used or consumed in * * * the construction * * * of any building * * * shall have a lien upon the property upon which they have * * * furnished materials * * * for the value of such * * * materials furnished."

The words "or consumed" were inserted by the amendment of 1911, and what, if any, added significance they have given to the mechanic's lien law, so far as we are aware, has not been judicially determined. It is argued by appellant in this case that the word "consumed" is merely used as a synonym of the word "used" which precedes it. It hardly seems reasonable, or in accordance with the rule which would give meaning to every part of a statute, to hold that the Legislature had gone to the trouble of making this addition to the language of the Code merely to repeat in another form the meaning already expressed in the word "used"; and, in the light of the limitation which had previously been suggested by the courts upon the expression "used in," as applying only to material which had actually entered into and become a part of the finished structure, it may be reasonably concluded that it was the legislative purpose to apply the term "consumed" to such a use of material in the construction of a building as would result in its destruction. We had, previous to this amendment, the ruling, inconsistent with the prevailing doctrine, that powder furnished for blasting a foundation for a structure was subject to the materialman's lien for material "used in" the structure. Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193, 20 Pac. 419. By no stretch of the meaning of words could it be said that the powder was used "in the structure"; that is to say, in the language of the court in Stimson Co. v. Los Angeles Traction Co., 141 Cal. 30, 74 Pac. 357, "as the materials of which it is constructed." But it may be said that the powder so used is consumed, in a very real and intimate sense, in the construction of the building. This application of the term may be made most appropriately to the material used in the forms for concrete. They do not become a part of the finished structure, but they are consumed as a part of the actual construction, or even, it may be said, as part of the structure. When the concrete walls are first poured they have of themselves no more stability than walls of sand. The forms hold them in shape until the concrete hardens, and perform a part, temporarily at least, essential not only to the erection but to the support of the building; and if their substance or their value is consumed in this purpose, may it not be said that these materials have been consumed in and as part of the building?

As has been pointed out, none of the decisions relied upon to exclude the lienability of materials thus used has dealt with the quality of use covered by the words "consumed in," of the amended statute; and it may even be questioned if there is justification in any of the decisions for the limitation of the words "used in" to materials that have actually entered into and become a physical part of the structure. The Code does not say that the materials must have been used in the building, or in the structure of the building, but that they must have been used in the construction of the building—in the actual process of erecting the building; and, so far as the decisions have been called to our attention, while they have used the broad language that the use must be such as to enter into and become a part of the finished building, they have, in restricting the application of the lien law, practically dealt with materials which were only used as an aid to, or preparation for, the work of actual construction, and not as a part of the actual construction of the building itself.

In the case of Stimson Mill Co. v. Los Angeles Traction Co., supra—so much relied on by appellant here, and in which the rule contended for by appellant is most strongly stated—the material in question was lumber used by the contractor for a railway bridge, in building a temporary timber trestle to support the stringers, ties, and rails of the railway, because of delay in the delivery of the steel and other material of which the finished supports were to be made. This work was obviously no part of the construction contemplated by the contract, but a temporary makeshift to avoid delay in other parts of the work. The commissioner's opinion in that case, holding these materials not covered by the lien law of our Codes, after stating the rule that the materials to be within the Code provision must be furnished "to be used, and must actually be used" in the construction of the building, makes use of the following language:

> "And this we understand means that the materials must be used, not merely in the process of construction, but 'in the structure'—that is to say, they must be used as the materials of which it is constructed" (citing Hamilton v. Delhi Min. Co., 118 Cal. 153, 50 Pac. 378; Silvester v. Coe Quartz Mine Co., 80 Cal. 513, 22 Pac. 217; Gordon Hardware Co. v. San Francisco, etc., R. R. Co., 86 Cal. 620, 25 Pac. 125).

We have examined the foregoing citations and fail to find a suggestion in either the facts of the cases stated or in the language of the decisions to give support to any rule or construction which would exclude from the application of the lien law materials furnished and used in a way to exhaust their substance or value, in the actual process of construction, whether or not they become a part of the finished structure.

Appellant relies upon, and quotes at length from, California Portland Cement Co. v. Wentworth Hotel Co., supra, and especially emphasizes the following quotation from the opinion:

> "The counter line of decisions, holding that such liens are given only where the materials have actually entered into and become a part of the structure, are reasoned out on a line of argument having as a basis the theory that liens of the variety mentioned are provided to be given upon the assumption that the property to which they are made to attach has been improved and its value enhanced by the labor bestowed or materials furnished; hence that

where such labor or materials do not actually enter into the structure no lien results. To the latter effect are all of the California cases" (citing Stimson Mill Co. v. L. A. Traction Co., supra, and all the cases on this point therein referred to, together with a number of additional California decisions).

The matter before the court in the Wentworth Hotel Case was a claim of lien for materials furnished for, but, owing to a change in the plans of the building, never used in the building or in connection with it, and the appellate court in its decision had no reference to materials actually used and consumed in the process of construction of a building, though not entering into the finished structure. The argument of the court and the authorities cited fit the facts and the issues before it, but neither the one nor the other has the remotest application to a state of facts where the materialman has contracted and furnished materials whose substance and value have gone into the actual process of building, and have materially enhanced the value of the completed structure, though not remaining as part of it. This distinction is recognized in the case of Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 124 Pac. 230, 41 L. R. A. (N. S.) 296, holding that lard oil applied to threads of joints, and soapstone on the inside of pipes, were covered by the materialman's lien. In this opinion this significant language is used:

> "Soapstone was used on the inside of pipes, as a lubricant to facilitate the pulling of wires through the pipes. This, being a part of the work of construction, we think it may also be considered as part of the material used in construction, for which a lien may be claimed."

There are many decisions from other states on this precise question of application of the lien laws to materials for forms in the erection of concrete buildings, and they are somewhat in conflict. Many of these have been considered in the opinion of the Court of Appeal in Olson-Mahoney Co. v. Dunne Inv. Co., supra, and no useful purpose would be served by attempting to review them here. It is our opinion, however, that the weight of authority and better reasoning sustains the doctrine of lienability of such materials where used and consumed in the actual work of construction. The conclusion goes only to materials used and consumed in the forms as part of the process of actual construction. There obviously can be no claim of lien for material retaining its identity as lumber, which, after its use in the forms in the building for which it was furnished, is taken down by the contractor and removed for use elsewhere. Material so removed, to the extent, at least, that it retains its value and identity, cannot be said to have been used or consumed in the construction in the sense contemplated by the Code.

[5] But what logical reason can be assigned for denying the claim of lien to that proportion of the material so furnished, which, either as to its substance or its value, has actually entered into and been consumed in the work of construction? There can be no injustice to the owner of property which is properly chargeable with the full value of lumber totally consumed in such a use, in making his property liable for half the material, if one-half is consumed, or one-half the value, if its value is depreciated one-half by the use. Neither does there appear to be any practical difficulty in arriving at a just estimate of values on this basis. In this case some of the lumber for forms was used over and over again in different stages of the construction, so as to practically destroy its commercial value for any purpose. Some of it was sawed up into short and irregular lengths, so as to destroy its further use and identity as lumber. Some of it was but slightly depreciated in value, or changed in form, and when removed had a commercial value of perhaps one-half its original price. The court found, on all the evidence, that, in the aggregate, 90 per cent. in value of all the lumber used in forms was consumed in that use. If this finding was justified by the evidence it accurately fixes the measure of value of the material which, through the use of these forms, went into defendant's building.

This method of fixing the liability for the use of material in concrete forms has been adopted by the courts of a number of other states, and we see no reason why it is not logical and fair. In Darlington L. Co. v. Westlake Co., 161 Mo. App. 723, 141 S. W. 931, the court says:

> "Where certain material is provided for by the contract in the erection of a structure, and is furnished and used accordingly, and is, either in whole or in part, consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure to the extent of the consumption of its reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means a depreciation in the market value of the material by the use provided for by the contract."

Relating to a claim of lien for material used in forms for a concrete building, where the value of a portion of the material was only partly destroyed, the Supreme Court of Wisconsin, in Moritz v. Lewis Const. Co., 158 Wis. 49, 146 N. W. 1120, 51 L. R. A. (N. S.) 1040, says:

> "Nor do we see any solid reason for denying a lien for the amount of depreciation of the remaining 25 per cent. of the lumber used for

shoring. This lumber was likewise used in the construction of the building, but in such use was not wholly consumed, but was consumed or destroyed to the extent found by the court below, and for which amount of destruction or consumption a lien was awarded."

To the same effect, Barker & Stewart Lumber Co. v. Marathon Paper Mills Co., 146 Wis. 12, 130 N. W. 866, 36 L. R. A. (N. S.) 875; Chicago Lumber Co. v. Douglas, 89 Kan. 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843.

[6, 7] 4. The next point urged is that there is no evidence in this case to support the allegation of the complaint and finding of the court:

> "That all of the material was sold to be used in the erection and construction of said buildings."

It must be confessed that there is little or no direct evidence in the record of an express agreement to this effect. Appellant says that "proof of such an agreement or understanding between Dowell (the contractor) and respondent is absolutely essential to the maintenance of respondent's judgment," and that "we cannot infer that there was such an agreement." Proof that there was such an agreement or understanding is essential, but we do not agree with counsel for appellant that such agreement cannot be established by inference. If there is sufficient evidence as to the circumstances and negotiations of the contract and delivery of this material to give rise to a legal inference that the parties arrived at such an understanding, the court can base its finding thereon, without a word of direct testimony as to such agreement or understanding. Code Civ. Proc. §§ 1832, 1959, 1960; Sav. & Loan Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922. The force of all indirect evidence rests on inference. There is some evidence in the record here tending to support, by logical inference, the finding of the court that it was definitely understood between the parties that this lumber was furnished to be used on these particular buildings; and in view of the entire absence of any testimony, circumstance, or condition to the contrary, we are not prepared to say the trial court was not justified in its finding. The material as ordered was to be delivered, and was delivered, at the place where these buildings were being constructed, and which was not the place of business of the contractor, Dowell, except for this particular contract. This destination of delivery was entered on the bills of respondent for all the numerous orders of lumber. It appears from the testimony of the contractor that he ordered the material for these buildings. Fred Westfall, the estimator for respondent, was asked by counsel if he estimated the lumber "that was sold to Mr. Dowell for the Bosworth buildings," and if he knew the market value of the lumber that was sold at that time, and he gave the prices as shown by the lists of the entire order. These facts, taken in connection with the generally known and established custom of dealers to charge materials so furnished to the particular job on which they are used, furnishes some evidence, though slight, as to an agreement and understanding of the parties. There can be little excuse for a lien claimant allowing his contract, in this material particular, to rest upon such slight showing; but, where the moral probabilities as to the transaction are so strongly with the respondent, we will not disturb the finding in his favor.

[8] 5. Appellant's sixth assignment of error arises upon the variance between the allegations of the complaint and the proof offered as to the contracts under which the buildings were constructed. The complaint alleges a single contract; the evidence discloses three contracts for different parts of the work. No issue was made as to this point by the answer, but under a stipulation at the trial the matter becomes an issue here. It is contended by appellant that where the liability against defendants' property is shown to have accrued under three separate contracts, each covering a distinct part of the work, the items of the lien claim cannot all be lumped together and made chargeable on the entire job, irrespective of the contract under which they may have arisen. This possibly might be true under the mechanic's lien law prior to 1911, where the contracts had been made according to law and filed with the county recorder, or, under the amended law of 1911, where the liability of the owner had been limited by the execution of a bond as provided by section 1183. This case arises under the amended mechanic's lien law of 1911 (St. 1911, p. 1313), and it does not appear that any bond was executed, and there is therefore no limitation on the liability of the owner for lien claims. It can make no difference to him whether the liens chargeable against this property arise under the one or the other of the contracts. It appears from the evidence that the three contracts were for buildings, or parts of buildings, all erected on the same property, and as part of a single plant or enterprise. Under these conditions we see no reason why the construction of the court reached in Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101, does not apply here.

A similar and more pointed ruling on the same matter is made in the case of Acme Lumber Co. v. Wessling, supra, where the lien claims arose under several separate oral contracts, and the court held that—

"It was not necessary to the validity of the claim of lien that it should be set forth that the demand was based upon more than one contract and then segregate and separately state the amount of each, even though the evidence adduced in support of the lien shows that the work and labor for which the lien is claimed was performed upon separate and distinct structures under separate and distinct contracts" (citing Kritzer v. Tracy Eng. Co., 16 Cal. App. 287, 116 Pac. 700; Boisot on Mech. Liens, § 408).

[9] 7. The items charged up with this material for cartage seem to have been incorporated as part of the price of the total bill rendered for "material furnished," and were properly so included as part of the claim of lien for value of the materials. West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231; Wood, Curtis & Co. v. El Dorado L. Co., 153 Cal. 232, 94 Pac. 877, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80, 15 Ann. Cas. 382.

[10] We are of the opinion that the plaintiff is entitled to enforce his lien for the material furnished and used in forms to the extent of the value consumed in such use, but are at a loss to understand how the trial court arrived at the valuation fixed by the findings. The evidence covering this question is confusing to the degree of being unintelligible, but, even then, assuming the correctness of the court's finding that all but 10 per cent. of the value of the lumber used in forms was consumed in that use, there is nothing in the findings determining the amount or value of the material which was used for forms. The total amount and value of all lumber furnished is found, but it appears from the evidence that some thousands of feet of flooring went into the buildings which was not used for forms. The value of this does not appear in evidence, and neither the value nor quantity appears in the findings, which leaves an indeterminate quantity, as well as value, of the lumber that was used and consumed in the forms. Again, after finding that 10 per cent. of the value of the lumber used for forms was not consumed in such use, the findings fix the value of the salvage at only $75, and the judgment is based on that deduction; whereas, on any basis of fact justified by the evidence, 10 per cent. of the value of material used in forms must have amounted to nearly twice that sum.

As we see no way of modifying the judgment, under the condition of the record, the case will be remanded for a new trial as to the one issue relative to the value of the material furnished and consumed in the construction of these buildings.

We concur: FINLAYSON, P. J.; THOMAS, J.

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40 Cal. App. 119

FELSENTHAL v. WARRING et al.

(Civ. 2861.)

(District Court of Appeal, Second District, Division 2, California. Feb. 27, 1919.)

1. WATERS AND WATER COURSES 🔑145, 156 (7)—RIGHT OF WAY FOR IRRIGATION DITCH —LOCATION—CHANGE.

Whether defendants' easement for irrigation ditch across plaintiff's land was acquired by express grant or by prescription, the right was limited to the line of the ditch, and defendants were without right to construct a new ditch thereon at a different place, although only 25 to 40 feet distant from the old line.

2. WATERS AND WATER COURSES 🔑30, 145 —EASEMENTS—DITCH—LOCATION—RIGHT TO CONSTRUCT NEW DITCH ON OTHER LAND.

Civ. Code, § 806, providing that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired," does not warrant defendants who had acquired a right to divert water from a creek on plaintiff's land and a right of way for a ditch over the land to construct a new ditch at another place, because the first ditch had been destroyed by a flood, whether the right of way rested upon an express grant from the government under Act Cong. July 26, 1866, or upon prescription.

3. WATERS AND WATER COURSES 🔑145 — EASEMENT FOR DITCH—LOCATION AND USE —CHANGE.

If defendants' title to an easement for an irrigation ditch rested upon prescription implying a grant, in view of Civ. Code, § 806, providing that the extent of servitude is determined by the nature of the enjoyment, the right is limited to the conducting of water in the open earthen ditch over plaintiff's land; the line of the ditch fixing the extent of the servitude upon such land.

4. WATERS AND WATER COURSES 🔑30 — PRIMARY AND SECONDARY EASEMENTS — CHANGING LINE OF DITCH.

The right of an appropriator of water upon government land, that has since become private property, to divert the water at any particular place and conduct to his own land over land that has passed into private ownership, is the right of a grantee of an easement, and as a primary easement it includes such secondary easements as are necessary to its full enjoyment, such as the right to enter the servient tenement to make repairs, but not the right to increase the burden by changing the position of the ditch.

5. INJUNCTION 🔑23—COMPARATIVE INJURY FROM GRANTING AND WITHHOLDING — GOOD FAITH OF PLAINTIFF.

Injunction will not be denied because greater injury will result to one party from its award than will result to the other from its withholding, particularly where the applicant plaintiff was not guilty of laches and the defendant did not complete the reconstruction of the ditch sought to be enjoined in good faith; the matter of injunction being one of right and not of grace.

6. INJUNCTION 🔑13—RIGHT TO INJUNCTION — "SUBSTANTIAL INJURY" — SUBSTANTIAL DAMAGE.

To justify the issuance of an injunction, there must be "substantial injury," but substantial injury does not necessarily involve "substantial damage," and the right does not depend upon the extent of the damage measured by a money standard.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Error not Causing Substantial Injury.]

7. INJUNCTION 🔑23 — BALANCE OF CONVENIENCE — FINAL INJUNCTION — INVASION OF PROPERTY RIGHTS.

The doctrine of balance of convenience has no application to final decrees after hearing on plenary proofs and cannot be made to justify or authorize the invasion of the property rights of one private party to serve the convenience or necessities of another private party.

8. WATERS AND WATER COURSES 🔑152(11) —USE OF EASEMENT—LIMITATION BY DECREE.

In a suit by an owner of land to enjoin defendant who had acquired an easement for an irrigation ditch across plaintiff's land from reconstructing a ditch destroyed by flood at a place other than that of the easement, while it was proper to fix the quantity of water diverted by defendant for irrigation purposes, where plaintiff was a riparian proprietor with the usual usufructuary indubitable rights, it was error to limit his user by the decree.

9. WATERS AND WATER COURSES 🔑152(11) — APPROPRIATION — ACTION — DECREE — BENEFICIAL USE.

In a suit to enjoin defendant's reconstruction of a ditch upon plaintiff's land at a place other than that where defendant had acquired an easement, it was error to fix the quantity of water diverted by defendant by the measure of the capacity of his ditch; his rights being limited to the water actually diverted and applied by him to beneficial uses.

10. WATERS AND WATER COURSES 🔑152(8) — AMOUNT DIVERTED — BENEFICIAL USE —EVIDENCE.

Because defendants' evidence showed their ditch to have a capacity of 60 inches and that they always used the ditch capacity, the court could not infer therefrom that 60 inches is reasonably necessary for their beneficial use, where there was direct evidence by defendants themselves that 60 inches greatly exceeded their needs for their beneficial uses.

11. WATERS AND WATER COURSES 🔑152(11) —APPROPRIATION—CONSTANT FLOW—CONSTRUCTION OF DECREE.

Where defendants' witness stated that 30 inches "constant flow" over an irrigation ditch would suffice for defendants' beneficial use in irrigating lands, *held*, that the expression "60 inches" in the decree of award to defendants means 60 inches "constant flow."

12. APPEAL AND ERROR 🔑1011(1)—REVIEW —FINDING UPON CONFLICTING EVIDENCE.

Where it is clearly apparent that the court's finding that respondents are entitled to 60 inches of water is based upon the erroneous theory that the extent of their right is measured by the capacity of their ditch, and that such amount has been decreed to them in spite of the testimony of one of them that much less would suffice their reasonable needs, the finding must be reversed although there is a substantial conflict in the evidence thereon.

13. APPEAL AND ERROR 🔑110—ORDERS APPEALABLE—MOTION FOR NEW TRIAL.

An attempted appeal from an order denying appellant's motion for a new trial, taken after Code Civ. Proc. § 963, was amended in 1915, must be dismissed, since appeals from such orders are no longer allowed under the statute.

Appeal from Superior Court, Ventura County; John M. York, Judge.

Suit by D. Felsenthal against M. D. Warring and another. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Judgment reversed, and appeal from order denying new trial dismissed.

Chas. F. Blackstock, of Oxnard, for appellant.

Walter F. Haas, Haas & Dunnigan, and Robert M. Clarke, all of Los Angeles, for respondents.

FINLAYSON, P. J. The controversy which resulted in this action arose concerning the right to water flowing in Hopper creek, in Ventura county, and the asserted right of defendants to reconstruct and maintain a ditch across plaintiff's land.

Plaintiff owns 137½ acres of land riparian to the creek. Of this tract about 13 acres are suitable for cultivation. Defendants own lands in the same vicinity, only a small portion of which is riparian to the stream.

In 1870, when plaintiff's land was still a part of the public domain, defendants constructed a dam in the creek at a place within what is now plaintiff's private property. At what time the land now owned by plaintiff ceased to be government land does not appear from the record. From an intake in the dam that defendants thus constructed on what is now plaintiff's property, they diverted water, through a ditch, across the land that is now plaintiff's. A part of the ditch was in the bed of the creek, and a part ran along and upon the westerly bank of the stream. The water thus diverted has ever since been used by defendants, below the intake, on their lands, east and southeast of plaintiff's land. In 1878 the channel of Hopper creek was changed somewhat by the floods of that year. Thereupon defendants constructed a new intake about 350 feet further upstream, and, at the same time, constructed an additional 350 feet of ditch extending from this new intake to the head of the ditch of 1870. Until the flood of 1914 the ditch, though repaired from time to time, remained approximately as it was when the work of 1878 was completed. The capacity of the ditch is 60 miner's inches, continuous flow. It is made of earth, with an average width of 2 feet at the bottom and 5 feet at the top, and an average depth of 18 inches. From the foregoing it will be seen that, at the time when this action was brought, defendants had acquired an easement in plaintiff's land, giving them the right to maintain the ditch, as so constructed, as a conduit for the amount of water that they rightfully might divert from Hopper creek at the intake on plaintiff's land, for use on their nonriparian lands under the flow of the ditch.

In 1914 a section of the ditch was washed away, as well as the bank along which that part of it had been constructed, making it necessary for defendants to rebuild. This flood of 1914 eroded the westerly bank of the stream so that now the bank is some feet further west of where it previously had been. Shortly after the washout of 1914, but prior to the commencement of the action, defendants commenced the reconstruction of their ditch on plaintiff's land, and finished the work of reconstruction some time after the action was commenced. Three hundred and fifty feet of this reconstructed ditch defendants constructed along the bank of the creek at a distance of from 25 to 40 feet west of the old ditch line. The action was commenced while defendants were rebuilding the ditch, and before its final reconstruction. At the time of filing the complaint a temporary restraining order was issued. This order was dissolved shortly after the filing of defendants' answer. So that, before the entry of the final decree, defendants had completed the ditch along the new line, 350 feet of which was, as we have stated, from 25 to 40 feet west of where it formerly had been. Plaintiff testified that, as located, the reconstructed ditch of 1914 would work less injury to his land than if located at any other place on his property, outside of the old location or in the creek bottom, where, he said, it would do him no injury whatever. There also is evidence to the effect that, if the reconstructed ditch had been built in the creek bottom, defendants would have to construct it upon an artificial embankment which, in all probability, would be swept away by each recurring freshet. The narrow strip of plaintiff's land—about 350 feet in length and 6 or more feet in width—so appropriated by defendants in 1914 for their reconstructed ditch, is good sandy loam, suitable for cultivation, upon which corn was growing at the time when this part of the reconstructed ditch was built. Its value, however, does not exceed $12, and the injury to plaintiff's freehold caused by defendants' appropriation of his land for the reconstructed ditch of 1914 will not exceed $12. It is no doubt true that, as claimed by defendants, they will sustain considerable loss if they are not permitted to divert from the creek and convey to their orchards, through a ditch on plaintiff's land, the water heretofore so diverted and conveyed by them—a loss much in excess of the $12 damage to plaintiff's land by reason of the change in the line of the ditch.

The complaint sets forth two causes of action. In the first, plaintiff seeks a preventive injunction, enjoining defendants from completing the reconstruction of the ditch along the new line—25 to 40 feet west of the old line—and a mandatory injunction requiring defendants to place plaintiff's land in the same condition as before the excavation of the new ditch, which, as we have seen, had been partially reconstructed when the action was commenced. In his second count, plaintiff seeks to quiet his title to the waters of the creek. The court denied plaintiff any injunctive relief whatever; instead, it entered a decree adjudging defendants to be the owners of an easement over plaintiff's land for the construction, maintenance, repair, and reconstruction of a ditch "substantially along the line of the present existing ditch"—that is, along the line of the ditch as reconstructed in 1914, 25 to 40 feet west of the former ditch line. The court likewise enjoined plaintiff from asserting any right or title adverse to such easement, and from interfering with the ditch. The decree declares that plaintiff is the owner of 2⅗ inches of water in the creek, for irrigation and domestic purposes; that defendants are the owners of al' the water of the creek flowing down to their intake on plaintiff's land, up to 60 inches, excepting the 2⅗ inches adjudged to belong to the plaintiff; that plaintiff be enjoined from taking more than 2⅗ inches at any time when the amount flowing to defendants' ditch shall not exceed 60 inches. From the judgment and an order denying his motion for new trial, plaintiff appeals.

[1] 1. The court erred in denying appellant any injunctive relief and adjudging that respondents have an easement in appellant's land for the construction, operation, and maintenance of a ditch along the new ditch line. Respondents' right to maintain a ditch on appellant's land was the right to continue the ditch that they were enjoying immediately before the flood of 1914. At that time they owned a certain right of way for a ditch of a certain character, acquired either by prescription or while the land was still a part of the public unoccupied lands of the United States. The right of respondents in regard to appellant's land, whatever its source, was

simply to continue the use thereof which they were enjoying at the time he acquired the land. Prior to the washout of 1914 the right of way had been definitely fixed and located along a certain definite and well-defined line. The previous location of the right of way for the ditch had been as definitely and finally fixed by the acts of respondents as it would have been had the metes and bounds been set forth in an instrument of grant. They had acquired the right to that particular location and no other. The remainder of appellant's land was his, free from any right of respondents. After the flood of 1914, when they reconstructed their ditch, respondents appropriated for their use different land of appellant's. We know of no principle of law that warrants respondents in subjecting to their use another and different portion of appellant's land without his consent. It is elementary that the location of an easement of this character cannot be changed by either party without the other's consent, after it has been finally established —whether it has been established by the express terms of a grant, or by conduct that gives rise to a prescriptive title. The acquisition of a right of way over one portion of a person's land, whether by grant or prescription, gives the grantee no right over any other portion. It is entirely immaterial that the new line was only from 25 to 40 feet distant from the old line. It was upon the property of appellant, over which respondents had no right whatever, and the principle is the same as if the new line had been hundreds of feet away from the old one. Vestal v. Young, 147 Cal. 715, 82 Pac. 381.

Nothing in Ware v. Walker, 70 Cal. 591, 12 Pac. 475, is inimical to these views. There the bed of the stream, where used by the plaintiff, could not be beneficially used by the defendants and no land available for any useful purpose whatever was invaded—nothing of any value whatever was appropriated. Having used the bed or channel of the arroyo as a part of his conduit for the water that he was entitled to divert, just as he would use an artificial ditch for the same purpose, the plaintiff in that case had the same right to clean out, remove obstructions from, and repair the part of his conduit that consisted of the channel bed that he would have had had the whole consisted of an artificial ditch. The stream had become obstructed by the deposits, from natural causes, of gravel in its bed, so as to prevent the flow of water to plaintiff's ditch; by digging a ditch through the sand bar that had formed in the channel of the arroyo, plaintiff did nothing more of injury to the defendant than if he had removed a number of fallen trees which might have been washed down by the floods of winter, and which had lain across the stream, obstructing the flow of the water and preventing it from entering plaintiff's ditch.

[2, 3] Respondents assert that, because they have acquired the right to divert water from Hopper creek at a point of diversion on appellant's land, they necessarily have acquired, as an incident to that right, a right of way for a ditch over the land; and that therefore, if the way formerly used for the ditch be destroyed by flood, or other act of God, they may reconstruct the ditch along a new line, provided it be the one that will entail the least injury to appellant's land. To support this contention they cite section 806 of the Civil Code. By this section it is provided that—

> "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired."

Whether respondents' title to a right of way for a ditch be regarded as one resting upon an express grant from the government under the Act of July 26, 1866, c. 262, 14 Stat. 251, or upon prescription—an implied grant—the result is the same. If regarded as an express grant from the government, it was a grant that did not specifically bound or define the right of way. While the land was still a part of the public domain, the way became definitely fixed and located along a certain line by the conduct of the grantees, the respondents here (14 Cyc. 1161; Winslow v. City of Vallejo, 148 Cal. 723, 84 Pac. 191, 5 L. R. A. [N. S.] 851, 113 Am. St. Rep. 349, 7 Ann. Cas. 851); and, when appellant's land acquired the impress of private property, the terms of the grant could not be changed, without his consent, so as to change the character of the easement or materially increase the burden of the servient estate. McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384. If respondents' title be regarded as resting upon prescription—an implied grant—then for the purpose of determining its terms we must look to the nature of the enjoyment by which it was acquired; for, as provided by the Code section already quoted, the nature of that enjoyment measures the extent of the servitude. The nature of respondents' enjoyment of the servitude consisted in conducting water in an open earthen ditch that followed a certain well defined and established course over appellant's land—a line that had been established for many years. That line, therefore, and none other, fixed the extent of the servitude that rested upon appellant's realty. Allen v. San Jose L. & W. Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; Vestal v. Young, supra.

[4] The right of an appropriator of water upon government land that has since become private property to divert the water at any particular place of diversion, and conduct it to his own land over the land that has passed into private ownership, is the right of a grantee of an easement. As a primary easement it, of course, includes what are sometimes called "secondary easements," or the

right to do such things as are necessary for the full enjoyment of the easement itself, as, for example, the right to enter upon the servient tenement and make necessary repairs. But secondary easements do not give the owner of the primary easement the right to increase the burden upon the servient tenement.

> "The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate *by an alteration in the mode of enjoying the former.*" North Fork W. Co. v. Edwards, 121 Cal. 666, 54 Pac. 69. (The italics are ours.)

The right of secondary easements is not a right to change the mode of enjoyment, if such change increases the burden upon the servient estate—as would be the case if respondents shifted the line of their ditch every time a winter flood or spring freshet washed away or ate into the bank of the stream. North Fork W. Co. v. Edwards, supra; Joseph v. Ager, 108 Cal. 517, 41 Pac. 422; Oliver v. Agasse, 132 Cal. 297, 64 Pac. 401; Snyder v. Colorado, etc., Co., 181 Fed. 62, 104 C. C. A. 136.

> "The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner or a lawful exercise of the power of eminent domain; *and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch.*" Snyder v. Colorado, etc., Co., supra. (The italics are ours.)

[5, 6] Finally, it is contended that appellant is not entitled to any injunctive relief because an injunction is a matter, not of right, but of grace; and that greater injury will result in awarding than in withholding the injunction. The general principle that, when one without right attempts to appropriate the property of another by conduct which will ripen into an easement, a court of equity will compel the trespasser to undo, so far as possible, what he has wrongfully done, is too well established for discussion. To this general rule there are a few well-recognized exceptions. Thus, it has been held that a court of equity may decline to issue a mandatory injunction where the defendant is engaged in a business that serves the public; or where, by innocent mistake, erections have been placed a little upon the plaintiff's land and the damage caused to defendánt by their removal would be greatly disproportionate to the injury of which the plaintiff complains, and the defendant has proceeded with the erection while laboring under an innocent mistake of fact or a bona fide claim of right, and the plaintiff has been guilty of laches. 5 Pom.'s Eq. Rem., § 508; Szathmary v. Boston, etc., Ry. Co., 214 Mass. 42, 100 N. E. 1107. Respondents' contention is that their case presents features that bring it within these exceptions to the general rule. But the appellant here was not guilty of laches, and respondents did not complete the reconstructed ditch in good faith. A large part of it was completed by them in the face of appellant's objection after the action was commenced and a restraining order issued—the order that subsequently was dissolved.

To justify the issuance of an injunction there must be substantial injury. Substantial "injury," however, does not necessarily involve substantial "damage." Where a valuable property right exists—no matter how small its value may be—and that right is substantially and materially interfered with by a nuisance caused by the wrongful use of the property by another, if the injury is of a continuing nature, requiring a multiplicity of suits to secure its redress, the injured owner of the right, if he be not himself at fault through laches or otherwise, is entitled to injunctive relief, not as a matter of discretion on the part of the court, but as a matter of right; and his right to this relief is not affected by any comparison of his loss with that resulting to the defendant by reason of the granting of the relief. The rule that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can be heard to say that he is injured by being prevented from doing to the hurt of another that which he has no right to do. When a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable ex debito justitiæ, and needs not to be implored ex gratia. There can be no balancing of conveniences when such balancing involves the preservation of an established right which will be extinguished if relief be not granted against one who would destroy it—yea, though the right be but that of a peasant to but a part of his small tenement. Walters v. McElroy, 151 Pa. 549, 25 Atl. 125; Evans v. Fertilizing Co., 160 Pa. 209, 28 Atl. 702; Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712; Higgins v. Flemington Water Co., 36 N. J. Eq. 538; Bristol v. Palmer, 83 Vt. 54, 74 Atl. 332, 31 L. R. A. (N. S.) 887, and extended note; Woodruff v. North Bloomfield Gravel Min. Co. (C. C.) 18 Fed. 753, 9 Sawy. 542; Weimer v. Lowery, 11 Cal. 104; Gregory v. Nelson, 41 Cal. 278; Learned v. Castle, 78 Cal. 454, 21 Pac. 11; Moore v. Clear Lake W. Works, 68 Cal. 146, 8 Pac. 816; Heilbron v. Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Allen v. San Jose L. & W. Co., supra; Allen v. Stowell, 145 Cal. 666, 79 Pac. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80; Vestal v. Young, supra.

The obvious distinction between "injury" and "damage"—a distinction not always observed when dealing with the question before us—is emphasized by Mr. Wood, who, speaking of a man's right of dominion over his property and the jealous care with which the courts have ever guarded this sacred right, says: "Whatever invades this right is a legal injury, whether damages ensue or not." Wood on Nuisances, § 783. See, also, sections 376 and 782. As is said in Learned v. Castle, supra, speaking of an injury to another's land that is a nuisance per se:

> "It is an injury to the right, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. * * * The right to an injunction, therefore, in such a case does not depend upon the extent of the damage measured by a money standard; the maxim de minimis, etc., does not apply."

Though dissenting from the majority decision in Sullivan v. Jones & L. Steel Co., supra, Chief Justice Mitchell was constrained to say that—

> "Where a clear legal right is being infringed, I agree that the remedy in equity is as mandatory as in law."

[7] Respondents have cited a number of cases where equitable relief was refused on the ground that the injury was merely theoretical, and the damage small. In so far as these were cases where injunctive relief was refused, it will be found on examination either that the injunction that was refused was an injunction pendente lite (as was the case in McGregor v. Silver King Min. Co., 14 Utah, 47, 45 Pac. 1091, 60 Am. St. Rep. 883), or that the injunction was refused because there was no injury, the land having no value whatever (as was the case in Crescent Min. Co. v. Silver King Min. Co., 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 810, a decision by a divided court). That the doctrine of the balance of convenience, so frequently determinative of the propriety of granting or denying a preliminary injunction, has no application to final decrees after hearing on plenary proofs, is firmly established in this and other states. Richards v. Dower, 64 Cal. 62, 28 Pac. 113; note to Bristol v. Palmer, supra, 31 L. R. A. (N. S.) 882. That an injunction may be refused where the property invaded is absolutely valueless is conceded. In such case there can be no real injury whatever. If the invaded property has no value, then, obviously, there can be nothing more than a mere theoretical injury, as was the case in Jacob v. Day, 111 Cal. 571, 44 Pac. 243, one of the cases cited by respondents. Here appellant's property, wrongfully invaded by respondents, has some value, even though small, and his claim to damages at law is indisputable, even though, measured in dollars, the amount appears insignificant compared with respondents' investment. We know of no principle of law or power in a court of equity to justify or authorize an invasion of the property rights of one private party to serve the convenience or necessities of another private party. Such a principle, if once adopted by judicial tribunals, upon grounds of necessity, would, in its practical operation, result in a system of judicial condemnation of the property of one citizen to answer an assumed necessity or convenience of another citizen, and the sacred right of private property, so jealously guarded by courts in all English speaking countries, would become but a shadowy unsubstantiality.

If it was error to deny appellant a final decree granting him injunctive relief, what shall be said of a judgment that actually adjudges respondents to be the owners of an easement in that part of appellant's land upon which, as trespassers, they have wrongfully built a portion of their reconstructed ditch? Not only does the decree do this; it goes to the length of enjoining appellant from even asserting any right adverse to such easement. This is tantamount to an injunction enjoining appellant from ever bringing an action at law for the trespass, or from suing to recover the damage, however small, caused to his land by respondents' unauthorized invasion of his property. Such a judgment is clearly erroneous. The same error likewise inheres in and vitiates the findings. For this reason a new trial is unavoidable.

[8] 2. Appellant complains of that part of the decree which adjudges respondents to be the owners of all the surface waters of the creek up to 60 inches—the capacity of their ditch—and himself the owner of but 2⅗ inches.

Adopting the testimony of those witnesses who testified that the duty of water on lands such as appellant's is 1 inch to 5 acres, and finding that appellant owns 13 acres of arable riparian land, the court found and adjudged him to be entitled to use thereon 2⅗ inches for irrigation and domestic purposes. In so finding and adjudging the court seems to have ignored entirely appellant's indubitable right, as a riparian proprietor, to have the stream flow through his land undeteriorated in quality and undiminished in quantity, save as respondents, as appropriators or adverse users, have acquired a superior right to take a definite quantity of water from the stream before it passes from appellant's land.

Since appellant is a riparian owner, the decree should not have attempted to limit his water right to the right to divert a fixed quantity—2⅗ inches—for irrigation and domestic uses. The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right—a right, among others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. Use does not create the right; disuse cannot destroy or suspend it. If his needs do not prompt him to make any use of the waters, he still has the right to have them flow onto, and along, and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of other riparian proprietors or prior appropriators, if any there be. Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390. The vice of the decree is that it limits appellant's right to such an amount as he may use for irrigation and domestic purposes upon his 13 acres of arable riparian lands. He owned 137½ acres, all of which was riparian to the stream and included the 13 acres of irrigable arable land. As between himself and respondents, appellant's right to the waters of the stream has no limitation, save as it is limited by the superior right of respondents as the owners of an appropriator's or adverse user's right. So limited, appellant's right to take water from the stream—as against respondents'—might be more or less than 2⅗ inches. Instead of fixing a definite quantity that appellant may take from the stream, and decreeing that his interest in the stream is confined to the right to divert such fixed quantity for irrigation and domestic uses, the court should have determined the amount that respondents are entitled to divert, and should have decreed that appellant has all the rights of a riparian proprietor, limited only by respondents' superior right to take from the stream a quantity ascertained and fixed by the court. True, the court did undertake to fix the quantity that respondents have the right to take from the stream, but in so doing proceeded upon an erroneous theory; and the finding that respondents are the owners of the waters of Hopper creek to the extent of 60 inches is not supported by the evidence.

[9] Respondents contend that, because the evidence showed the capacity of their ditch to be 60 inches, the court was justified in inferring that 60 inches was the amount reasonably necessary for the beneficial uses to which they applied the water. That, in fixing the extent of respondents' right, the court proceeded upon the theory that the capacity of respondents' ditch measures their right to the water of the stream, regardless of whether that amount be greater or less than the amount reasonably necessary for their beneficial uses, is clearly apparent from a consideration of the whole record. In adopting the theory that the capacity of their ditch measures respondents' right to the water of the stream, the court indubitably erred. The extent of an appropriator's or adverse user's right is limited, not by the quantity of water actually diverted, nor by the capacity of his ditch, but by the quantity which is, or may be, applied by him to his beneficial uses. Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139. An appropriator's right is limited to such quantity, not exceeding the capacity of his ditch, as he may put to a useful purpose upon his land within a reasonable time, by use of reasonable diligence. Senior v. Anderson, 115 Cal. 496, 47 Pac. 454. A diversion over and above what is reasonably necessary for the uses to which he devotes the water cannot be regarded as a diversion for a beneficial use. He cannot waste. If there is any surplus over and above the water reasonably necessary for his beneficial use, the riparian proprietor below his point of diversion has the right to demand that it flow in the stream as it has been accustomed to flow.

[10, 11] Respondents' suggestion that, because the evidence shows the capacity of their ditch to be 60 inches, and that they always used the ditch capacity, the court could infer therefrom that 60 inches is reasonably necessary for their beneficial uses, does not impress us as having any force in the face of certain indisputable facts. It may be that, in the absence of any direct evidence to the contrary, a court would be justified in presuming that an appropriator takes no more than his reasonable uses necessitate. But here we have direct evidence, furnished by respondents themselves, that 60 inches greatly exceeds the amount reasonably necessary for their beneficial uses. Thus, Walter Warring, one of the respondents, testified that 30 inches, constant flow, would be sufficient to irrigate respondents' lands together with a piece belonging to one Pedleford. Respondents endeavor to make a point of the fact that this witness used the expression "constant flow," when saying 30 inches would suffice. But the 60 inches awarded to respondents by the decree means 60 inches "constant flow," or else the decree is fatally uncertain.

[12] As indicating that the court seems to have tried the case upon the theory that the capacity of the ditch measures respondents' right, regardless of whether it carried more than was reasonably necessary for their beneficial uses, are the following facts, shown by the record: In the early stages of the trial, in reply to a statement by the court, counsel for respondents said:

> "We claim we are not confined to the necessity" (that is, the amount necessary for respondents' beneficial uses). "We claim we have a right to use as much as we have been using."

And when, later on in the trial, counsel for respondents asked one of their witnesses how much water, during the irrigation season, respondents took out of the stream, and counsel for appellant objected on the ground that counsel should ask, "How much was reasonably necessary for them to take?" the court, instead of sustaining, overruled the objection. It was a proper objection, and should have been sustained. This ruling of the court, coupled with its failure to limit the quantity decreed to respondents to the amount which they themselves testified would suffice for their reasonable needs, convinces us that the court adopted respondents' theory that the capacity of their ditch measured the quantity of water they were entitled to take, without regard to any waste on their part.

We are fully aware that an appellate court will not reverse a finding if there is a substantial conflict in the evidence; but the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion. And where, as here, it is clearly apparent that the court's finding that respondents are entitled to 60 inches of water is based upon the erroneous theory that the extent of their right is measured by the capacity of their ditch, and that amount of water has been decreed to them in spite of the testimony of one of themselves that less than half of that quantity would suffice for the reasonable needs of their lands, we have no hesitancy in holding that the finding is within the rule declared in Field v. Shorb, 99 Cal. 661, 34 Pac. 504; Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834; and In re Coburn, 11 Cal. App. 604, 105 Pac. 924.

[13] The attempted appeal from the order denying appellant's motion for a new trial was taken after section 963 of the Code of Civil Procedure was amended in 1915 (St. 1915, p. 209). The appeal from that order, therefore, is dismissed.

The judgment is reversed.

We concur: SLOANE, J.; THOMAS, J.

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40 Cal. App. 51

SALLEE v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 2581.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1919. Rehearing Denied March 22, 1919; Denied by Supreme Court April 21, 1919.)

1. Street Railroads 🔑112(1) — Injury to Pedestrian—Prima Facie Case.

In action for injuries to plaintiff pedestrian, when crossing track behind trolley car, due to her being struck and caught by a trolley rope swinging from defendant's car, proof that defendant knew that the rope was dangling or that the officials knew it was not required to make a prima facie case for plaintiff.

2. Street Railroads 🔑112(2) — Injury to Pedestrian—Negligence.

Operating a trolley car upon and across a crowded thoroughfare with the trolley rope at its rear end swinging in a loop, which rendered it liable to strike, catch, and cast down pedestrians passing behind such car, was in and of itself a negligent act.

3. Street Railroads 🔑112(2) — Injury to Pedestrian—Doctrine of Res Ipsa Loquitur—Applicability.

In action for injuries to plaintiff pedestrian, when crossing track behind trolley car, due to her being struck and caught by a trolley rope swinging from defendant's car, plaintiff was entitled to rely on the doctrine of res ipsa loquitur to make out a prima facie case.

4. Street Railroads 🔑114(4) — Injury to Pedestrian—Negligence—Evidence.

In action for injuries to plaintiff pedestrian, when crossing track behind trolley car, due to her being struck and caught by a trolley rope swinging from defendant's car, facts *held* to afford sufficient evidence, in the absence of explanation that the accident occurred through the want of proper care on the part of defendant or its employés.

5. Street Railroads 🔑114(21)—Injury to Pedestrian—Proximate Cause—Evidence.

Evidence *held* sufficient to show that the striking of plaintiff pedestrian by a swinging loop of trolley rope attached to defendant's car, and not plaintiff's contributory negligence, was the proximate cause of plaintiff's injuries.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Margaret M. Sallee against the United Railroads of San Francisco. Judgment for defendant, and plaintiff appeals. Reversed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the defendant's favor after an order granting its motion for nonsuit in an action for damages for personal injuries. The plaintiff alleged that her injuries occurred while she was walking on the southerly side of Market street to the Ferry Building in the city and county of San Francisco and was in the act of crossing the car tracks of the defendant on East street at its intersection with the said southerly line of Market street, and that the accident occasioning her injuries happened in this wise: One of the cars of the defendant operated by its employés was in the act of passing along said East street northerly on to Market street; the said plaintiff waited until said car had passed before attempting to cross the tracks behind it; the defendant, through its employés operating said car, had negligently permitted the trolley rope to hang loose and swing out from the rest of the car in a semicircle, one end being attached to the trolley and the other to the car. The fact that said trolley rope was swinging loose from said trolley and was endangering the lives or safety of people passing behind said car was known to said defendant at said time and to the servants of said defendant who were operating said car. As the plaintiff was in the act of passing behind said car without observing said swinging rope, she was struck and caught by said rope about her neck and violently thrown down, and was thereby severely injured. The defendant by its answer denied the said alleged negligent acts on its part, and pleaded contributory negligence on the part of the plaintiff. The plaintiff, both by her own testimony and that of her supporting witnesses, offered evidence tending to prove the foregoing averments of her complaint, save and except the averment that the fact that the said trolley rope was swinging loose in the manner stated in her complaint was known to the defendant or its employés at the time of said accident. At the conclusion of the plaintiff's testimony the defendant moved for a nonsuit upon the ground, first, that the evidence failed to show negligence on the part of the defendant; second, that the evidence showed contributory negligence on the part of the plaintiff; and, third, that the evidence failed to show any proximate connection between the alleged negligence of the defendant and the injuries complained of. The court granted said motion upon the express ground that there was no evidence "that the defendant knew that the rope was dangling or that the officials of the company knew it."

[1] The sole question presented by the appellant upon this appeal is as to whether such proof was necessary on the plaintiff's part in order to make out her case; the contention of the appellant being that this is one of the class of cases to which the doctrine of res ipsa loquitur is to be applied, and that the presumption of negligence arising from its application would be sufficient to make out the plaintiff's case as against a motion for nonsuit. The respondent resists this contention upon two asserted grounds—first, that the doctrine of res ipsa loquitur does not apply to cases involving collisions between street cars and pedestrians; and, second, that if it does have such application it is limited to cases where the duty of extreme care devolves on the defendant by reason of the dangerous nature of the instrumentality through the operation of which the injury occurs.

[2] After a careful review of the facts of this case as presented by the plaintiff's proofs, we are not satisfied that the exigencies of her case required recourse to the doctrine of res ipsa loquitur in order to escape a nonsuit. The act of the defendant in operating a trolley car upon and across a crowded thoroughfare, with the trolley rope at its rear swinging in a loop which rendered it liable to strike and catch and cast down pedestrians passing behind such car, was in and of itself a negligent act. The conductor of the car was charged with the duty of adjusting from time to time its trolley by means of this trolley rope, and of fastening the latter after each of such adjustments so that it would not swing loose and thereby menace the safety of pedestrians passing behind and in proximity to the moving car. It was his failure to perform this duty which led directly to the plaintiff's contact with the rope and consequent fall and injuries. To hold upon such a state of facts that the plaintiff had cast upon her the further burden of proving that the conductor knew that he had been negligent would be to require something which the plaintiff, in most cases at least, could never supply.

[3] Assuming, however, that the plaintiff was required to furnish this link in the chain of proofs sufficient to make out a prima facie case, we are of the opinion that she was entitled to rely on the doctrine of res ipsa loquitur to supply that link. We disagree with the respondent's first contention that this doctrine has no application to cases of collisions between street cars and pedestrians, and find ourselves supported in that view by the following authorities, in each of which the action was similar in character and parties to the instant case: Dillar v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; Uggla v. West End, etc., Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481; Toby v. Scranton Ry. Co. (D. C.) 245 Fed. 365; Hull v. Berkshire St. Ry. Co., 217 Mass. 361, 104 N. E. 747; Washington v. Rhode Is. Co. (R. I.) 70 Atl. 913; Haynes v. Raleigh G. Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. (N. S.) 810, 41 Am. St. Rep. 786; Cincinnati Tr. Co. v. Holzenkamp, 74 Ohio St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 800, 113 Am. St. Rep. 980; Jones v. Union Ry. Co., 18 App. Div. 267, 46 N. Y. Supp. 321.

The rule as stated in Shearman & Redfield on Negligence (5th Ed.) § 59, does not recognize the exception which the respondent contends for, but states generally the doctrine as follows:

> "Proof of an injury, occurring as the proximate result of an act of the defendant, which would not usually, if done with due care, have injured any one, is enough to make out a presumption of negligence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use

proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

An illuminating case touching the proper application of the doctrine of res ipsa loquitur is the case of Delaware, etc., Co. v. Dix, 188 Fed. 901, 110 C. C. A. 535, wherein the court, in defining and applying the rule, and after stating the facts which the plaintiff in that case had proved, proceeds to state:

> "Unless, then, the plaintiff was required to go further and show that the defendant knew, or ought to have known, that the car door was loose, then the motion for a nonsuit was properly refused, as also the motion for judgment non obstante veredicto. Under the doctrine, therefore, of res ipsa loquitur, was the plaintiff required to prove more? That doctrine is clearly stated by Wigmore, in his work on Evidence (volume 4, § 2509), as follows: 'With the vast increase in modern times of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed "accident" by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. "Res ipsa loquitur" is the phrase appealed to as symbolizing the argument for such a presumption. In England, a rule of that sort has for a generation been conceded to exist, for some classes of cases at least. In the United States the presumption has spread rapidly, although with much looseness of phrase and indefiniteness of scope. * * *'
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> "'Res ipsa loquitur,' the thing speaks for itself, symbolizes that the occurrence of the injury raises a presumption of culpability on the part of the owner or manager of the apparatus, because in cases where it applies powerful and dangerous agencies in the control of one will do harm unless properly constructed or managed, and also because the evidence of the cause of the injury, whether innocent or blameworthy, is in the possession of, or accessible to, the person constructing or operating, and not accessible to the other party. Erle, C. J., in Scott v. London & St. K. Docks Co., 3 H. & C. 596 (injury to a passer-by from the falling of goods from a train), said: 'There must be reasonable evidence of negligence, but, when the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen when those who have the management use proper care, it affords evidence in the absence of explanation by the defendant that the accident came through want of care.'
>
> "How completely this applies to the case at bar. Such an accident would not happen in the ordinary use of a refrigerator car, unless the defendant was negligent in permitting it to have its door open with an extending lever. It had in its possession the evidence by which it might be explained."

[4] In the instant case, as in the case last above quoted, there was reasonable evidence of negligence; the appliance was shown to be under the management of the defendant or its servants; the accident was such as in the ordinary course of things could not happen when those in the immediate charge and control of the appliance use proper care. These facts, in our opinion, afford sufficient evidence, in the absence of explanation by the defendant, that the accident occurred through the want of proper care on the part of said defendant or its employés. This being so, the trial court was in error in granting the defendant's motion for nonsuit for the want of the link in the plaintiff's case which the application of the doctrine of res ipsa loquitur supplied.

[5] As to the other points urged by the respondent, no extended discussion is required. There is sufficient evidence that the striking of the plaintiff by the swinging loop of the trolley rope was the proximate cause of her injuries to have entitled the case to be passed upon by the jury. There was no such evidence of contributory negligence upon the plaintiff's part to have warranted the court in withholding the case from the consideration of the jury upon that ground as a matter of law.

No other reason being urged by the respondent as a justification of the order of the trial court granting a nonsuit and for its judgment based thereon, it follows that said order was erroneous, and, hence, that the judgment must be reversed. It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 31

FRANKLIN v. SOUTHERN PAC. CO. et al. (Civ. 2593.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1919. Rehearing Denied by Supreme Court April 18, 1919.)

1. JURY ⟹13(9)—RIGHT TO JURY TRIAL—INJUNCTION.

In an action for damages and for an injunction for the flooding of land, the parties are entitled to a jury trial on the issue as to damages, and where such trial is had the general verdict is binding on the court which cannot vacate it except on motion for new trial, and it was error for the court to set aside a verdict for defendant and to award damages notwithstanding the verdict.

2. LIMITATION OF ACTIONS ⟹183(2)—METHOD OF PLEADING—EXCLUSIVENESS OF STATUTE.

Code Civ. Proc. § 458, providing that the statute of limitations may be pleaded by giving the number of the section and subdivision relied on, is not exclusive, and allegations by defendant, in a suit for damages and to enjoin flow

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of water, that the embankments had been erected for more than five years prior to the action, were sufficient to raise the issue of limitations.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Jesse Franklin, as administrator of the estate of John Franklin, deceased, against the Southern Pacific Railroad Company and another. From judgment for plaintiff, defendants appeal. Reversed and remanded, with direction.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants.

B. J. Bradner, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought to recover for damages alleged to have been sustained by the wrongful acts of defendants in constructing and maintaining certain embankments and dikes on their right of way, as a result of which, and lack of sufficient culverts therein, the waters of a natural wash were obstructed and diverted from their usual course and the flow thereof precipitated upon his land; and also sought a decree enjoining defendants from maintaining such obstruction, which, if continued, it was alleged would cause him irreparable damage.

In accordance with demand therefor, a jury was impaneled, to which the issue as to damages was, upon evidence adduced and instructions given by the court, submitted, as a result of which it rendered a verdict in favor of defendants. Thereafter, notwithstanding such verdict and in disregard thereof, the court made findings upon all the issues and upon which it awarded plaintiff $2,500 damages sustained, and made a decree perpetually enjoining defendants from maintaining the obstruction by means of which it was alleged defendants had wrongfully diverted the flow of water upon plaintiff's land.

From the judgment and decree so rendered, defendants have appealed.

Defendants' first contention is that the parties were entitled as of right to a trial by jury of the issue at least as to the damages alleged to have been sustained, and that its verdict was binding upon the court which, in the absence of proceedings for a new trial, had no power to vacate and set aside the same.

[1] This identical question was before this court in the case of Farrell v. City of Ontario, 178 Pac. 740, wherein Hon. Louis W. Myers, as justice pro tem. (who presided as trial judge in the instant case), in an exhaustive opinion reviews a number of divergent authorities of this state touching the question, as a result of which it was held that, in an action for damages and for an injunction for the abatement of a nuisance, the parties are entitled to a jury trial upon the issue as to damages, and, where such trial is had, the general verdict thereon is binding upon the court, which has no power to vacate it except upon motion for new trial. We refer, without further discussion, to that opinion and the authorities referred to therein as determinative of the question.

[2] In their answer, "for a second, further, separate, and distinct defense," defendants alleged:

> "That all of said improvements, in so far as the general right of way of the said defendants, including the improvements of ditches described in plaintiff's complaint, is concerned, were erected more than five years prior to the institution of this action, and the cause of action attempted to be set up by plaintiff, if any, is now barred by the statute of limitations of this state; said statute of limitations being hereby pleaded as a bar to this action."

As to this defense the court, in ruling upon defendants' motion for nonsuit, stated that the statute of limitations as a defense had not been sufficiently pleaded to put it in issue, and hence made no finding thereon. In thus ruling and omitting to make a finding as to the issue tendered, the court erred. While section 458, Code of Civil Procedure, provides that the statute of limitations as a bar to an action may be pleaded by giving the number of the section and subdivision thereof relied upon, nevertheless such mode of pleading is not exclusive. As said in Manning v. Dallas, 73 Cal. 420, 15 Pac. 34:

> "There are only two ways of pleading the statute, one by stating the facts showing the defense, and the other by stating 'generally that the cause of action is barred by the provisions of section (giving the number of the section, and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure.'"

In the pleading under review the defendants stated the facts, namely: That the improvements, embankments, dikes, and ditches described in plaintiff's complaint, and which it is alleged caused a diversion of the flow of water, had been erected for "more than five years prior to the institution of the action." In our opinion, the allegation was a sufficient pleading of the facts to raise the issue as to whether or not the cause of action was barred by the statute of limitations.

We do not feel called upon to determine the correctness of the court's statement that the statute would not commence to run until plaintiff had suffered damage from the obstruction; but, having concluded the statute of limitations as a bar to the action was sufficiently pleaded, it clearly tendered an issue upon which defendants were entitled to a finding, and this was not made by the trial court.

The judgment appealed from is reversed, and the cause remanded to the trial court with direction to enter judgment in accordance with the general verdict of the jury upon the issue as to damages; and that, as to the equitable issue involving plaintiff's right to the injunction prayed for in his complaint, a new trial thereof be had upon such evidence as may be properly received thereon.

We concur: CONREY, P. J.; JAMES, J.

Ex parte KANE. (Cr. No. 2254.)

(Supreme Court of California. May 19, 1919.)

In Bank.

Application by Jack Kane for writ of habeas corpus. Application denied.

Jack Kane, in pro. per.

PER CURIAM. The within application is denied. See In re Lee, 171 Pac. 958; In re Fritz, 177 Pac. 157; In re McCready, 177 Pac. 459.

All concur, except LAWLOR, J., absent.

GILLESPIE v. FENDER. (L. A. 6094.)

(Supreme Court of California. April 7, 1919.)

1. MORTGAGES 🔑559(6)—VACATION—JURISDICTION — DEFICIENCY JUDGMENT — PLEADING TO SUSTAIN.

That a deficiency judgment was rendered against defendant in a mortgage foreclosure action, though complaint alleged no facts showing a right thereto, did not invalidate the judgment for want of jurisdiction; such defect not going to the jurisdiction of a court.

2. JUDGMENT 🔑18(2) — VALIDITY — SUFFICIENCY OF COMPLAINT.

Failure of complaint to state facts sufficient to constitute a cause of action does not render a judgment void.

In Bank.

Action by George S. Gillespie against Frank E. Fender. Application for writ of supersedeas. Denied.

Charles L. Childers, of El Centro, for applicant.

PER CURIAM. In view of the facts stated in the petition, the application for a writ of supersedeas must be denied.

[1, 2] It is clear that there is no merit in the appeal from the order denying the motion to vacate the judgment for deficiency entered against the petitioner here. The sole ground of the motion to vacate the judgment was that the judgment is void and that the same was entered by the court without jurisdiction. This claim was based entirely upon the proposition that the complaint in the action, one for the foreclosure of a mortgage, had not stated facts sufficient to show any liability on the part of the petitioner for any deficiency that might remain after the sale of the mortgaged premises; in other words, did not state a cause of action against petitioner in respect to such deficiency. It is clear that this was in fact the situation. But this was not a defect going to the jurisdiction of the superior court, and the judgment in respect thereto was not void. The complaint sought this very relief, and the court erroneously concluded that the plaintiff in that action was entitled to this relief as against petitioner. It is thoroughly settled in this state that the failure of a complaint to state facts sufficient to constitute a cause of action does not render a judgment void. The court had full jurisdiction of the subject-matter of the action, and, by reason of personal service on petitioner, full jurisdiction of the person of the defendant as to all the matters tendered by the complaint. See Crouch v. Miller, 169 Cal. 341,[1] and cases therein cited. The remedy of the petitioner, who must be held to have been perfectly advised of the claim of the plaintiff in that action, as stated in his complaint, was to contest that claim in the trial court, or on appeal from that judgment. Possibly, also, he might have invoked relief by motion under section 473 of the Code of Civil Procedure on account of excusable mistake, neglect, or inadvertence on his part. No such motion, was however, made. The superior court was not at liberty to consider the question of the sufficiency of the complaint on the motion that was in fact made.

The application for a writ of supersedeas is denied.

ANGELLOTTI, C. J., and SHAW, LAWLOR, WILBUR, and LENNON, JJ., concur.

180 Cal. 204

GAGE CANAL CO. v. EAST RIVERSIDE WATER CO.

EAST RIVERSIDE WATER CO. v. GAGE CANAL, CO. et al.

(L. A. 4780.)

(Supreme Court of California. April 11, 1919.)

1. WATERS AND WATER COURSES 🔑158½(1) —CONTRACT—EVIDENCE AS TO RIGHT ACQUIRED.

Evidence *held* to sustain a finding that a contract granting rights to water arising on certain lands was not restricted to water having its source on a specified tract which had never in fact furnished any water, especially as the parties had long acted on a contrary construction of the contract.

2. WATERS AND WATER COURSES 🔑158½(1) —ASSIGNMENT OF RIGHTS—EVIDENCE.

Evidence that defendant had been long recognized as a successor to all rights held by a water rights grantee, and that plaintiff had recognized such fact by verified pleadings, *held* to sufficiently establish defendant's succession to rights created by the grant.

Department 2.

Appeal from Superior Court, Riverside County; Charles Wellborn, Judge.

Action by the Gage Canal Company against the East Riverside Water Company, in which defendant filed a cross-complaint against the plaintiff and the Riverside Trust Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

Purington & Adair and McFarland & Irving, all of Riverside, and Henry Goodcell, of San Bernardino, for appellant.

William Collier, of Riverside, for respondent.

MELVIN, J. Plaintiff appeals from the judgment, and embraced within the appeal are the points made on a motion for a new trial, which was denied.

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[1] 146 Pac. 880.

By its complaint plaintiff alleged its ownership of the Gage Canal, situate in part in San Bernardino and partly in Riverside county, and its right to all of the waters carried in said canal except 367.78 inches, measured under a four-inch pressure, to which it admitted that respondent has a prior and perpetual right. It is alleged that during all the time of plaintiff's ownership defendant, without right and without plaintiff's consent, has been taking 696.88 inches of water, or 329.1 in excess of its right, and that it threatens to continue such taking and to continue to deprive plaintiff of such excess. The prayer is for an injunction prohibiting and restraining defendant from taking out of said canal any water in excess of 367.78 inches.

By its answer defendant alleged that the Gage Canal Company was merely an instrumentality and the representative of the Riverside Trust Company, Limited, and the latter corporation was made a party to the action. This pleading also set forth the history of the canal, which was built by Matthew Gage, and conveyed in 1890 to the Riverside Trust Company. It was alleged that prior to said conveyance the East Riverside Water Company and its water users had obtained from said Gage a title to 696.88 inches of water, which was in perpetuity and prior and superior to any rights of the grantor; that each of the corporations succeeding Gage had taken the canal with knowledge of said right; that for more than 20 years the designated amount of water had been delivered to the water company for distribution to its water users; and that said right had been judicially confirmed by certain decisions binding upon the parties hereto, in which the water company's obligation to pay its share of the expenses for the maintenance of the canal as originally constructed had been adjudged, and in one of which the water company had been found not to be liable for the expense of pumping from certain artesian wells from which a large part of the water supply flowing in the Gage Canal was and is obtained. The defendant also filed a cross-complaint to quiet its title to 696.88 inches of water.

The court found that before Matthew Gage transferred his interest to the trust company the water company had the right to take about 700 inches of water; that the trust company took with knowledge of this obligation and that it solemnly in writing assumed the burden; that by transfer of rights the amount to which the water company had been entitled had been reduced to 696.88 inches; that the canal company had assumed this burden; and that the water company was entitled to have its title quieted to the amount of water demanded by it. Judgment was entered accordingly.

The principal controversy seems to have been with reference to the validity of a certain grant made many years ago by the predecessor of plaintiff to the East Riverside Land Company. The predecessor of the water company here defendant is described therein as the assignee of the Iowa Land & Improvement Company. It was dated November 10, 1886. By it for a named consideration of $167,500 Matthew Gage sold, granted, and conveyed to the East Riverside Land Company:

> "Three hundred and thirty-five (335) inches of water measured under a four-inch pressure, together with the use thereof, arising and flowing from the springs, water sources, water rights and artesian wells, bored or to be bored on that part of the lands of grantor lying above the flow of the Gage Canal so called, and west of the west line of lot thirteen in block 72, seventy-two, of the rancho of San Bernardino."

The contract also contains the following paragraph:

> "It is understood and agreed and said understanding and agreement is indicated by the acceptance of this conveyance, that the said three hundred and thirty-five inches of water, under a four-inch pressure have been actually delivered upon the lands of the East Riverside Land Company."

Upon this contract and its predecessor the East Riverside Water Company bases its claim to 321.1 inches of water, which, according to the findings, is now being distributed, although originally that company received through gates and openings constructed at its expense the full 335 inches of water. The agreement with the Iowa Land & Improvement Company, upon which the assigned claim of the land company was based, was made in August, 1885.

After setting forth said contract and the conveyance to the East Riverside Land Company, the court found:

> "That on the trial of this cause it was claimed both by the Riverside Trust Company, Limited, and the Gage Canal Company, cross-defendants, that by the terms of said contract and conveyance the water sources of said canal, for the purposes of said contract and conveyance, were and consisted of about 30 acres of land, being a part of lot 12 lying westerly of a small portion of lot 13 and north of the south bank of the Santa Ana river, as shown upon a plat offered in evidence by the cross-defendants and marked Exhibit 65. That said lots as shown by said plat were a part of block 72 of the lots, blocks, and surveys laid down and designated upon the plan of the surveys of the rancho of San Bernardino, as recorded in the office of the county recorder of said San Bernardino county, Cal., and being a part of said Carit tract or Orange Grove homestead.
>
> "That as to said claim made by the said cross-defendants the court finds that the same is not sustained by the evidence, and further finds that no water of any kind has ever been furnished from said portion of said Carit tract and water sources for the purpose of supplying the Gage

Canal or the defendant East Riverside Water Company or its predecessors in interest. That the East Riverside Water Company is still the owner of, in control of, and has used continuously, and its predecessors in interest have used continuously under said contract made with the Iowa Land & Improvement Company, and at the date of the commencement of this action, and at the date of the trial of this cause, continued to use under said contract and conveyance 329.1 inches of water, and that no part of the same since the making of said contract has ever been furnished from said tract of land as claimed by cross-defendants to be the exclusive water sources for the whole of the 335 inches provided in said contract, and for the 329.1 inches still owned, used, and distributed by the East Riverside Water Company under said contract, but that at all times since the making of that contract and the execution of same, and since the year 1886, the said 329.1 inches of water have been furnished from the water sources of the said canal as transferred by deed and contract from the Riverside Trust Company, Limited, to the Gage Canal Company under date of March 17, 1910, and executed by the said Riverside Trust Company, Limited on the 2d day of June, 1910, and said contract as a part of said deed being executed on the 17th day of March, 1910."

[1] This finding is fully sustained by the evidence. For many years, although there was litigation between Mr. Gage's successors and the respondent herein, there was never any assertion, until shortly before the commencement of this action, that the water to be supplied under the contract and conveyance from Gage was to be limited to that to be obtained from the "Carit tract" or "Orange Grove homestead." In Riverside Heights Water Co. v. Riverside Trust Co., Limited & East Riverside Water Co., 148 Cal. 457, 83 Pac. 1003 (decided in January, 1906), it was found that the amount of water to which the company here respondent was entitled was something more than 700 inches. One of the matters there specifically settled was the extent of the water company's liability to the owner of the canal for repairs to the canal. In Riverside Trust Co., Limited, v. East Riverside Water Co., 173 Fed. 241, 97 C. C. A. 407 (decided in October, 1909), it appears that the trust company pleaded this very title of the water company to the 335 inches of water and asked that the said East Riverside Water Company be compelled, under the terms of said contract and grant, to pay its proportion of the expense of putting pumping plants in operation upon some of the artesian wells which, at the time of the construction of the canal, had flowed by gravity. The trial court found, and the Court of Appeals approved the finding, that upon Gage or his successors rested the burden of producing the water, while upon the vendees was placed the duty of contributing to the expenses of maintaining the canal and its branches. The entire course of conduct of the producers of the water and respondent herein for many years indicated that both interpreted their respective duties and obligations as to quantity and sources of water under the "Iowa Land Company" contract exactly as found by the court. Not until January, 1911, did the plaintiff make any sort of claim that it was not bound by this agreement. At that time in a letter to respondent from the canal company, the claim was made that under the deed from Gage to the East Riverside Land Company "the lands described," from which alone respondent "is entitled to derive 335 inches of water, have never in fact produced that water or any part of it." In this letter, however, the Gage Canal Company offered to compromise the matter on the basis of the assumption by the water company of some of the expense of pumping water from the artesian wells. There was no such adjustment, and for more than two years until the commencement of this action respondent continued to take its full complement of water as represented by all of its contracts and grants just as it had been doing for something more than a quarter of a century. These and other circumstances entirely justified the court in ruling adversely to appellant's attempted construction of the contract. One of those circumstances is the fact that by the very language of the conveyance by Gage the 335 inches of water were being at that time actually delivered to the grantee. It would be absurd, therefore, to hold that the parties to the contract, Gage who made the grant and the grantee that paid many thousands of dollars for the water right, contemplated production of the water from a small tract from which no drop of water ever had been or could be developed for use in the canal.

The Riverside Trust Company, Limited, and afterwards the plaintiff took all title to the canal, subject to the prior rights of Gage's grantees. This is evidenced by solemn writings which we need not be at pains to reproduce in this opinion.

[2] Appellant insists that the record fails to show by competent evidence that the water company is the successor to the rights of the East Riverside Land Company. But there was ample proof that the defendant and cross-complainant was recognized at all times as the successor to all rights held by the East Riverside Land Company, and that appellant and its predecessor by verified pleadings declared a duty resting upon the owner of the canal to furnish water to respondent under the obligation of Gage's contract with the Iowa Company and his grant to the East Riverside Land Company.

No other alleged errors require analysis or comment.

The judgment is affirmed.

I concur: LENNON, J.

SHAW, J. (concurring). I concur in the judgment and in the opinion of Mr. Justice MELVIN, but I desire to state some additional reasons why in my opinion the judgment should be affirmed.

There was ample evidence to establish the fact that the defendant, East Riverside Water Company, prior to the year 1900, owned and enjoyed the right to receive through the canal now maintained by the Gage Canal Company a flow of water amounting to 696.88 miners' inches, subject to the burden of paying its ratable share of the expenses of operating and maintaining the canal from its beginning at the water sources down to section 30 on the north bank of the Arroyo Tequesquite. This right was derived from grants made by Matthew Gage, the original owner of the water and its sources. These grants described the water which was the subject of the grant as a stated number of "inches of water measured under a four inch pressure, together with the use thereof, arising and flowing from the springs, water sources, water rights and artesian wells bored or to be bored," on the parcel of land described and belonging to Gage, or in words of like effect. The right to 367.78 miners' inches of water under these grants is admitted. It is the remaining 329.1 miners' inches which the plaintiff seeks to enjoin the defendant from taking. The right to receive this 329.1 inches from the canal so long as it was composed of water "arising and flowing from the springs, water sources, water rights and artesian wells" bored on the described land, has never been seriously disputed. But about the year 1900, 14 years after the date of the grant, owing to drought and to the apparent lowering of the water plane and of the water pressure in the vicinity of the wells, water ceased to flow from the artesian wells and none has since flowed therefrom, except such as has been raised and made to flow by means of pumps installed in the wells and maintained and operated by the Gage Canal Company and its predecessors in interest in charge of the canal.

The original grants of Gage contained no agreement or covenant on his part to keep up the flow of water in the canal by pumping water into it from wells or other sources, in the event that the water ceased to arise and flow naturally from the wells into the canal. The plaintiff herein, as successor to Gage, as I understand its position, although it is not very clearly stated in its briefs, claims that the only water which was the subject of the grant was water naturally arising and flowing from the wells, springs and other sources; that there was no grant of any water other than that which came to the surface in this way; that plaintiff never has been and is not now under any obligation to obtain water from the wells or elsewhere by means of pumps and conduct such water into the canal to satisfy the grant; that when the water permanently ceased to flow from the wells the right which was the subject of the grant became extinguished and that when plaintiff obtained other water by means of pumps or otherwise, either from the wells or elsewhere, it did that which it was not bound to do; that it is under no obligation to continue to pump that water and deliver it to the water company, and, consequently, that the water company has no right to take from the canal any part of the water flowing therein so obtained by pumps. The main question thus presented for decision is whether or not, by reason of the language of the grants or otherwise, the plaintiff, as successor of Gage, is bound to maintain the supply of water in the canal necessary to fulfill the grants, even if it is obliged to resort to pumps, or to obtain the water from some other source, in order to do so.

I am unable to find in the language of the grants anything which imposes this obligation upon Gage and his successors in interest. Apparently, the grant was of water naturally flowing, and there is nothing to indicate that the maintenance of the supply by means of pumps or other artificial constructions was intended or contemplated by the parties. If there was no other evidence of the right to insist that the plaintiffs should produce the water by pumps than these grants, I should be inclined to hold that the judgment was erroneous.

It appears, however, that when the water ceased to flow in the year 1900, the country had reached such a state of development that the continuance of the supply was necessary in order to prevent disaster. In this emergency the Riverside Trust Company, the immediate predecessor of the plaintiff, proceeded to install pumps and maintain the supply of water in the canal by pumping the required amount from the wells from which the water previously had flowed naturally. This water it delivered, as before, to the parties holding rights under the Gage grants. This immediately gave rise to the question whether the parties holding these rights were obliged to contribute to the additional expense of obtaining the water caused by the necessity of pumping. The water users claimed that the trust company was bound to maintain the supply, while the trust company claimed to the contrary and presented bills to the users, for the due proportion of each, of the expenses of installing and operating the pumps. The East Riverside Canal Company refused to pay these bills, and thereupon the trust company began an action against it in the United States District Court for the Southern District of California to recover the ratable share of such expenses which it had charged to said canal company, basing its action upon the theory that it was under no obligation to pump the water and that all the parties interested were bound to contribute to the expense thereof. In that action the court decided that the intervention of unusual droughts and the cessation of the natural flow of the water did not relieve the plaintiff from its obligation to supply the water which was to be furnished under the terms of the original grants and that said grants "import that upon Gage rested the burden of producing the water and causing the same to flow upon the surface, thence to be turned into the canal and delivered continuously and permanently." Riverside Trust Co. v. East Riverside Water Co., 173 Fed. 244, 97 C. C. A. 410. Judgment was given accordingly in favor of the defendant. This judgment was introduced in evidence to support the claims of the defendant in this action. It was clearly an adjudication to the effect that the trust company, as successor to Gage, was obliged to maintain enough water in the canal to satisfy the grants, at least if there was enough in the land comprising the source, and that the water company was entitled to receive the same without contributing anything to the expenses of maintaining and operating the pumps.

This adjudication is binding upon the said trust company and upon its successors in interest, including the plaintiff, so far as it decided the true meaning and effect of all the grants under which the defendant holds its water rights in the canal. A judgment of a court having jurisdiction of the parties "operates as an estoppel to preclude the 'parties and privies from contending to the contrary of that point or matter of fact, which having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them.'" Koehler v. Holt Mfg. Co., 146 Cal. 337, 80 Pac. 74; Cromwell v. County of Sacramento, 94 U. S. 353, 24 L. Ed. 195; Wiese v. San Francisco Musical Soc., 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577; Freeman v. Barnum, 131 Cal. 389, 63 Pac. 691, 82 Am. St. Rep. 355. In the case between the trust company and the water company in the federal court, the point that the canal company was bound to supply enough water to satisfy the grants, free of charge for pumping the same, was distinctly put in issue and was adjudged in favor of the water company. The plaintiff as successor of the trust company is therefore stopped from ever contending that it is not obliged by the grant to continue to furnish to the successors of the original grantees the water which it has caused to flow in the canal by pumping the same to the surface. The findings in the case state the ultimate fact that the defendant is entitled to take the water in controversy from the canal and to have the same produced at the surface by whatever means may be adopted by the person charged with the duty of operating the canal, free from any charge for the expenses of maintaining or operating pumping plants or other appliances for bringing said water to the surface of the land comprising said water sources. This finding is supported by the judgment given in evidence, and it is sufficient to sustain the judgment denying the injunction.

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CAMPBELL v. GENSHLEA. (L. A. 4741.)

(Supreme Court of California. March 11, 1919.)

1. NEW TRIAL 🔑114—HEARING BY TRIAL JUDGE.

In view of Code Civ. Proc. § 660, a motion for new trial need not necessarily be considered by judge who tried the case.

2. CANCELLATION OF INSTRUMENTS 🔑37(1)—DEED—FRAUD—PLEADING.

In pleading cause of action for cancellation of a deed because of menace, fraud, and the like exercised upon grantor, the facts relied upon should be stated.

3. CANCELLATION OF INSTRUMENTS 🔑37(7)—QUIETING TITLE 🔑34(1)—DEEDS—UNDUE INFLUENCE—SUFFICIENCY OF COMPLAINT.

In action to quiet title and cancel deeds executed by mother to daughter upon the ground of undue influence, complaint *held*, as against general demurrer, to state cause of action.

4. PLEADING 🔑205(5) — ALLEGATION OF UNDUE INFLUENCE—GENERAL DEMURRER.

In action to quiet title and to cancel deeds on the ground of undue influence, failure of complaint to state all the facts constituting the fraud is not reached by a general demurrer; a general demurrer not going to a part of a cause of action.

5. DEEDS 🔑188—UNDUE INFLUENCE—PLEADING.

Allegations that deeds were only made because of grantee's undue influence *held* sufficient allegation that deeds were obtained solely by reason of grantee's conduct.

6. PLEADING 🔑205(5)—FRAUD—SPECIAL DEMURRERS.

In action to cancel deed on ground of undue influence, complaint's lack of direct allegations of fraud must be specially demurred to.

7. APPEAL AND ERROR 🔑231(2)—WAIVER OF OBJECTIONS—PLEADING.

Where pleadings alleged fraud in general terms and the parties go to trial without special objection to the allegation of the facts and circumstances constituting the fraud, such infirmity of the complaint may not be successfully urged on appeal.

8. Limitation of Actions 🔑19(3)—Action to Cancel Deeds—Undue Influence.

Action to quiet title to land and to cancel deeds upon ground of undue influence, where general relief asked for is that plaintiff be decreed the owner of all the property involved, free of any claim, right, title, or interest of defendant, the period of limitations is governed by Code Civ. Proc. § 318, prescribing five-year period in action for recovery of real estate, and not section 338, subd. 4, prescribing period of limitations in actions for fraud.

9. Pleading 🔑236(4)—Amendment—After Announcement of Decision.

In action to cancel deeds upon ground of undue influence, where it was suggested during the trial that the words "and executed" should be stricken from complaint where used, in view of nondelivery of deed and of the meaning of "executed" under Code Civ. Proc. § 1933, but complaint was not so amended at time, court properly permitted complaint to be so amended after announcing decision but before entry of judgment; the granting of such motion being within discretion of court.

10. Appeal and Error 🔑230—Objections—Admission of Testimony.

Alleged error in the admission of testimony will not be considered on appeal, where not objected to in lower court at the time it was offered.

11. Appeal and Error 🔑242(4)—Review—Admission of Testimony.

The admission of testimony will not be reviewed on appeal, where it does not appear that lower court made ruling on objection thereto.

12. Appeal and Error 🔑926(5)—Review—Presumptions.

Where no ruling upon objection to admission of testimony is shown by the record, it will be presumed that the objection was withdrawn.

13. Evidence 🔑318(2)—Witnesses 🔑392(1)—Hearsay Evidence—Letter.

A letter written to witness' brother by witness' mother was inadmissible upon cross-examination of witness, although it contained some alleged statements of witness at variance with his testimony; such evidence being hearsay, and it not being shown that witness was in any way responsible for it.

14. Trial 🔑395(1)—Findings—Separate Counts.

A judgment entered in a case in which more than one count has been considered need have but one set of findings, even where separate causes of action having some common elements are joined.

15. Cancellation of Instruments 🔑60—Undue Influence—Findings.

In an action to quiet title and to cancel deeds from mother to daughter upon ground in one count of insanity and in another count of undue influence, findings *held* to support judgment for plaintiff.

16. Deeds 🔑211(4)—Undue Influence—Sufficiency of Evidence.

Evidence *held* to support finding that mother's deeds to daughter were procured by daughter's undue influence.

17. Deeds 🔑208(1)—Delivery—Undue Influence—Sufficiency of Evidence.

Evidence *held* to support finding that mother's deeds to daughter had never been delivered.

18. Deeds 🔑194(5)—Delivery—Presumption.

Recordation of deeds raises presumption of delivery.

19. Gifts 🔑47(3)—Parent and Child—Conveyances—Presumption of Invalidity.

In a case involving a purported gift inter vivos, based upon an alleged consideration of love and affection, where the donee is a daughter having the control and direction of the aged donor, a strong presumption of confidential relation arises which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property.

20. Deeds 🔑68(3)—Competency of Grantor.

An aged woman who is sick, infirm, suffering from senile dementia, mentally unsound and incompetent to that degree that she is easily influenced, intimated and coerced so that she would do and perform acts and transactions such as she would not have done but for such influence, intimidation, and coercion, and who is unable, unassisted, to properly manage her property, is incompetent to make a valid delivery of a deed.

21. Deeds 🔑71—Validity—Duress.

A deed procured by duress will be canceled.

22. Deeds 🔑54—Validity—Nondelivery.

A recorded, undelivered deed will be canceled.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Robert P. Campbell, administrator of the estate of Maggie Rayner, deceased, against Charles J. Genshlea, administrator of the estate of Helen May Hubbs Genshlea, deceased. From judgment for plaintiff, defendant appeals. Affirmed.

Robt. T. Linney and Gordon L. Finley, both of Los Angeles, for appellant.

Davis & Rush, of Los Angeles, for respondent.

MELVIN, J. Defendant appeals from a judgment quieting title to certain real property in Los Angeles and San Diego counties, and setting aside two purported deeds from Maggie Rayner as grantor to her daughter Helen May Hubbs (afterwards Helen May Genshlea).

In the first count of the complaint it is alleged in substance that on the 23d of September, 1910, Maggie Rayner, while insane, made a pretended transfer of the properties, and in the second count it is averred that on the date above set forth the two purported transfers were made by Maggie Rayner, who was then old, sick, infirm and mentally unsound and incompetent to a degree, that she was easily influenced and that she was in fact influenced unduly, intimidated, and subjected to duress by her daughter who thus obtained the execution of the instruments. Upon issue joined, the cause was tried; Maggie Rayner's estate being substituted as a party after her death during the trial. The judgment was given under the second count as the court found against actual insanity.

It appeared at the trial that the property involved was deeded by Bayard Hubbs on his deathbed to his mother, Mrs. Maggie Rayner. The daughter at that time lived in another part of the state, and she and her mother were then not on good terms. Shortly after her son's death, Mrs. Rayner became seriously ill. She sent for her daughter and made deeds to her property which were left with a depositary for delivery after her death. She recovered sufficiently to lose fear of speedy death and took the deeds from the person having their custody. In February, 1910, mother and daughter again quarreled, and the former went back to San Diego from Los Angeles, where she had been residing. She lived with the Williams family in San Diego from April, 1910, to the latter part of September of that year. At that time and for more than a year theretofore, as the court found, Mrs. Rayner had been and she continued to be "old, sick, infirm, suffering from senile dementia, mentally unsound, and incompetent to that degree that she was easily influenced, intimidated, and coerced, so that she would do and perform acts and transactions such as she would not have done but for such influence, intimidation, and coercion, and that, though not insane, was by reason of such old age, disease, weakness of mind, and physical and mental infirmities, unable unassisted to properly manage and take care of herself or her property, and by reason thereof was likely to be deceived and imposed upon by artful and designing persons." It was also found that Helen May Hubbs, well knowing her mother's condition, went to San Diego shortly before September 23, 1910, took Mrs. Rayner to live with her, and "while the said Maggie Rayner was so residing with her, she, the said Helen May Hubbs, imprisoned and restrained said Maggie Rayner, and denied her communication with her friends and acquaintances and drugged, threatened, abused, intimidated, unduly influenced, and coerced the said Maggie Rayner to such a degree that she caused and procured the said Maggie Rayner to sign the purported deeds or transfers." It was further found that the deeds were without consideration and were only signed by reason of the undue influence and duress to which the mother was subjected by the daughter. The deeds were placed by Mrs. Rayner in the custody of Mr. Fishburn (who had been custodian of the earlier writings), with instructions to keep them until after the grantor's death and then to deliver them to her daughter. On the 3d of September, 1910, however, she and her daughter visited Mr. Fishburn, who, upon request, delivered the deeds to Mrs. Rayner. It was found that Helen May Hubbs obtained possession of the purported deeds on or about December 6, 1910, and thereafter caused them to be recorded: One in Los Angeles, February 17, 1911; the other in San Diego on March 28, 1911. The findings recited the further facts that Helen May Hubbs married Mr. Genshlea after the signing of the purported deeds; that on the 12th of January, 1913, she died testate; and that said Genshlea was claiming the property as her administrator.

[1] Appellant complains that he was deprived of substantial rights because the motion for new trial was heard before and decided by another judge than the one who had presided at the trial and signed the judgment. We know of no statute or decision which gives to a litigant the right to have his motion for a new trial heard by the judge who tried the case. The motion is heard, not by the judge merely as an individual, but by the court. Section 660, Code Civ. Proc.

[2-5] Appellant insists that the general demurrer to the complaint should have been sustained. Attack is made chiefly upon the allegations regarding undue influence, fraud, etc. After averring the knowledge on the part of the daughter of her mother's incompetent condition, the second count (we need not consider the first, as plaintiff did not prevail thereunder) contains allegations that Helen May Hubbs went to San Diego, took Mrs. Rayner to live with her, and while her mother was so residing Mrs. Hubbs "imprisoned and restrained plaintiff, and denied her communication with her friends and acquaintances, and while so restraining plaintiff she drugged, threatened, abused, intimidated, persuaded, unduly influenced, and coerced plaintiff, to such a degree that she caused and procured plaintiff to make and execute the purported deeds or transfers." It is asserted that this paragraph of the complaint sets forth conclusions merely instead of facts and that it is insufficient because of failure to allege that the deeds were procured solely by reason of the stated acts or conduct of Helen May Hubbs, appellant citing as leading cases in support of his argument Estate of Gharky, 57 Cal. 275, and Goodwin v. Goodwin, 59 Cal. 560. It is true that in setting forth a cause of action for the cancellation of a deed be-

cause of menace, fraud, and the like exercised upon the grantor, the facts relied upon should be stated; but as to this point in the case at bar appellant depends upon his general demurrer. The complaint does state a cause of action to quiet title and to cancel certain deeds. The deficiencies here asserted to exist were not called to the court's attention by the general demurrer. A general demurrer will not go to a part of a cause of action (Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553; Amestoy v. Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. 550), and the cause of action was sufficiently stated to justify the overruling of the general demurrer. The alleged failure to allege that the deeds were obtained solely by reason of the conduct of Helen May Hubbs is without basis, as the complaint did contain the averment that they were only made because of her undue influence, etc. All of the objections to the complaint made by appellant here and his entire argument in favor of reversal of the judgment because of the court's refusal to sustain the demurrer are met and answered by Yordi v. Yordi, 6 Cal. App. 20–31, 91 Pac. 348. In Collins v. O'Laverty, 136 Cal. 31, at page 36, 68 Pac. 327, at page 329, the court, answering objections similar to those raised by appellant in this case, used the following language:

> "There is in the complaint no direct allegation that the deed was obtained by fraud or undue influence; but it is alleged—in addition to the facts showing the condition of the deceased, and the circumstances of the transaction—that the defendants, 'fraudulently taking advantage of the incapacity, illness, and weakness of mind of the said Julia Collins, procured her to sign a pretended deed, purporting to convey,' etc., which is substantially an allegation of the procurement of the deed by undue influence, and, in the absence of special objection by demurrer, sufficient."

See, also, Trubody v. Trubody, 137 Cal. 172, 69 Pac. 968.

[6, 7] Appellant's objections to the complaint because of the lack of direct allegations of fraud, etc., are also untenable, in view of the fact that no special demurrer was interposed. Spreckels v. Gorrill, 152 Cal. 383, 387, 92 Pac. 1011. Where, as in this case, the pleadings allege fraud in general terms and the parties go to trial without special objection to the allegation of facts and circumstances constituting the fraud, such infirmity of the complaint may not be successfully urged on appeal. Sukeforth v. Lord, 87 Cal. 399–403, 25 Pac. 497.

[8] Nor was the second count of the complaint barred by subdivision 4 of section 338, Code of Civil Procedure. Indeed, in raising the question of the bar of the statute, appellant's counsel frankly concede that Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820, seems to be an authority against their contention; but they question the soundness of that decision and assert a difference between that case and this, depending upon the fact that in Murphy v. Crowley plaintiff prayed for possession, while in the case at bar the administrator prays only that the deeds "be declared null and void," etc. General relief is asked in addition to the prayer that—

> "Plaintiff be decreed to be the owner of all of said property above described, free of any claim, right, title or interest of said administrator, of the estate of said Helen May Hubbs Genshlea, deceased, or of any one claiming thereunder."

The judgment declared that plaintiff is entitled to possession of the land. The prayer in this case is very similar to that considered in Page v. Garver, 146 Cal. 577, 80 Pac. 860, and in that case it was held that the rule declared in Murphy v. Crowley, supra, was applicable and that the five-year period of limitation prescribed by section 318, Code of Civil Procedure, was the time within which the action might be commenced. See, also, Scholle v. Finnell, 166 Cal. 546, 137 Pac. 241; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; People v. Kings County Development Co., 171 Pac. 102.

[9] The court permitted an amendment some time after announcing the decision but before the entry of judgment. This consisted in striking out the words "and executed" wherever they appeared in the second count. It appears that during the trial it was suggested that the words "made and executed" did not merely refer to the writing and formal subscription of the deeds described, but that the word "execution" included delivery; the court and counsel calling attention of respondent's counsel to the definition as expressed by section 1933, Code of Civil Procedure, and expounded in Williams v. Kidd, 170 Cal. 631, 159 Pac. 1, Ann. Cas. 1916E, 703. Nothing was done, however, at that time to change the pleading to conform to the theory of plaintiff that there had been no effective deliveries of the instruments. After the court allowed the described amendment, defendant was formally heard upon a motion to strike out the amendment, and the motion was denied. We cannot say that the court committed error by thus allowing the amending of the pleading. Such a course is, in view of the wide discretion given to courts in permitting amendments after decision, usually upheld. As was declared with reference to amendment of pleadings in the opinion in Lee v. Murphy, 119 Cal. 364, 367, 51 Pac. 549, 550:

> "I find no limitation as to the time before judgment entered when the power of the court ceases, and even after judgment it may be exercised for the relief of a party where the judgment results from mistake, inadvertence, surprise, or excusable neglect."

Appellant complains of the delay of several months between the decision and the signing of findings of fact and conclusions of law, but does not show any injury caused thereby. The only effect of this delay was to leave defendant in possession of land to which he was not entitled.

[10] Serious error is charged as committed by the admission of testimony derogatory of the character and conduct of Mrs. Genshlea. "Such testimony," say counsel, "is of two classes: What the witness heard Mrs. Rayner say about her daughter and what the witness personally knew." In this behalf they specify certain parts of the testimony of seven witnesses, but as only two objections were made to offered testimony of this sort we may only consider the record relating to them.

The first question to which formal objection was made was as follows:

> "Did your aunt ever complain to you, or speak to you, of May's personal habits, as to drinking or spending money, or trying to get her property, or anything of the sort?"

[11] The objection was that the question was incompetent, irrelevant, and immaterial, because the daughter's character and personal habits were not in issue. There is no record of any ruling upon this question, but the answer appears. It involves charges of immorality and drunkenness made by Mrs. Rayner against her daughter, as well as a statement that said daughter and another had administered to her powders which the mother did not want to take and had forced her to sign checks and papers. There was no motion to strike the answer out. We may not act upon this alleged error, for the reason that there seems to have been no ruling upon the objection; and, while the caption "defendant's exception No. 1" precedes the question as reported in the transcript, we may not presume that there was any ruling made after the question was propounded and objection was made. The following language of the court in Smith v. Smith, 163 Cal. 630, 631, 126 Pac. 475, is therefore appropriate as applied to the condition of the record here:

> "Plaintiff's bill of exceptions fails to indicate any ruling of the court or any exception registered on her behalf. We cannot therefore pass upon any alleged errors of law committed at the trial."

[12] The other question falling under the objection of appellant was of the same general nature as the one just discussed. There is no ruling shown by the record, and for the reasons above set forth we must hold that the judgment may not be reversed because the two interrogatories were propounded and answered. Where no ruling upon an objection is shown, the inference arises that it was withdrawn.

[13] There was no error in refusing to admit on the cross-examination of witness Robert Campbell, appearing for the plaintiff, a letter written by his brother Bayard Campbell to their mother, even though the writing may have contained some alleged statements of witness which were at variance with his testimony. He was not shown to be responsible for the epistle in any way. Its admission in evidence would have been the most flagrant hearsay. We are surprised both at the offer of such evidence in the lower court and the contention here that it was improperly excluded.

[14, 15] The appellant asserts that the pleadings and findings do not support the conclusions of law or the judgment. The complaint is one to quiet title and to cancel deeds. Its sufficiency has been previously considered and declared in this opinion. All of the averments in the complaint were met by denials in the answer and the judgment gives the relief demanded by plaintiff. We are of the opinion that the pleadings do support the judgment. We are also convinced that the findings support the judgment. It is true that there was a finding against the insanity of Mrs. Rayner as alleged in the first count, but that did not necessitate the entry of a formal judgment against plaintiff based thereon. A judgment entered in a case in which more than one count has been considered need have but one set of findings. This is the rule even where separate causes of action having some common elements are joined. Anderson v. Blean, 19 Cal. App. 581, 126 Pac. 859. The findings cover all the issues. They recite the judgment of May 9, 1912, that Mrs. Rayner was incompetent; Mrs. Hubbs' appointment as her guardian; their residence in Los Angeles to the date of the guardian's death, January 12, 1913; Mrs. Rayner's residence until her death with defendant; the appointment of plaintiff as guardian ad litem of Mrs. Rayner; the latter's death on August 17, 1914; the subsequent prosecution of the cause by the administrator of her estate; the ownership by her of the property involved at and for many years prior to Mrs. Rayner's death; the signing and formal acknowledgment of the deeds on September 23, 1910; their deposit with Mr. Fishburn, and their withdrawal thereafter by her at a time when her daughter accompanied her to Mr. Fishburn's place of business. These are followed by the findings that for more than one year prior to the signing of the deeds and always thereafter Mrs. Rayner had been sick, infirm, etc., as set forth in the finding quoted above in this opinion; that Mrs. Hubbs had come to San Diego, knowing her mother's weak condition, and had used the coercive measures described in a finding heretofore quoted herein; that the deeds were "only signed because" of the undue influence, duress, etc., as previously set forth; that they should therefore be set aside; and that Mrs. Hubbs obtained possession of the deeds in December, 1910, and caused their recordation. The other findings

relate to Mrs. Hubbs' marriage to Mr. Genshlea, and other formal matters not necessary to be set forth here. That such findings support the judgment there can be no doubt. The finding that Mrs. Rayner was and her estate is the owner and entitled to the possession of the property is a finding of ultimate fact which supports the judgment of ownership. Estate of Hill, 167 Cal. 59, 63, 138 Pac. 690. The findings regarding the menace, fraud, etc., of the daughter are also findings of ultimate fact, and as we have indicated in the discussion of the pleadings, sufficient to support the judgment.

Finally, the appellant insists that the vital findings are not sustained by the evidence. It would subserve no good purpose to review in detail the conflicting testimony regarding the competency or capacity of Mrs. Rayner. Her physician described her condition at the time the deeds were signed as feeble, and expressed the opinion that thereafter she was incompetent, and many others, who had ample opportunities to know the facts, told of the aged woman's physical and mental feebleness and her susceptibility to influence. She was suffering from paralysis and senility, as one of the physicians testified. Such evidence fully supported the finding that she was incompetent and easily influenced.

[16] The finding of undue influence is supported by the evidence. It appears that, when she was in better mental condition than that under which she labored later, Mrs. Rayner in 1908 made deeds to the property in favor of her daughter, but that these were not intended for delivery during her life. Her conduct in 1910 with reference to the deeds here involved would indicate a like purpose, and when she took the documents from Mr. Fishburn's custody she did not declare a purpose to deliver them, but said she wanted them because she was going away. After she came under the influence of her daughter the evidence shows that she turned against friends and became suspicious of them; that she left the climate of San Diego, which she loved; that she abandoned cherished plans for visiting, at her daughter's suggestion; and that she was not allowed to talk with friends and relatives except in her daughter's presence. By her daughter this old woman was taken from the friends she cherished, from the property which her son had given her, and from the grave of that son. Dying, the daughter left a will by which this property was to go to strangers.

[17, 18] There was evidence which tended to support, and if believed did support, the finding that there was no delivery of the deeds. True, the recordation raised a presumption of delivery, but there was evidence that long after that time Mrs. Rayner continued to receive the rent from her agent in Los Angeles. Not until April, 1911, did Mrs. Hubbs demand that checks and mail should be sent to her. The daughter wrote and the mother signed a letter in October, 1910, directing the agent to "send all money you collect to Mrs. Rayner at this address." In the latter part of 1910, Mrs. Hubbs took her mother to the home of Mrs. Lohse in Alameda. At first, according to the testimony of Mrs. Lohse, Mrs. Hubbs said her name was Higgins. She directed that no one should see the mother, and when absent for a number of hours she kept the old lady locked in their apartments. She also told Mrs. Lohse that her mother was "not all there in the head," but that she was harmless. The date when possession of the deeds was obtained was found by the court evidently upon the testimony of this witness, who said, among other things, after fixing the date of a notary's call at about December 6, 1910:

> "I had a conversation with Helen Hubbs the day after the notary was there. She came downstairs and showed me some papers, which she took out of her stocking and said to me at the time, 'Now I am on velvet and I am not a bit afraid.' * * * She spoke to me of property that belonged to her mother in Los Angeles and San Diego. Mrs. Hubbs had no property when she first came but said she was expecting or waiting for some property. She said she was putting a deal through, she didn't say what deal it was, and if she could work it the way she wanted to she would be pretty well to do. * * * She showed me the papers and I recall what some of them were. I couldn't recall all of them. One was for a deed of love and affection for the Westlake property, and the mention of some property in San Diego, I can't tell just exactly what it was, and there was some other property that she had the deed to that I casually looked over, but I couldn't tell you what they were. I happened to recall that the consideration mentioned in the deed of this property was love and affection because it was typewritten in there as far as I can remember."

Without further lengthening the recital of testimony, it is enough to say that the finding of undue influence and coercion, as well as that of nondelivery, are justified and upheld.

[19-22] It is to be remembered that in a case involving a purported gift inter vivos, based upon an alleged consideration of love and affection, where the donee is a daughter having the control and direction of the aged donor, a strong presumption of confidential relation arises which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289. In the absence of such showing, the conveyance is presumed to have been obtained by undue influence and to be void. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Odell v. Moss., 130 Cal. 352, 62 Pac. 555; Ross v. Conway, 92 Cal. 632, 28 Pac. 785. Applying these presumptions to the facts of this case, as disclosed by the record, we must

conclude that the finding of undue influence in the production of the deeds, as well, as that of nondelivery, were fully sustained, and in relation to the latter finding it should be remembered that before Mrs. Hubbs obtained manual custody of the deeds (as shown by the record) she herself had announced her mother's feeble mental condition. One so afflicted and so situated as was Mrs. Rayner could not make a valid delivery of a deed. The judgment would, of course, be supported upon either the finding of duress, etc., or that of nondelivery. American National Bank v. Donnellan, 170 Cal. 9, 15, 148 Pac. 188, Ann. Cas. 1917C, 744.

No other assignments of error require analysis or discussion.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

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40 Cal. App. 163

MERCED COUNTY v. SHAFFER et al.

(Civ. 1906.)

(District Court of Appeal, Third District, California. March 4, 1919.)

1. BAIL ⚿59—BAIL BOND—DEFECT—OBLIGATION OF SURETIES TO PAY.

Bail bond wherein the sureties bound themselves that, if one or both of their principals failed to perform any of the conditions, such principal or principals would pay to the state the sum of $1,000, *held* defective as not obligating the sureties to pay.

2. BAIL ⚿59—BOND—OBLIGATION—DEFECT.

Bail bond given pursuant to order providing that each of the two defendants be admitted to bail in the sum of $500, but purporting to be on behalf of both, and providing that if the conditions were not performed one or both of the principals would pay to the state the sum of $1,000, *held* defective and void as obligating the sureties, if at all, to pay the sum if either or both of their principals failed to appear.

3. BAIL ⚿55—BOND—CONFORMING TO STATUTE.

The bail bond in a criminal proceeding is purely statutory, and must conform to the statute and the order of the court, not being good even as a common-law obligation if it fails to do so.

4. BAIL ⚿59 — BOND FOR GREATER SUM THAN ORDERED—INVALIDITY.

A bail bond in a sum greater than the order of the court is absolutely void.

5. BAIL ⚿93 — SUIT ON BOND — REFORMATION.

In view of Pen. Code, § 1278, where a bail bond is defective and void in two respects, in that it does not obligate the sureties to pay in the event of default, and in that it is in an amount in excess of the order of the court, the court, in suit on the bond after forfeiture, on the county's prayer for reformation, has no authority to make a new valid undertaking for the sureties in accordance with the intention they had, but failed to express.

Appeal from Superior Court, Merced County; George E. Church, Judge.

Action by the County of Merced against H. S. Shaffer and J. J. Griffin. From judgment for defendants on demurrer to the complaint, plaintiff appeals. Affirmed.

C. H. McCray and Edward Bickmore, both of Merced, for appellant.

H. K. Landram, F. W. Henderson, and C. W. Croop, all of Merced, for respondents.

BURNETT, J. In the month of February, 1916, O. Dinelli and Francis Francisco were arrested upon a burglary charge in Merced county. They were committed by the justice of the peace to the custody of the sheriff and their bail fixed at $500 each. After setting out these facts, the third amended complaint alleges further:

"Said H. S. Shaffer and said J. J. Griffin and each of them for the purpose of releasing the said O. Dinelli and the said Francis Francisco from actual custody upon said charge, and in order that said O. Dinelli and the said Francis Francisco might be released therefrom, entered into and executed an obligation, bond, and undertaking." That said bond was presented to the justice of the peace, who accepted and filed the same. "That a copy of said obligation, bond, and undertaking as the same was written when made, executed, and delivered to the people of the state of California by the said H. S. Shaffer and the said J. J. Griffin, as aforesaid, is hereunto attached and made a part hereof and marked plaintiff's Exhibit A." "That after the said O. Dinelli and said Francis Francisco were taken into custody as aforesaid, one L. J. Schino, an attorney of Merced, Cal., was employed by said defendants to represent them in the matter of said charge. That said justice of the peace did inform said L. J. Schino, as attorney for said O. Dinelli and Francis Francisco, of the order of admission of the said defendants to bail and the amount thereof, to wit, the sum of $500 for each defendant, and that said L. J. Schino did procure the execution of said obligation, bond, and undertaking of said H. S. Shaffer and J. J. Griffin and presented the said obligation, bond, and undertaking to said justice of the peace for his approval."

It is then alleged that, through a mutual mistake of the parties executing, presenting, and accepting the bond, the obligation presented and accepted did not express the true intention of the parties, and that such intention was embodied in an instrument attached to the complaint, marked "Exhibit B."

It further appears that upon the acceptance of said undertaking the defendants were released, and that thereafter they failed to appear for examination in accordance with the order of the court, and thereupon said undertaking was forfeited. The prayer of the complaint is that the undertaking executed by the defendants in this action be reformed, and as reformed the forfeiture of the same be enforced, and the plaintiff have judgment against defendants in the amount of the undertaking.

The bond as actually signed, executed, delivered, and accepted was in the following form:

Exhibit A.

"In the Justice's Court of Number Two Township, County of Merced, State of California.

"The People of the State of California, Plaintiff, v. O. Dinelli and Francis Francisco, Defendants.

"Bail Bond.

"Whereas, an order having been made on the 24th day of February, A. D. 1916, by Frank H. Farrar, Esq., justice of the peace of No. 2 township, county of Merced, state of California, in the above-entitled cause, and the above-named defendants, and each of them, be admitted to bail, pending the hearing upon the charge hereinafter mentioned, in the sum of one thousand dollars ($1,000.00), that is to say, that each of said defendants be admitted to bail in the sum of five hundred dollars ($500.00) each, upon a charge of felony, to wit, burglary, alleged to have been committed in said county and state.

"Now, therefore, we, the undersigned, by occupation merchants, residents of the county of Merced, state of California, do hereby undertake, that the above-named defendants, and each of them, shall and will appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times hold himself amenable to the orders and process of the court, or courts, wherein said charge is being or is to be prosecuted, and if convicted, shall and will appear for judgment and render himself in execution thereof; or if he, or they, fail to perform any of these conditions, that he, or they, will pay to the people of the state of California, the sum of one thousand dollars ($1,000.00).

".......... [Seal.]
"H. S. Shaffer. [Seal.]
"J. J. Griffin. [Seal.]

"Approved this 25th day of Feb., 1916.
"Frank H. Farrar, Justice of the Peace."

Exhibit B is as follows:

"Bail Bond.

"In the Justice's Court of Number Two Township, County of Merced, State of California.

"The People of the State of California, Plaintiff, v. O. Dinelli and Francis Francisco, Defendants.

"Whereas, an order having been made on the 24th day of February, A. D. 1916, by Frank H. Farrar, Esq., justice of the peace of No. 2 township, county of Merced, state of California, in the above-entitled cause, and the above-named defendants, and each of them be admitted to bail, pending the hearing of the charge hereinafter mentioned, in the sum of one thousand dollars ($1,000.00), that is to say, that each of said defendants be admitted to bail in the sum of five hundred dollars ($500.00), each, upon a charge of felony, to wit, burglary, alleged to have been committed in said county and state.

"Now therefore, we, the undersigned, by occupation attorneys, residents of the county of Merced, state of California, do hereby undertake that the above-named defendants, and each of them, shall and will appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times hold himself amenable to the orders and process of the court, or courts, wherein said charge is being or is to be prosecuted, and if convicted, shall and will appear for judgment and render himself in execution thereof; or if he or they fail to perform any of these conditions, that we will pay to the people of the state of California, the sum of five hundred dollars ($500.00) for each of said defendants failing to perform any of these conditions.

".......... [Seal.]
"H. S. Shaffer. [Seal.]
"J. J. Griffin. [Seal.]

"Approved this 25th day of Feb., 1916.
"Frank H. Farrar, Justice of the Peace."

[1, 2] It is apparent that there are two vital defects in the bond as executed. One of these is the same as appeared in the bond in the case of County of San Luis Obispo v. A. M. Ryal et al., 175 Cal. 34, 165 Pac. 1. Therein it was held that—

> "The law requires, and the form of bond on appeal in a criminal case set out in the Code provides, that the sureties shall bind themselves in the event of the appealing defendant failing to do certain things they will pay to the state of California a specified penal sum; and such a bond is insufficient where the sureties merely agree that their principal upon default in its terms will pay a specified sum, instead of agreeing themselves to do so."

This is one of the portions of the bond that plaintiff seeks to have reformed. The other defect is equally objectionable and arises from the fact that the order of the court provided that the defendants be admitted to bail in the sum of $500 each; whereas, the bond, as given, purports to be on behalf of both defendants and provides that if the conditions were not performed "that he or they will pay to the people of the state of California the sum of $1,000." They were thus obligated to pay said sum if either or both of said defendants failed to appear; whereas, the order required a penalty of only $500 for each.

[3] It is not disputed that the bond in a criminal proceeding is purely statutory and must conform to the statute and the order of the court. If it fails to do so, it is not good even as a common-law obligation. San Fran-

cisco v. Hartnett, 1 Cal. App. 652, 82 Pac. 1064; Malheur County v. Carter, 52 Or. 616, 98 Pac. 489; Boozer v. City of Atlanta, 18 Ga. App. 732, 90 S. E. 492.

[4] Neither is it disputed that a bond in a sum greater than the order of the court is absolutely void. Roberts v. State, 34 Kan. 151, 8 Pac. 246.

United States v. Goldstein's Sureties, 1 Dill. R. 413, Fed. Cas. No. 15,226, is a leading case in which a person was arraigned before a United States commissioner upon two separate charges. The commissioner ordered him to bail in the sum of $500 on one charge and $200 on the other. One bond for $700 was taken. Defendant failed to appear and the bond was forfeited. The court said:

> "Bonds or recognizances of this character are binding only when taken in pursuance of law and the order of a competent court or officer. No order was made authorizing a single bond for $700, and the bond taken was a substantial departure from the bonds required by the commissioner, and was not therefore obligatory on the sureties. State v. Buffam, 2 Frost ([22] N. H.) 267. Judgment accordingly."

In the Roberts Case the Supreme Court of Kansas held that—

> "Where the district court directs bail to be taken in the penalty of $1,200, and the sheriff requires and accepts from the principal and his sureties a bond in the sum of $1,250, the bond is utterly void, as the sheriff is only authorized to require bail in such an amount as is directed by the court."

The bond executed by the defendants herein was therefore, not only not binding upon them because they did not agree to pay anything themselves, but it was absolutely void because it was in an amount in excess of the order of the court.

[5] Plaintiff, however, claims that the court has authority to make a new undertaking for the sureties, not in accordance with the obligation that they actually signed, but in accordance with the intention which they had at the time but failed to express. This seems a rather startling proposition, but it is claimed by appellant that respectable authority exists for the contention.

We think, however, that no authority can be found for the proposition that an undertaking, which is void upon its face, can be amended by changing the express obligation of the sureties to something different, but what they intended, and make it binding upon them after said purported undertaking has been declared forfeited.

In 34 Cyc. 926, we find the statement:

> "Where an instrument is immoral in its tendency, or for some fundamental reason is void, reformation would amount to the making of a new contract and is therefore never granted."

In Wallen v. State, 18 Tex. App. 414, it was held that a bail bond is strictly a statutory bond, and to entitle the state to a forfeiture thereon the bond must contain all the requisites prescribed by statute. It is true that no effort was made therein to reform the bond, but the court, after quoting from Pomeroy his statement of "all the possible modes in which the remedial jurisdiction occasioned by mistake can be exercised," declares:

> "But we are clearly of the opinion that these rules have no application to statutory bail bonds."

However, appellant relies upon the case of Neininger v. State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674, for the contrary doctrine. Therein it was, indeed, stated that—

> "A written instrument executed by a surety, which by mistake fails to express the actual agreement and intention of the parties, may be reformed upon parol proof, like other written instruments, and then enforced against the surety."

But it is quite apparent that the Neininger Case differs from this in two important particulars. In the first place, it was not a void instrument, but simply defective in reciting the name of the prosecuting witness. In other words, a clerical mistake was made that did not affect the obligation of the sureties. No new contract was made for them, but the contract which they actually executed was more clearly identified. Again, the sureties in that case entered into a "recognizance," that is, they appeared before the justice of the peace and acknowledged their obligation to pay the state the sum of $300 in case the accused failed to appear at the next term of court. This recognizance constituted their obligation, and the mistake was made in entering it in the docket of the justice. If the sureties herein had actually executed the contract as set out in the Exhibit B, but, in copying it, it was made to appear as Exhibit A, the mistake, of course, could have been corrected; but plaintiff is trying to have substituted for the instrument which was executed and upon which the defendants were released, an entirely different instrument, which never has been executed and which could not be made effective now because there would be no consideration to support it.

It must be remembered that the statute (section 1278 of the Pen. Code) provides the form of the undertaking and requires that it shall be executed and acknowledged by the sureties and that they must justify before the magistrate. Thereupon the defendant may be discharged from custody. Admittedly, no such undertaking was "executed" in this case. The attempt was entirely abortive; but, because the parties intended to comply with the law, appellant claims virtually that the intention should take the place of the deed. The law requires a written promise, and that before the defendant is released, not merely an intention to make a promise which may be made a matter of record "after" the defendant has been released. A careful consideration of the different modes of equitable relief on the ground of mistake as recited by Pomeroy can leave but little doubt that none of them applies to a case like this.

We think the court below was entirely right in sustaining the demurrer to the complaint, and the judgment is therefore affirmed.

We concur: HART, J.; BUCK, Presiding Judge pro tem.

(40 Cal. App. 170)

PEARSON v. WHEELER. (Civ. 2618.)

(District Court of Appeal, Second District, Division 1, California. March 4, 1919.)

BROKERS ⚿86(1)—RIGHT TO SHARE OF COMMISSION—SUFFICIENCY OF EVIDENCE.

In an action to recover a share of commission for assistance rendered defendant in selling a tract of land, evidence *held* insufficient to show that defendant received any commission on the sale as made.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Calvin Pearson against H. K. Wheeler, as administrator of the estate of J. Kittredge Wheeler, deceased. From judgment of nonsuit, plaintiff appeals. Affirmed.

Randall & Bartlett, of Los Angeles, for appellant.

John H. Miller, of San Francisco, for respondent.

CONREY, P. J. Plaintiff appeals from a judgment of nonsuit.

The plaintiff alleges that he entered into an oral contract with J. Kittredge Wheeler, whereby plaintiff was to render services to Wheeler in locating and examining land for particular purposes specified by Wheeler; that plaintiff should assist Wheeler in selling any land so located and examined; that out of any sale consummated in pursuance of said contract Wheeler would pay, or cause to be paid, to the plaintiff one-third of any commission received by Wheeler from the sale of any such lands. Plaintiff further alleged that he performed all services which by the terms of said contract were to be performed by him; in particular that the plaintiff located and examined a tract of land in Madera county, known as the Lauganour tract, and assisted Wheeler in selling the same; that out of the sale of said tract defendant received as commission therefor the sum of $9,000; that plaintiff became entitled to one-third of said commission, but that Wheeler refused to pay, and has not paid, to plaintiff the same, or any part thereof.

The answer, which was filed by Wheeler, denied that he entered into any contract with the plaintiff whereby the plaintiff was to render services to the defendant in locating and examining land. As there is no evidence in the record tending to show that the contract included any such purpose or any agreement concerning the same, we may dismiss that element of the case from further consideration. The answer "admits that it was agreed between the said plaintiff and the defendant that the plaintiff should have one-third (⅓) of any commission earned for the sale of the tract of land known as the Phil Lauganour tract, if the said plaintiff and said defendant should be successful in selling said land." The answer admitted that the plaintiff did take defendant to see the Lauganour tract, and defendant examined the same; denied that the plaintiff assisted the defendant in selling said tract; denied that out of the sale thereof the defendant received a commission of $9,000, and denied that the plaintiff was, according to the terms of any contract between them, entitled to one-third of $9,000; admitted that the plaintiff and the defendant co-operated in an effort to sell said tract of land, and that if said sale had been made as the result of the effort of the plaintiff and the defendant the plaintiff would have been entitled to one-third of the commission which might have been earned; denied that the defendant received as a commission for the sale of said tract the sum of $9,000 or any other sum, but, on the contrary, alleged that the defendant became the purchaser thereof; admitted that there was an understanding between the plaintiff and the defendant that if the defendant should effect the sale of any lands which the plaintiff had for sale the commission earned and paid should be equally divided; alleged that no sales were made by the plaintiff and the defendant under said understanding, and that no services were rendered by the plaintiff to the defendant, except plaintiff did show to the defendant certain tracts of land which he desired to sell; alleged that the plaintiff was paid a large sum of money by the agent who held the option and through whom the defendant purchased the said Lauganour tract.

The evidence produced by the plaintiff at the trial of this action did not tend to establish the existence of any contract for the division of commissions between the plaintiff and Wheeler other than the terms of agreement as admitted in the answer. Therefore it only remains necessary to see whether the evidence shows that Wheeler received a commission for the sale of said land, and, if he did receive such commission, determine whether the plaintiff, under the terms of the contract as admitted, became entitled to a part thereof.

The evidence shows that at the time when Wheeler was negotiating for this land he was acting for or in connection with one C. J. Bills; the consideration was paid partly in money and partly by the execution of a mortgage for the remainder of the purchase price. The money was paid by Bills, but the deed was made to Wheeler, and Wheeler, together with his wife, executed the mortgage. Following that transaction, Wheeler conveyed the property to Bills, subject to the mortgage. Wheeler and Bills conducted their negotiations with a real estate partnership which held an option on the property. Gus W. Anderson, a member of that firm, testified that in figuring out the sale price of the land the gross purchase price named was $195,739; that no commission was paid, but the sum of 5 per cent. was deducted from the purchase price and counted as a commission; that the actual price paid (which necessarily would include the mortgage) was $185,953. Presumably, on account of the death of Mr. Wheeler and the consequent disability of the plaintiff to testify concerning the transaction, there is no evidence, either from Wheeler or from the plaintiff, as to whether any commission was actually received by Wheeler. The record is equally wanting in direct testimony showing whether Wheeler made a resale of the property to Bills, thereby obtaining some profit to himself, or whether Bills was the actual original purchaser, taking the property in the name of Wheeler. The latter inference is more strongly indicated by the evidence. Bills himself, called as a witness by the plaintiff, testified that not a cent of commission was paid on that deal, and that Wheeler did not get out of it one cent directly or indirectly. Unusual as this circumstance may seem, it stands absolutely uncontradicted. The nonsuit was properly granted upon the stated ground that the evidence failed to prove that Wheeler received any commission on the sale as made.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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40 Cal. App. 155

POWELL v. POWELL et al. (Civ. 2719.)

(District Court of Appeal, First District, Division 2, California. Feb. 28, 1919. Rehearing Denied by Supreme Court April 28, 1919.)

1. APPEAL AND ERROR ⚷1010(1)—REVIEW—QUESTIONS OF FACT.

The appellate court will not substitute its own views for those of the judge, unless there was no substantial evidence to support his findings.

2. APPEAL AND ERROR ⚷1010(1)—REVIEW—QUESTIONS OF FACT—INHERENT IMPROBABILITY OF TESTIMONY.

To justify an appellate court in determining that there was no substantial evidence because of inherent improbability to warrant the conclusion of the trial court, there must exist, either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story.

3. TRUSTS ⚷44(2) — ESTABLISHMENT — CORPORATE STOCK — EVIDENCE — SUFFICIENCY.

Evidence *held* sufficient to support a finding that transfer of the stock was absolute and that it was not to be charged with any trust.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by Laura G. Powell, as administratrix of the estate of Chas. G. Powell, deceased, against J. A. Powell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 176 Cal. 676, 170 Pac. 147.

Howard Harron and Brewton A. Hayne, both of San Francisco, for appellant.

W. H. L. Hynes and Walter J. Burpee, both of Oakland, for respondents.

BRITTAIN, J. The plaintiff appeals from a judgment, the effect of which was to determine that 249 shares of the capital stock of Powell Brothers Construction Company belonged to J. A. Powell and R. V. Powell, and that the estate of Charles G. Powell, deceased, had no interest in them as the beneficiary of any trust.

Charles G. Powell formed the corporation defendant, and J. A. Powell and R. V. Powell owned equal interests in it. The other defendants held qualifying shares to enable them to act as directors. Charles G. Powell died in 1913. For ten years he suffered from an incurable disease. He retired from active business in 1912. Prior to his retirement he had done nothing for the corporation for some time. In November, 1912, he transferred to his brothers 249 shares of the stock, and they issued to him one share to qualify him as a director and to permit his name still to be used as president of the corporation. In January, 1913, he transferred this single share to them and resigned as president. The appellant claims the transfer of the 249 shares was without consideration and upon a trust for the benefit of Charles G. Powell. The lower court found Charles G. Powell had sold 248 of the 249 shares and all the credits he owned against the corporation for $10,000 paid to him by J. A. Powell and R. V. Powell, and that he subsequently sold to them the remaining share for $100. The court further found that each of the transfers was bona fide, that neither was upon any understanding that the buyers should retransfer, that the transfers were absolute and intended so to be, and that the holdings were not charged with any trust.

As a part of a very long finding condensed in the statement just made, the following language relating to the payment of the $10,000 was used:

> "All the money used for said payment came from the safe deposit box of R. V. Powell, who had almost $1,000 remaining therein after withdrawing the said $10,000 therefrom."

The appellant attacks this finding of the probative fact, arguing that since the finding of the ultimate fact of purchase depends on the finding of payment of $10,000 and the fact of payment depends on the money coming from the safe deposit box, if it should be demonstrated there was not $10,000 in the box, the entire structure must fall. However compelling this logic may be, its entire force rests upon the demonstration that the money was not in the box.

On behalf of the appellant, it is next asserted that, if the testimony of any witness is inherently improbable, it may be disregarded. Subject to many limitations, this doctrine of inherent improbability is established by ample authority, and its existence has many times been recognized in this state. The elaborate attempt on the part of the appellant to show that the rule should be applied in this case falls far short of the requirements of the rule itself. The presumptions that every witness speaks the truth, and that the judge of the trial court faithfully performs his duty in determining the weight and credibility of evidence, are not to be ignored because of argument based on deductions drawn from inferences superimposed upon assumptions unwarranted by any fact.

A single illustration serves to show the tenuous character of the deductions upon which reversal is asked in this case. The bill of exceptions shows that in the accumulations of money in the safe deposit box was $500, that amount having been handed to R. V. Powell by his wife more than a year prior to the payment of the $10,000. Prior to her marriage Mrs. R. V. Powell was a nurse, and as such she had rendered services to Mrs. Bellina, a sister of Powell. There was delay in the payment for services, and Mrs. Bellina and Mrs. Powell finally agreed upon the sum of $500.

On cross-examination, Mrs. Bellina testified that she had deposited something over $3,500 in a savings bank, and paid therefrom to Mrs. Powell "in 20-dollar gold pieces the $500 which she gave her husband for his safe deposit box." Further cross-examination developed clearly that the witness remembered giving $500 to Mrs. Powell, but she had no recollection about going to the bank for it. On redirect examination she testified she was not sure of the source from which she got the money, and said she may have got it from money she received from the sale of her house.

The record of withdrawals from the bank was introduced and showed the particular $500 was not drawn from the bank. Mrs. Powell testified she received $500 from Mrs. Bellina, in 5-dollar pieces, 10-dollar pieces, and 20-dollar pieces, and gave the money to her husband, who said he was going to put it in his safe deposit box.

From these facts it is first assumed that, despite Mrs. Bellina's statement to the contrary, the $500 could not have come from the sale of the house. It is next inferred that, although both Mrs. Bellina and Mrs. Powell distinctly remembered the payment of $500 in gold coin, neither honestly could have been mistaken in regard to the denomination of any of the coin. Even though the payment of $500 might actually have been of $480 in 20-dollar pieces and the remainder in one 10 and two 5 dollar pieces, if this fact were not remembered by a witness more than a year after the payment, under the theory advanced here, a positive statement that $500 was paid would be unworthy of belief. It is next deduced that—

> "These intestine conflicts * * * are fatal to R. V. Powell's acquiring $500 for the box from his sister through his wife."

It is finally argued that, since this $500 and other sums upon similar inferences eliminated did not go into the box, it is mathematically demonstrated that $10,000 were not in the box at the time of the purchase.

Upon such a diaphanous demonstration, this court is asked to apply the rule of inherent improbability, not alone to the evidence regarding the payment of $500, but to all the evidence of all the defendants' witnesses. Confining the result of such an application of the rule to the evidence regarding the payment of $500, it would necessarily follow that the three witnesses should be branded as perjurers. If upon similar demonstrations the rule were applied, numerous other witnesses would be similarly marked.

[1, 2] It is within the province of the trial court to determine the credibility of witnesses before it and the weight to be given to their evidence. Even though the appellate tribunal might have reached a different conclusion, not having the opportunity to hear and see the witnesses, it is not permitted to substitute its own views for the conclusions of the judge who presided at the trial. If the record in any case shows there was no

substantial evidence to support the finding of the lower court, the appellate court may, and it ought to, set it aside. To warrant it in determining there is no substantial evidence because of inherent improbability, there must exist either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story. The appellate court will not indulge in lengthy and dubious computations, nor seek far for a reason, no matter how ingenious may be the argument by which it is urged, to determine that witnesses have committed perjury. It is its duty, if possible to harmonize apparent inconsistency in their statements, and to do this it will indulge in every reasonable presumption of fact.

[3] The entire record in the present case discloses ample evidence to support the particular finding of probative fact, as well as the findings of ultimate facts made by the judge who tried the case. The views of this court are in accord with those findings.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

40 Cal. App. 108

BECKETT v. STUART. (Civ. 2501.)

(District Court of Appeal, Second District, Division 1, California. February 27, 1919. Rehearing Denied by Supreme Court April 28, 1919.)

Appeal and Error ⟹837(2)—Matters Reviewable—Record.

Documentary evidence before the appellate court on an appeal cannot be considered on a subsequent appeal, where such evidence is not contained in the record on the subsequent appeal.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Ida R. Beckett against Z. B. Stuart. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

See, also, 35 Cal. App. 796, 171 Pac. 107.

J. W. Hocker, Hocker & Austin, Simms & Fulwider, and Stephen Monteleone, all of Los Angeles, for appellant.

Rubert B. Turnbull, of Pasadena, Joe Crider and Hugh Kelley, both of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from the judgment entered herein on the 9th day of February, 1917. On appeal from a former judgment in this action the judgment was reversed. 23 Cal. App. 373, 138 Pac. 115. After a second trial of the action judgment has been entered a second time in favor of the plaintiff. The pleadings have not been amended, and the issues at the second trial were the same as at the first trial. In the former decision on appeal this court said:

> "In this action plaintiff alleged that she intrusted to defendant for the purpose of collection a certain note and mortgage then owned by her, executed by one Juliet Burns, upon which there was due and payable the sum of $1,500; that on December 30, 1909, said Burns paid the same to defendant, who appropriated it to his own use and refused to pay the same, or any part thereof, to plaintiff. These allegations, other than the refusal to pay, are denied by the answer, which further alleged that in December, 1909, said Burns paid to defendant the sum of $1,500 for the use of one Sarnighausen, who on December 22, 1909, made and delivered to plaintiff his note therefor, which said sum was at the time a loan made by plaintiff to Sarnighausen of the funds then belonging to her in the hands of said Burns; that on July 12, 1910, for a valuable consideration, plaintiff sold and transferred to defendant said note so made to her by Sarnighausen. * * * If, as alleged in the answer, plaintiff, prior to the bringing of the suit, to wit. on July 12, 1910, for a valuable consideration, sold and delivered said promissory note to defendant, such fact would constitute a sufficient defense to the action. Moreover, the affirmative allegation of the answer that on July 12, 1910, plaintiff, for a valuable consideration, sold and transferred the note to defendant, which as such constituted a defense, tendered a material issue, as to which defendant was entitled to a finding by the court. For this reason, if for no other, the judgment should be reversed; and it is so ordered."

The evidence received by the court at the second trial is not before us on appeal, the appeal being upon the judgment roll alone. The findings of the court upon which the present judgment rests are fully responsive and adverse to the affirmative defense contained in defendant's answer. The facts, which are fully set out in the findings, show that the Sarnighausen transaction was a subterfuge, under and by means of which appellant applied the plaintiff's money to his own use without her knowledge or consent.

Further, "the court finds that it is not true that the amount evidenced by said Sarnighausen note or any sum or at all was ever loaned by the plaintiff, Ida R. Beckett, to said F. Sarnighausen, and the court finds that it is not true that on the 12th day of July, 1910, or at any time or at all for a valuable consideration plaintiff sold, assigned, and delivered said promissory note to the defendant. The court finds that subsequent to the execution of the Sarnighausen note, to wit, the note executed by said F. Sarnighausen in favor of Ida R. Beckett, the said Ida R. Beckett indorsed said note to Z. B. Stuart, the defendant herein, for the purpose of collection and for such purpose only; that at no time was the said defendant, Z. B. Stuart, the owner of or entitled to the proceeds of said note. The court finds that at the time of the indorsement of said note by the plaintiff to the defendant for the purpose of collection the said plaintiff was not apprised of the actual transaction by which the said F. Sarnighausen had made, executed, and delivered said note in favor of the plaintiff, and at said time plaintiff had no knowledge of the real facts of said transaction.

"The court finds that the instrument purporting to be an assignment of the Sarnighausen note in favor of the defendant, Z. B. Stuart, and purported to have been executed by the plaintiff, Ida R. Beckett, which instrument is marked 'Defendant's Exhibit 4,' was not signed by Ida R. Beckett, and that the signature thereon, purporting to be that of Ida R. Beckett, is not her signature."

Appellant's assignments of error are: (1) That the court erred in rendering a judgment not supported by the pleadings and findings; (2) that the court erred in rendering judgment based upon findings outside of the issues joined by the complaint and answer; (3) that the court erred in failing to apply the law of the case as announced by the appellate court on the former appeal. None of these contentions can be sustained. The cause of action set forth in the complaint was for moneys of the plaintiff, received by the defendant and wrongfully retained by him. The facts alleged were established, and the affirmative defense was refuted. The court did not base its judgment upon findings outside of the issues presented by the pleadings. The decision rendered is not in conflict with the law of the case as established on the former appeal. We do not agree with the claim of counsel for appellant that the documentary evidence before the court on the former appeal (none of it being in the present record) is before us for the purposes of this appeal. The case on second trial, as shown by the findings, is very materially different in its facts from the case as stated in the former decision made by this court.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(40 Cal. App. 159)

R. N. NASON & CO. v. KENNEDY.

(Civ. 2687.)

(District Court of Appeal, Second District, California. March 1, 1919. Rehearing Denied by Supreme Court April 28, 1919.)

1. GUARANTY 🔑38(1) — CONSTRUCTION—UNCERTAINTY—CONTINUING GUARANTY.

Where there is uncertainty as to whether a contract of guaranty was continuing or not, the court must resort to the circumstances under which the instrument was executed.

2. EVIDENCE 🔑461(1) — PAROL EVIDENCE — AMBIGUITY OF GUARANTY.

Where a guaranty is susceptible either of the interpretation that it is, or that it is not, continuing, in determining intention of the parties, the ambiguity may be explained by parol evidence of the situation and surroundings of the parties, and the guaranty interpreted in the light of such circumstances.

3. GUARANTY 🔑38(2)—CONTINUING CHARACTER.

Mother's guaranty of her son's account with plaintiff "up to the sum of seven hundred fifty ($750.00) dollars for what goods in your line he may purchase from you," in view of the circumstances, *held* to cover only the son's initial order, and not to have been continuing and to cover future transactions.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by R. N. Nason & Co., a corporation, against Maria J. Kennedy. From judgment for defendant, plaintiff appeals. Affirmed.

W. T. Craig and Bert P. Woodard, both of Los Angeles, and Henry N. Beatty, of San Francisco, for appellant.

F. A. Stephenson, of Los Angeles, for respondent.

SHAW, J. Plaintiff appeals from a judgment entered in favor of defendant in an action brought to recover upon a written guaranty executed by defendant, as follows:

"July 24, 1914.

"R. N. Nason & Co., San Francisco, California.—Gentlemen: I do hereby guarantee the account of L. C. Kennedy up to the sum of seven hundred fifty ($750.00) dollars, for what goods in your line he may purchase from you, and it is understood that if he does not pay his bills under the terms of purchase that I will pay them or see that they are paid.

"Respectively Yours,
Mrs. Maria J. Kennedy."

Appellant contends that this instrument constituted a "continuing guaranty," as defined by section 2814, Civil Code; whereas, respondent insists that, as found by the court, it should be construed as a guaranty for goods bought to the extent only of $750, which sum having been paid by L. C. Kennedy, the obligation of the guaranty was discharged.

[1, 2] While by this writing defendant guarantees the account of L. C. Kennedy and agrees that if he does not pay his bills she will pay them, nevertheless it is silent as to what particular account or bill it had reference to. There is nothing contained therein disclosing with certainty that the parties intended the guaranty should cover liability incurred in successive transactions covering an indefinite period of time. Hence, by reason of such uncertainty, we must, in deter-

mining the intention of the parties thereto, resort to the circumstances under which the instrument was executed. First National Bank v. Bowers, 141 Cal. 253, 74 Pac. 856. These circumstances, as disclosed by the evidence, are as follows: In July, 1914, defendant's son, L. C. Kennedy, being desirous of engaging in the mercantile business, placed an initial order for a stock of goods with the Los Angeles agent of plaintiff, whose principal place of business was in San Francisco. Upon receiving this order, plaintiff wrote to the agent from whom it had received the same, stating in substance that it could not make shipment of the goods unless payment thereof was guaranteed, and inclosed with its letter the form of guaranty, with the request that the agent get Kennedy to have his mother sign the same, and saying:

> "We understand she is responsible and thus we would be protected for this amount."

Plaintiff further stated in the letter:

> "Mr. Kennedy should be willing to make this guaranty because on the terms you are desirous of making to him, he should be in a position to take care of his indebtedness easily, but as a precaution and as a safeguard and on account of the conditions under which he is going into business and also on account of the present financial situation, we must insist upon a guaranty."

L. C. Kennedy, in substance, testified that plaintiff's agent, Mr. Hambly, who was instructed to secure the guaranty, in requesting same told him that plaintiff thought his order too large and had reduced it to approximately $750, to the extent of which value they were willing to ship the goods in filling his order, if payment thereof was guaranteed by his mother; that there was no arrangement or understanding for the purchase of other goods from plaintiff than this initial order which the guaranty was intended to cover. Kennedy did from time to time, while conducting his business, buy other goods from plaintiff, the total amount of which was $1,881.02, upon which he paid all but a balance of $747.27, for which suit is brought.

> "Where a merchant sells goods to a customer under a guaranty from a third person that they will be paid for, and afterwards sells him other goods, the first money he receives from the purchaser should be applied to the payment of the goods covered by the guaranty." Carson v. Reid, 137 Cal. 253, 70 Pac. 89; Marx v. Schwartz, 14 Or. 178, 12 Pac. 253.

The former case is also authority for the statement, quoted from Melville v. Hayden, 3 Barn. & Ald. 593, that "it ought to appear unequivocally that it was the intention of the defendant to guaranty * * * payment for goods to be furnished from time to time," and "that in every doubtful case the presumption ought to be against holding a guaranty to be continuing."

Looking solely and alone to the guaranty, it cannot be said that it expresses an intention of the parties that it was to be a guaranty for a line of credit to the extent of $750 to be extended by plaintiff to L. C. Kennedy and covering future transactions. Its language is equally susceptible of either interpretations, viz., that it is or is not continuing. Hence an ambiguity arises which may be explained by parol evidence of the situation and surroundings of the parties and the guaranty interpreted in the light of such circumstances. Bell v. Bruen, 42 U. S. (1 How.) 185, 11 L. Ed. 89.

[3] In view of the fact that L. C. Kennedy was for the first time applying to the plaintiff for the purchase of goods, which plaintiff refused to furnish except upon a guaranty of payment therefor, and there being no arrangement for a line of credit and no understanding that other purchases were to be made or contemplated, taken in connection with the statements made by plaintiff's agent, it may fairly be said that the parties understood and intended the guaranty to cover such initial order only. Had it been intended to cover future transactions, it should have been so worded as to include the same; but, as stated, it is silent as to the time, accounts, or bills which it was to cover.

The evidence supports the finding of the trial court that it was intended to cover the initial order of goods only, without which plaintiff was unwilling to furnish the same. The foregoing view renders it unnecessary to consider whether or not the evidence supported the finding of the court that there was no consideration for the guaranty.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

40 Cal. App. 68

PARKER v. SWETT et al. (Civ. 2617.)

(District Court of Appeal, First District, Division 1, California. Feb. 26, 1919. Rehearing Denied March 28, 1919; Denied by Supreme Court April 28, 1919.)

1. Easements 🔑42 — Partition Deeds — Construction—Land Subject.

Where plaintiff and defendant acquired land through parties who had divided it, easements in favor of one reserved in the partition deed cannot be held as against a parcel of land adjoining that divided which was acquired by the servient owner after the partition deeds were made; Civ. Code, § 1106, relating to subsequently acquired title, passing by operation of law, being without application thereto.

2. Quieting Title 🔑2 — Easements — Pipe Line Right of Way.

The right to an easement or a right of way for a pipe line is one to which the title may be quieted, although the line has not been constructed.

3. Quieting Title 🔑10(2) — Pipe Line Right of Way—Title—Boundaries Not Described.

Although a right of way for a pipe line does not definitely describe the route of the line, it must be held that a reasonable route was intended and title may be quieted to such route, and it is customary for the court to designate for the parties what would be a reasonable route under the circumstances in evidence.

4. Dismissal and Nonsuit 🔑58(4) — Grounds—Insufficiency of Complaint.

Where an objection to the form of the action would go to the question of the sufficiency of the complaint as stating a cause of action, which had been decided by the trial court in overruling a demurrer, the question was not a proper one for consideration upon a motion for nonsuit.

5. Quieting Title 🔑45—Nonsuit—Disclaimer.

Where the court granted a nonsuit in favor of all defendants, and one defendant had expressly disclaimed any interest in the rights concerning title sought to be quieted, nonsuit as to him was error.

6. Quieting Title 🔑7(4) — Judgment of Nonsuit as to Easements—Cloud on Title.

Where the answer of a defendant denied that plaintiff is the owner of all or any of the five easements alleged, which became a matter in issue, a judgment of nonsuit against the plaintiff in his suit to quiet his title to these rights is a cloud upon his title, and the fact that he may be using them at the present moment without objection from the defendants does not remedy the injustice.

7. Easements 🔑36(3) — Prescription — Adverse Claim or Holding—Evidence.

In order for the statute of limitations to run against the right of the holder of an easement, there must be definite and positive evidence of an adverse claim and an adverse holding.

8. Easements 🔑8(2, 3)—Adverse Possession—Evidence—Express Recognition.

Express recognition of the rights of plaintiff as the owner of the dominant estate in deeds to the servient estate containing reservations thereof is contrary to any claim of adverse possession to such easements.

9. Easements 🔑30(2) — Right of Way by Grant—Nonuser—Abandonment.

Although plaintiff and his predecessors have neglected for 25 years to exercise their right to lay a pipe line upon a right of way, they have not lost such right, for an easement founded upon a grant cannot be lost by mere nonuser, no matter how long that nonuser may continue, and it may be lost by abandonment only when the intention to abandon clearly appears.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Homer C. Parker against E. C. Swett and others. From a judgment for defendants, plaintiff appeals. Order appealed from reversed, with instructions.

Samuel C. Wiel and Wm. E. Colby, both of San Francisco, and Percy S. King and Clarence N. Riggins, both of Napa, for appellant.

R. P. Henshall and Luther Elkins, both of San Francisco, for respondents.

KERRIGAN, J. This is an appeal from a judgment for defendants following an order of nonsuit. The action was to quiet title in the plaintiff to certain easements upon the lands of defendants alleged to be appurtenant to the land of plaintiff. Appellant contends that the nonsuit was improperly granted.

The facts of the case are, briefly, these: In 1890, W. W. Thompson and Horace B. Chase were the owners in common of certain lands in Napa county. On May 7th of that year, this land was partitioned between them. Thompson received by the partition deed the southern half of the original tract, and Chase received the northern half. By mesne conveyances the southern half became the property of the present plaintiff and the northern half became the property of the defendant Swett. By the partition deed, above referred to, Thompson, the predecessor in title of plaintiff, reserved to himself five servitudes or easements over and upon the northern half of the land, which land is at this time the property of the defendant Swett. These easements are expressed as follows in the partition deed:

"And the said party of the first part hereby excepts and reserves from the operation of this conveyance unto himself his heirs and assigns forever, and as appurtenant to the tract of land adjoining the above described premises on the south, which has this day been granted by the party of the second part to the party of the first part, and to which conveyance or grant reference is hereby had and made for a description of the lands so adjoining on the south, the following rights, privileges and easements, to wit:

"First. A right of way over, in, along and through all roads upon the above described premises.

"Second. A right of way over, in, along and through all avenues in the vineyard upon said lands so long as said avenues shall continue to exist either in vineyard or orchard.

"Third. A right to take, use, appropriate, divert, lead and carry away, in pipes or otherwise, one-half of the waters flowing or that may flow, in the stream on said premises, to be taken at or near the point where the waters of said stream are now partially diverted in pipes leading to the dwelling on said premises.

"Fourth. The right of way for a line of pipe for water from the point where said waters may be diverted over, across, in and through said premises to the said adjoining tract on the south, such pipe to be laid so as not to interfere with the proper cultivation of said premises, and also, the right at all times to enter in and upon said premises for the purpose of viewing, changing, repairing or reserving said pipe that may be so laid, and making and maintaining a proper division of such water.

"Fifth. The right to enter in and upon said premises and mine and quarry from the rock quarry on said premises, such rock as he may see fit, with the right to remove the same."

The defendant Carlston answered, claiming an interest in the northern half as a mortgagee only—and his rights, of course, would be determined by those of the defendant Swett, his mortgagor. The defendant Clarence Grange disclaimed all interest in the land.

[1] At the outset we will consider the right of plaintiff to charge these easements and servitudes so reserved against the northern half of the original tract, against an adjoining parcel of land also described in the complaint, which was acquired by Chase some time after the partition deeds were made, and which passed with the other land to the defendant Swett. We think this cannot be done. The partition deeds, in terms, referred only to the land originally held in the one tract. This was all the land that was in contemplation of either party. Appellant states that the third tract, afterward acquired by Chase, contained some of the headwaters of the stream of water which flows upon the land partitioned, and argues that a half interest in the entire stream was granted by the partition deed, and therefore, the predecessor of the defendants having later acquired title to a portion of the thing which he had previously granted to Thompson, that later acquired title would redound to the benefit of his grantee Thompson and his successors in interest under the provisions of section 1106, Civil Code. We think this section does not apply to the present case. It is very clear from the entire instrument, and from the situation of the parties themselves, that there was no intention to convey anything but a right to the use of the water which was upon the northern half of the original tract of land. Indeed, the deed itself, after describing the premises constituting the northern half of the original tract, grants the "right to take, use, appropriate, divert, lead and carry away, in pipes or otherwise, one-half of the waters flowing or that may flow in the stream on said premises, to be taken," etc.

Therefore, as to the portion of the land owned by the defendant Swett which was acquired by her predecessor in interest after the partition of the original tract between Thompson and Chase, we think the nonsuit was properly granted.

[2] As to the portion of the land owned by defendant Swett, which was acquired by her through mesne conveyances from Chase which originally was a part of the tract partitioned between Thompson and Chase, we are of a different opinion. The point is raised in the statement of the trial court in granting the nonsuit, and in the arguments of counsel, that an action to quiet title is not the proper form of action for the plaintiff to pursue; particular stress being laid upon the argument that title cannot be quieted to a pipe line not in existence. The easement in regard to a pipe line was of a "right of way for a pipe line." It has been repeatedly held that the right to an easement of this kind may be quieted. Stone v. Imperial Co., 173 Cal. 39, 159 Pac. 164; Arroyo, etc., Co. v. Dorman, 137 Cal. 611, 612, 70 Pac. 737; Los Angeles v. Los Angeles Co., 152 Cal. 647, 93 Pac. 869, 1135; Verdugo v. Verdugo 152 Cal. 655, 93 Pac. 1021; Los Angeles v. Hunter, 156 Cal. 604, 105 Pac. 755; Watson v. Lawson, 166 Cal. 236, 135 Pac. 961; Byington v. Sacramento, 170 Cal. 132, 148 Pac. 791.

[3] It is true that the route of the pipe line is not definitely described in the deed, but it has been held that in such a case a reasonable route is intended, and title may be quieted to such reasonable route. Ballard v. Titus, 157 Cal. 683, 110 Pac. 118; Civ. Code, § 1419; Sulloway v. Sulloway, 160 Cal. 513, 117 Pac. 522; Stone v. Imperial Co., 173 Cal. 39, 159 Pac. 164; Byington v. Sacramento Co., 170 Cal. 132, 148 Pac. 791.

It is proper and customary under such circumstances, in view of the general equitable jurisdiction to do full and complete justice in one action, for the court to designate for the parties just what would be a reasonable route under all the circumstances in evidence. Ballard v. Titus, 157 Cal. 683, 110 Pac. 118; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254; Gazos, etc., Co. v. Coburn, 8 Cal. App. 158, 96 Pac. 359.

[4] However, the objection of respondent as to the form of the action would go to the question of whether or not the complaint stated a cause of action, and this question had been decided by the trial court in overruling defendant's demurrer to the complaint. It was not a proper consideration upon the motion for nonsuit. Keefe v. Keefe, 19 Cal. App. 315, 125 Pac. 929. But the question has been raised and argued by both counsel, and it is stated by the trial court as a reason for granting the nonsuit. It will probably become material at the next trial of the action, and we have therefore discussed it here.

[5] The court granted the nonsuit in favor of all the defendants. Defendant Grange had expressly disclaimed any interest in the rights sought to be quieted. Clearly as to this defendant, the nonsuit was error.

[6] Again, the trial court granted a nonsuit as to all the easements sought to be quieted. It is admitted in the brief of respondent, and upon the hearing in this court, that at the trial the right of the plaintiff to three of the easements was expressly conceded by the defendants. In respondent's brief we have the following statement:

> "The record below on the motion for a nonsuit shows that counsel for the defendant expressly stated: 'The roadways, which by the way, your honor, are not in dispute between us, as to the roads, there is no doubt as to the right of Parker to these roads.' And appellant's counsel will probably concede that these roads are being used by plaintiff to this day. And not alone was this concession made at the trial, but the roads and avenues referred to are in use by the plaintiff up to this very moment. He is not therefore in any wise aggrieved in respect of them.
>
> "Nor is the right of the plaintiff to enter upon the premises and mine and quarry rock, under the fifth easement, in dispute. The record shows that counsel for the defendant said: 'One of them was the right to go in on the premises and quarry rock, which is not in dispute to this day and which has been exercised by Mr. Parker and his predecessors.'"

However, the answer of defendant Swett denied that the plaintiff is the owner of all or any of the five easements, and this became a matter in issue. The judgment of nonsuit against the plaintiff in his suit to quiet his title to these rights is a cloud upon his title—and the fact that he may be using them at the present moment without objection from the defendants does not remedy the injustice. We fail to comprehend the logic of the respondent's position in asserting that the plaintiff is entitled to these rights and yet seeking to uphold a judgment which denied them to him. As to these three easements, unquestionably, the judgment of nonsuit should be reversed.

[7] The respondent argues, in support of the judgment regarding the easement for a right of way for a pipe line, first, that the statute of limitations has run against plaintiff's right. It has been repeatedly held that, in order for the statute to run in a case like this, there must be definite and positive evidence of an adverse claim and an adverse holding. Half Moon Bay Co. v. Cowell, 173 Cal. 543, 160 Pac. 675; Barlow v. Frink, 171 Cal. 170, 152 Pac. 290.

[8, 9] There is distinctly no evidence in the record of any denial of plaintiff's right until the time when the present defendant acquired the land, which was in August, 1913—less than three years before the commencement of this action. On the contrary, the deeds in evidence by which the successive grantees in the chain of defendant Swett's title acquired the land, and the deed to defendant Swett herself made in 1913, show in each case an express recognition of the right of plaintiff, for each deed contains the reservations in favor of the southern portion of the original tract, in the identical language of the first deed to Chase. This express recognition of plaintiff's rights as the owner of the dominant estate, by each successive owner of the servient estate, is contrary to any claim of adverse possession. It is true that the plaintiff and his predecessors have neglected for 25 years to exercise their right to lay a pipe line, but an easement founded upon a grant cannot be lost by mere nonuser, no matter how long that nonuser may continue. Currier v. Howes, 103 Cal. 437, 37 Pac. 521; Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282. And such an easement may only be lost by abandonment when the intention to abandon clearly appears. Moore v. Sherman, 52 Mont. 542, 159 Pac. 967. In this case there was no intention to abandon, and no evidence appears that would indicate such an intention. On the contrary, the evidence of the plaintiff is decidedly to the effect that he never intended to abandon the right. The evidence of plaintiff's predecessor in interest is to the effect that he never exercised his right to lay the pipe for the reason that he did not require the water during his ownership of the ranch and the installation of a pipe line was quite expensive.

> "Mere failure to take and use the water for which he has, at the time, no need, will not forfeit the right to the vendor, in such a case." Copeland v. Fairview Land, etc., Co., 165 Cal. 166, 131 Pac. 119.

From our conclusions, it appears that the nonsuit should not have been granted except as to that portion of the land owned by the defendant Swett which was not included in the original partition between Thompson and Chase.

The order appealed from is therefore reversed, with instructions to the trial court to proceed in accordance with the views herein expressed.

We concur: WASTE, P. J.; RICHARDS, J.

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40 Cal. App. 13

SOUTH v. SAN BENITO COUNTY et al.
(Civ. 2706.)

(District Court of Appeal, First District, Division 2, California. Feb. 19, 1919.)

1. Venue 🔑41—Change of—Trial in County of Defendant's Residence.

The joinder as party defendant of one against whom no cause of action is stated does not deprive the other defendants of the right to have the action tried in the county of their residence.

2. Counties 🔑142—Bridges—Failure to Construct—Resulting Accidents—Liability.

A county, exercising power for purposes essential to the public, such as the construction of bridges, is deemed an agency of the state, and is not subject to liability for any act or omission of its officers in the exercise of such power, unless an action is given by statute.

3. Bridges 🔑39(4)—County Board of Supervisors—Liability for Failure to Construct Bridges—Duty.

The supervisors of a county, who have not agreed with the supervisors of adjoining county for the reconstruction of a bridge on the county line, pursuant to the legislative discretion conferred on them by Pol. Code, § 2713, are not liable for a traveler's injuries due to failure to replace the bridge.

4. Venue 🔑41—Change of—Consideration of Motion—Fictitious Defendant.

A defendant, who is fictitious in fact as well as in name, and is not brought into court, cannot be regarded in the consideration of a motion by other defendants for change of venue.

5. Bridges 🔑46(3)—Personal Injuries—Complaint—Sufficiency.

A complaint in an action for personal injuries received by plaintiff when defendant's automobile, in which he was riding, plunged over an embankment where a bridge had been removed, not alleging negligence, or facts from which negligence of the defendant owner and driver can be inferred, does not state a cause of action against such defendant.

6. Negligence 🔑108(2)—Complaint—Sufficiency—Specification of Negligent Act.

In action for personal injuries, it is not necessary that the term "negligence" be used in pleading, but it must appear by direct averment that the acts causing the injury were done negligently, where the stated facts do not constitute a cause of action unless done negligently, except where the facts necessarily exclude hypotheses other than that of negligence, and, although it may be sufficient to allege negligence in general terms, the particular act negligently done must be specified.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by William South against the County of San Benito and others. From an order of the superior court, refusing to change the county of trial, certain defendants appeal. Order reversed, with directions to allow motion for change of venue.

Geo. W. Jean, of Hollister, Wyckoff & Gardner, of Watsonville, Snook & Church, of Oakland, and A. D. Shaw, of Hollister, for appellants.

D. M. Burnett and James P. Sex, both of San Jose, for respondent.

LANGDON, P. J. This is an appeal from the superior court of the county of Santa Clara refusing to change the place of trial of this action to San Benito county. The action is one to recover damages for personal injuries sustained by the plaintiff in an accident in which an automobile in which he was riding plunged over a precipice into the bed of San Felipe creek. It is alleged that the center line of San Felipe creek is the boundary line between the counties of San Benito and Santa Clara; that a county road and public highway led from Hollister, in San Benito county, to Gilroy, in Santa Clara county, and that for many years prior to January 1, 1914, there had been a bridge across San Felipe creek at the point where said creek was crossed by said road, which bridge was maintained by the two counties jointly as a part of said road; that after January 1, 1914, no bridge was maintained at said point and no means were provided for crossing the creek, but that at the point where the bridge had formerly been there existed on each side of the creek, from January 1, 1914, to June 29, 1914, a sheer drop of about 25 feet from the surface of the roadway to the bed of the creek, a condition dangerous to persons traveling over the road; that immediately before reaching the declivity on the San Benito side there was a small and narrow board or scantling placed across the road, but no other barriers and no lights; that on the night of June 29, 1914, plaintiff, riding in an automobile as the guest of the defendant J. A. Phippen, who was driving from Hollister toward Gilroy, was precipitated over the declivity on the San Benito side, whereby he received the injuries complained of. It is also alleged that it was the duty of the defendant counties and the defendant supervisors of both counties to replace said bridge and repair said highway and make the same passable, but because of their negligence, carelessness, and wrongful failure to replace said bridge and repair said highway and make the same passable, plaintiff sustained the injuries of which he complains.

It appears that the appellants are the five members of the board of supervisors of San Benito county and that they are all residents of San Benito county. The other defendants in the action were County of San Benito, County of Santa Clara, H. S. Hersman, A. L. Hubbard, H. M. Ayer, John Roll, and R. E. Mitchell, personally and as members of and constituting the board of supervisors of the county of Santa Clara, and J. A. Phippen and John Doe. Appellants urge that their motion in the court below should have been granted, for the reason that there is no cause of action stated against the defendants other than themselves, and that such other defendants are therefore improperly joined.

[1] It is settled that the joinder as party defendant of one against whom no cause of action is stated does not deprive the other defendants of the right to have the action tried in the county of their residence. Donohoe v. Wooster et al., 163 Cal. 114, 124 Pac. 730; Bartley et al. v. Fraser et al., 16 Cal. App. 560, 117 Pac. 683.

[2] It seems clear, under the decisions, that no cause of action exists against the county of Santa Clara or against the supervisors of said county, either individually or by virtue of their office. On the question of the liability of the county, we have the following language in Brunson v. City of Santa Monica, 27 Cal. App. 89, 148 Pac. 950.

> "In the absence of a statutory provision declaring otherwise, a municipal corporation in California is not liable in damages for the neglect of its officers or agents in the maintenance or care of streets or bridges (Winbigler v. City of Los Angeles, 45 Cal. 36); nor for such negligence committed while engaged in repairing a sewer (Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113). The case at bar comes within the doctrine of these cases of nonliability. The complaint does not definitely state for what purpose the so-called 'dump' was being maintained; but it is stated that the dump was a public work of the city and that the plaintiff was compelled, as well as permitted, to use it. This implies the use of a power of compulsion for some public reason, such as the exercise of the police power for protection of the public health. The decisions in other states, to which we are referred in the brief of appellant, show that there is a conflict of decision on the question here presented; but it is equally clear that the rule in this state is as above stated.
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> "An attempt has been made to modify by statutory provisions the rule of law above stated. An act approved April 26, 1911 (Stats. 1911, p. 1115), is entitled: 'An act relating to the liability of public officers for damages resulting from defects and dangers in streets, highways, public buildings, public works or property.'
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> * * *
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> "Here we have an act which in its title purports to deal with the liability of public officers for damages resulting from certain specified causes. This cannot by any process of reasoning be made to include the subject of liability of the public corporations in whose service such officers may be. The act is void as to any purported legislation therein contained attempting to create a new rule of liability as against such corporations."

The entire matter is carefully considered in the case of Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, and it is stated that, in so far as municipal corporations exercise powers conferred on them for purposes essentially public, they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action is given. To the same effect is the case of Coffey v. City of Berkeley, 170 Cal. 258, 149 Pac. 559.

[3] We next come to consider the liability of the supervisors of Santa Clara county. The accident occurred in San Benito county, and the embankment over which the automobile was precipitated was on the road in San Benito county. There is no dispute about these facts. The theory upon which the supervisors of Santa Clara county were sought to be held is that there was a joint duty imposed by law upon the boards of supervisors of these two counties to construct the bridge, and that their liability arises from their failure to do so before the accident occurred.

It has been held in this state that before a public official becomes liable for a breach of duty, the duty must be plain and mandatory, the means and ability to perform it must exist, and it must be such as not to involve the exercise of any discretion on his part, either as to its performance or nonperformance or as to the manner of its performance. Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Taylor v. Manson, 9 Cal. App. 382, 99 Pac. 410. In Taylor v. Manson, supra, the court said:

> "As the members of the board are public officers, with their duties prescribed by law, and as the other defendants are sureties on their official bonds, they can only be held for nonfeasance as to some act or duty required of the board by reason of their office, or for the negligent performance of some act or duty where the act or duty is plain. It is only where the duty is plain and certain, and such duty is negligently performed or not performed at all, that the officer is held liable to a private individual. If the act is a matter of discretion, or the officer has not the means or ability to perform it, he is not liable nor are his sureties on his official bond. Doeg v. Cook, 126 Cal. 213, 77 Am. St. Rep. 171, 58 Pac. 707; Shearman & Redfield on Negligence, § 340, and cases cited; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Elliott on Roads and Streets, 506. The reason for the rule is plain. An officer is

a public servant. His remuneration is often small. His implied agreement is to faithfully perform the duties required of him by law."

The only statute in force imposing any duties on boards of supervisors in reference to the construction or maintenance of county boundary line bridges is found in section 2713, Political Code, and is as follows:

> "* * * Bridges crossing the line between counties must be constructed by the counties into which such bridges reach, and each of the counties into which any such bridge reaches shall pay such portion of the cost of such bridge as shall have been previously agreed upon by the boards of supervisors of said counties. * * *"

There is no allegation in the complaint that the two boards had come to an agreement as to the proportion of the cost to be borne by each county, or that there was any fund available for the construction of the bridge by the two boards, or at all. It does not appear then that the construction of this bridge was the plain, certain, and ministerial duty of the supervisors of Santa Clara county. Until an agreement has been reached by the two boards, it would seem that neither board has the power to expend the county moneys for such work, and in reaching the agreement, provided for by the Political Code, clearly the boards would be exercising a legislative discretion.

Other than the power given by the above-quoted section to agree with the supervisors of San Benito county upon the division of the cost of a bridge crossing the county line, the supervisors of Santa Clara county clearly had no authority to repair the road in San Benito county, where the accident occurred, or to place warning signals thereon, and they therefore cannot be charged with liability under the provisions of section 1 of the act of April 26, 1911 (Stats. 1911, p. 1115), hereinbefore referred to.

However, while it was contended in the briefs that the counties and the supervisors were liable, it was admitted by counsel for respondent upon the oral argument of this case that there was no cause of action against either the counties or the supervisors of Santa Clara county, and so it is unnecessary for us to discuss these questions further.

[4] A fictitious defendant, John Doe, was named, and it was alleged that he was the roadmaster for the defendant French in the supervisorial district in San Benito county. Apart from the fact in this case that the uncontradicted affidavit of Mr. French appears in the record to the effect that there was no roadmaster in his district at any of the times mentioned in the complaint, and it would seem, therefore, that this defendant is fictitious in fact as well as in name, it has been held that fictitious defendants who have not been brought into court are not to be regarded in the consideration of the motion for change of venue. Yuba Co. v. North American, etc., Co., 12 Cal. App. 223, 107 Pac. 139.

[5] The one remaining question in the case, and the one that is decisive of this appeal, is whether or not a cause of action is stated against the remaining defendant, J. A. Phippen, and to that question we shall direct our attention. The allegations of the complaint with reference to defendant Phippen are as follows:

> "That on the night of June 29th, 1914, at the hour of about 11:55 o'clock, this plaintiff was the guest of and riding with said J. A. Phippen, who was then and there driving his automobile along said highway in said San Benito county, in the direction of Gilroy; that said Phippen was so driving said automobile at a prudent rate of speed; that this plaintiff was unacquainted with the condition of said road and the danger incident to traveling thereon, and to the absence of said bridge, and the existence of said drop or declivity from said roadway to the bed of said creek.
>
> "That as the said automobile approached said point where said bridge had formerly been, and where said road formerly crossed said creek, no lights or other barriers were displayed or shown to warn the traveling public of the danger there present.
>
> "That immediately before reaching said declivity or drop there was placed across said road a small and narrow board or scantling, but the same bore no lights or other signals, and the same was not visible to this plaintiff until said automobile had collided therewith, although the lights of said automobile were burning brightly, and although the plaintiff was constantly on the alert for possible danger.
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> "That the said defendant J. A. Phippen, while so operating said automobile and while approaching said point, did fail to observe said scantling or board, and did so operate his said automobile as to come in collision with said board, or scantling, so set across said road, and that, as soon as said Phippen so came in collision with said scantling, he, the said Phippen, attempted to stop said automobile, but failed to do so, before the same reached said drop or declivity; and that, when the automobile reached said drop or said declivity, it was precipitated over said bank," etc.

Plaintiff then states the nature of his injuries and damage, and continues in his complaint, as follows:

> "That at all times herein mentioned it was the duty of the defendant counties, and the duty of all of the other defendants, *except the defendants John Doe and J. A. Phippen,* as supervisors, to replace said bridge and repair said highway and make the same passable," etc.

We fail to find in the above either an allegation of negligence or any allegations of fact from which negligence can be inferred. On the contrary, the complaint alleges that the said Phippen was driving his automobile "at a prudent rate of speed"; that "there were no lights or other barriers displayed to warn the traveling public of the danger there present"; that the narrow board or scantling was placed across the road and bore no lights or other signals, and the same was not visible to the plaintiff until the automobile had collided therewith, although the plaintiff was constantly on the alert for possible danger. These allegations would seem to negative rather than to assert negligence on the part of the defendant Phippen.

[6] Although it is not necessary for the term "negligence" to be used in pleading, it is necessary for it to appear by direct averment that the acts causing the injury were done negligently, where the facts stated do not constitute a cause of action unless done negligently, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. Silveira v. Iverson, 125 Cal. 266, 57 Pac. 996. It should appear in what respects the defendant was negligent, and that such negligence had a causal connection with plaintiff's injury. Lang v. Lilley & Thurston Co., 20 Cal. App. 264, 128 Pac. 1031. While it is sufficient to allege negligence in general terms, the particular act alleged to have been negligently done must be specified. Stephenson v. Southern Pacific Co., 102 Cal. 147, 34 Pac. 618, 36 Pac. 407.

We think this pleading does not meet the general rule, or the rule laid down in this state. A demurrer to the complaint on the part of defendant Phippen would have to be sustained. A cause of action not being stated against Phippen, there remain no other defendants, except those who are nonresidents of the county in which the action was brought; this being true, the motion for a change of venue should have been granted.

The order appealed from is reversed, with directions to the court below to grant appellants' said motion.

We concur: BRITTAIN, J.; HAVEN, J.

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40 Cal. App. 28

SOUTH v. FRENCH et al. (Civ. 2707.)

(District Court of Appeal, First District, Division 2, California. Feb. 19, 1919.)

1. VENUE 🔑41—CHANGE OF VENUE—RESIDENCE OF DEFENDANTS — DEFENDANT AGAINST WHOM NO CAUSE OF ACTION IS STATED.

The joinder as party defendant of one against whom no cause of action is stated does not deprive other defendants residing in another county of the right to have the action tried in the county of their residence.

2. NEGLIGENCE 🔑108(2)—COMPLAINT—SUFFICIENCY—ACT NEGLIGENTLY DONE—OTHER ALLEGATIONS SHOWING ABSENCE OF NEGLIGENCE.

The allegation that an automobile driver "negligently" failed to observe that the road terminated in a declivity is not sufficient, in the face of other allegations showing that he was without knowledge of such condition, and that no lights were displayed or warnings given, thus showing an absence of negligence upon his part.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by William South against T. H. French and others. From an order denying the named defendant's motion for a change of venue to another county, he appeals. Order reversed, with directions to grant motion.

Geo. W. Jean, of Hollister, Wyckoff & Gardner, of Watsonville, Snook & Church, of Oakland, and A. D. Shaw, of Hollister, for appellant.

D. M. Burnett and James P. Sex, both of San Jose, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the county of Santa Clara, denying appellant's motion to change the place of trial of this action to San Benito county. The action is one to recover damages for personal injuries sustained by the plaintiff in an accident in which an automobile in which he was riding plunged over a precipice into the bed of San Felipe creek.

[1] The defendant French, who is the appellant here, is the supervisor of district No. 1 of the county of San Benito, and it appears without contradiction that he is a resident of San Benito county. The defendant John Doe, sued by a fictitious name, is alleged to be the roadmaster of the same district in San Benito county, and it also appears that he is a resident of San Benito county. The only question presented upon this appeal, then, is whether or not a cause of action has been stated against the remaining defendant, J. A. Phippen, for the joinder as party defendant of one against whom no cause of action is stated does not deprive the other defendants of the right to have the action tried in the county of their residence. Donohoe v. Wooster et al., 163 Cal. 114, 124 Pac. 730; Bartley et al. v. Fraser et al., 16 Cal. App. 560, 117 Pac. 683.

[2] In the case of South v. County of San Benito et al. (No. 2706) 180 Pac. 354, which arose out of the same accident, this court has decided, in an opinion filed this day, that a pleading containing substantially the same allegations as the complaint in the present case does not state a cause of action

against Phippen. The difference in the allegations in the two cases is not sufficient to warrant a different conclusion in this case. In the present case, the plaintiff alleges that he was riding in the automobile of defendant J. A. Phippen as his guest; that said Phippen was driving at a prudent rate of speed; that the plaintiff was unacquainted with the condition of the road and the danger incident to traveling thereon, and was unacquainted with the presence of the sheer drop or perpendicular declivity of about 20 feet from the surface of the roadbed to the bed of said creek; that, as the automobile approached the point where said roadway left said creek and terminated in such perpendicular drop or declivity, *no lights were displayed or other warning given of the danger there present, and no warning lights were displayed or warning of any kind given of the fact that said road was not safe to travel on, or that said road approached said bank of said creek and terminated in such drop or declivity;* that as the said J. A. Phippen was so driving and operating his said automobile, and approaching said point, he negligently failed to observe the fact that said road terminated at said creek in such drop or declivity, and so drove his automobile as to cause the same to approach so close to said drop or declivity as to make it impossible to stop the same before the same went over said drop or declivity and was precipitated to the bottom of said creek; that the plaintiff, using ordinary care and being constantly on the alert for possible danger, could not, while seated in the rear seat of said automobile, see the condition of said road, or ascertain the fact that the same terminated at said creek.

The only allegation of negligence made against the defendant Phippen is that he "negligently failed to observe the fact that said road terminated at said creek in such drop or declivity." The mere statement that he did this negligently is not sufficient, in the face of other allegations, which clearly show an absence of negligence on his part. Since it is alleged that no lights were displayed, nor any warnings of any kind given of the fact that the declivity existed, or that the road was unsafe, or that the said road approached the bank of said creek—and it is not alleged that the defendant Phippen had independent knowledge of these facts—it is apparent that Phippen could not be negligent in failing to observe something which it was impossible for him to observe.

While some cases have held that it is a sufficient allegation of negligence to state that the act complained of was done negligently by the defendant, specifying, however, the particular act alleged to have been negligently done (Fisher v. Western Fuse & Explosives Co., 12 Cal. App. 739, 747, 108 Pac. 659), it seems that this is true only where such allegation is not contradicted by other allegations of the complaint. Where it appears from other specific facts alleged that the act alleged to have been done negligently was not done negligently, the complaint is insufficient to charge negligence. Citizens' Co. v. Abright, 14 Ind. App. 433, 42 N. E. 239, 1028; Louisville Co. v. Bates, 146 Ind. 564, 45 N. E. 109. This rule, indeed, would seem to be the only natural and logical one. A pleader should not be allowed to negative his own averments and yet ask that they be considered sufficient.

As plaintiff has not stated a cause of action against defendant Phippen, and as the other defendants are residents of San Benito county, the motion to change the place of trial to San Benito county should have been granted.

The order appealed from is reversed, with directions to the court below to grant said motion.

We concur: BRITTAIN, J.; HAVEN, J.

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40 Cal. App. 237

NILSON et al. v. WAHLSTROM et ux.

(Civ. 2842.)

(District Court of Appeal, First District, Division 1, California. March 11, 1919.)

1. EASEMENTS 🔑3(2)—RESERVATION OF EASEMENT APPURTENANT.

Deed to plaintiffs, reserving to grantor, as an easement in favor of the tract owned by him, perpetual right of way over and across strip of land conveyed, constituting northerly 30 feet across width of his tract, constituted and reserved only easement appurtenant to tract of which strip was the northerly portion, and not an easement in gross.

2. EASEMENTS 🔑24 — EASEMENT APPURTENANT—EASEMENT IN GROSS.

An easement appurtenant to a particular tract of land was not like an easement in gross, which the owner could have conveyed away apart from the land.

3. APPEAL AND ERROR 🔑173(2) — RAISING QUESTION FOR FIRST TIME—DEDICATION OF LAND IN SUIT.

In suit to quiet title, wherein issue of dedication to public use of strip of land in suit was not presented by defendants' pleadings or embraced in findings or in fact raised on record, question cannot be urged on appeal for first time.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by Anna B. Nilson and others against Walfrid Wahlstrom and Maria Wahlstrom, his wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellants.

R. L. Thompson, of Santa Rosa, and R. M. Barrett, of Oxnard, for respondents.

RICHARDS, J. This is an appeal from a judgment in the plaintiffs' favor in an action to quiet their title as against the defendants to a strip of land 30 feet wide running across what is known as the Marshall ranch, in the county of Sonoma, and containing .55 acres of land.

The facts out of which the respective claims of the parties herein arise to interests in this strip of land are these: The ranch was a goodly number of years ago subdivided. In the year 1907 one Geo. P. McNear was the owner of a tract within the boundaries of said ranch containing nearly 17 acres, including this strip, which constituted the northerly 30 feet across the width thereof. The plaintiffs Nelson and Abraham were the owners of two other tracts in said ranch to the westward of the McNear tract. On June 8, 1907, McNear conveyed to Anna B. Nilson and Albertine Abrahamson said 30-foot wide strip of land extending from the county road to their properties, and in said conveyance he inserted the following reservation:

> "Reserving, however, unto the said party of the first part and the 16.30-acre tract hereinafter described as an easement in favor of said tract of 16.30 acres forever, and in favor of every piece and parcel thereof and in favor of the said party of the first part, his grantees, heirs or assigns, and all persons who may purchase any portion of said 16.30-acre tract, the perpetual right of way over and across said strip hereinbefore described, containing .55 acres."

On February 24, 1917, said McNear undertook to convey to the defendants herein, who own tracts of land on the northerly side of said strip, rights of way over and across the same. When these defendants undertook to exercise the rights purported to have thus been granted them by McNear, the plaintiffs brought this action to quiet their title to the strip. The defendants appeared and answered denying the plaintiffs' exclusive right to said strip, and setting up affirmatively by both their answer and by a cross-complaint the aforementioned source and extent of their asserted rights in and to the use of the same. Upon the trial, the court found in the plaintiffs' favor and rendered its judgment accordingly, quieting their title to the strip. Upon this appeal the first, and in fact the only available question, is that of the construction to be given to the reservation in the deed from McNear to the plaintiffs above set forth. The respondents contend that it constitutes and reserves only an easement appurtenant to the lands of which it was the northerly portion retained by McNear, and no other or further easement or interest in McNear. The appellants contend that the said reservation is also to be construed as reserving an easement in gross in McNear apart from his ownership of his said adjoining land, which said easement in gross was transferable and transferred to the appellants.

[1, 2] We are entirely satisfied that the contention of the respondents which was upheld by the trial court must be sustained upon this appeal upon the authority of the following cases: Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213. The reservation in McNear thus construed as embracing only an easement appurtenant to the lands then owned by him and bounded on the north by this strip, it follows that he had nothing in the way of an easement in gross which he could have later conveyed to the defendants and appellants herein, and hence that as to them and their asserted rights of way over said strip derived from McNear the plaintiffs were entitled to have their title quieted.

[3] The appellants undertake to further urge upon this appeal that the evidence in the case showed that the said strip of land had been dedicated to the public use, and that as a portion of the general public they were entitled to a right of way over it for ingress to and egress from their premises. In respect to this contention it is only necessary to say that no such issue was presented by the pleadings or embraced in the findings of the court, or in fact raised upon the record before us. The question cannot, therefore, for the first time be urged upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

40 Cal. App. 173

OFF v. CRUMP. (Civ. 2878.)

(District Court of Appeal, Second District, Division 2, California. March 4, 1919.)

1. Appeal and Error ⚷422 — Ambiguous Notice of Appeal — Considering Appeal as Properly Noticed.

Notice of appeal, reciting that the appeal is taken "from an order and judgment entered herein * * * denying the motion for a new trial and entering judgment against defendant," is uncertain and ambiguous; but, since it is open to a construction covering judgment as well as order denying new trial, which is not an appealable order under Code Civ. Proc. § 963, the appeal will be considered as properly noticed; respondent not appearing to have been misled or prejudiced.

2. Municipal Corporations ⚷706(5)—Collision—Negligence—Contributory Negligence—Evidence.

In action for injuries sustained by plaintiff pedestrian crossing a street, caused by being run into by defendant's automobile, evidence *held* to support court's findings as to defendant's negligence and as to plaintiff's freedom from contributory negligence.

3. Appeal and Error ⚷842(4)—Findings of Court—Review.

Question of contributory negligence of plaintiff injured by being run into by defendant's automobile while crossing a street being a matter on which under the evidence reasonable minds might differ the findings of trial court will not be disturbed.

4. Municipal Corporations ⚷705(10)—Injury to Pedestrian — Contributory Negligence.

Plaintiff pedestrian, in determining what course to pursue when one of two automobiles going in opposite directions close to him sounded horn, had the right to assume that defendant approaching street crossing would drive in a reasonable manner and not close to each other; State Motor Vehicle Law, § 20b, requiring that vehicles proceeding in opposite directions shall in passing give as nearly as possible one-half of road.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by E. T. Off against E. S. Crump. Judgment for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.
Overton, Lyman & Plumb, of Los Angeles, for respondent.

SLOANE, J. The plaintiff recovered judgment in this case in the sum of $800 for injuries caused from being run into by defendant's automobile. The judgment was entered December 10, 1915. There was a motion for a new trial, which was denied, under an order of court dated January 3, 1916. The notice of appeal recites that the appeal is taken "from an order and judgment entered herein on January 5, 1916, in favor of plaintiff and against this defendant, denying the motion for a new trial and entering judgment against defendant."

[1] The uncertainty and ambiguity of this notice is obvious. Respondent urges that it is notice only of an appeal from the order denying a new trial. At the date of this order and notice, an order denying a new trial had ceased to be an appealable order, under amendment of section 963, Code of Civil Procedure. Unless the appeal was also taken from the judgment, appellant has no standing in this court. It seems entirely probably that the purpose of the notice was an appeal from the order denying a new trial alone; but, as it is open to a construction covering the judgment as well, and as respondent does not appear to have been misled or prejudiced, we will consider the appeal as properly noticed.

The record comes here on a bill of exceptions, and the only real contention between the parties seems to be on the question of contributory negligence. Respondent objects to any consideration of the evidence applicable to that point on the ground that contributory negligence was not pleaded as a defense. The only matter in the answer suggesting a defense of contributory negligence is that, after controverting the allegations of the complaint charging negligence of defendant in driving his automobile, it is denied "that the plaintiff was struck by said automobile from any cause other than his own negligence," and it is alleged that, "on the contrary, the colllision with the plaintiff, and any injuries which the plaintiff may have received therefrom, were wholly and solely due to the negligence of the plaintiff." Similar allegations of negligence as against a plaintiff have been held insufficient to raise an issue of contributory negligence in Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 500, 143 Pac. 714, and Hughes v. Warman Steel Casting Co., 174 Cal. 558, 163 Pac. 885. It is contended, however, by appellant that the case was tried, and evidence introduced, on the theory that contributory negligence had been made an issue. The findings seem, at any rate, to have been framed on this theory, as the court finds:

> "That at the time plaintiff was struck by said automobile he was using reasonable and ordinary care, and was not negligent. That no negligence of the plaintiff contributed to or was the proximate cause of the accident."

[2, 3] Assuming, for the purposes of this case, that the issue was properly before the court, we are of the opinion that the findings of the court, both as to the negligence of the defendant and as to freedom from contributory negligence on the part of plaintiff, are

supported by the evidence. That the evidence was sufficient to justify a finding of negligence against the defendant does not seem to be seriously disputed. There is more room for disagreement as to whether plaintiff showed a want of ordinary care contributing proximately to the injuries complained of; but it is a matter on which, under the evidence, reasonable minds might differ, and therefore the finding of the court cannot be disturbed.

[4] There is very little conflict in the testimony. The plaintiff started to cross a street, apparently in the business district of Pasadena. He was aware that two automobiles were approaching from different directions; he seems to have kept an eye alternately first on one and then on the other, as he progressed across the street. When near the center of the street, the car approaching from the south, being in close proximity to the plaintiff, sounded its horn. He looked toward it, at the same time taking a quick step or two forward to clear its track. He then turned his face toward the defendant's machine, coming from the north, and which was at some distance from him when he had looked that way just before the horn of the other machine sounded, and was at that instant, without warning, run into by defendant's machine. The defendant admits that he did not see plaintiff at any time before running him down. There is evidence that his attention was distracted from his driving by a dog which he and his wife had in the machine. The very fact that he did not see plaintiff, in broad daylight, crossing the street, which was not congested with traffic, is evidence in itself that he was not paying attention to his driving. It is said that no significance is to be attached to the fact that defendant did not sound his horn, as plaintiff already knew he was approaching; yet a timely warning from that source would have notified plaintiff how close he was. Plaintiff could not look both ways at once, but he could have heard from both directions. All these circumstances of defendant's negligence have this bearing on the question of plaintiff's contributory negligence: He had a right, in determining what was the prudent course for him to take, to assume that defendant would drive in a reasonable and cautious manner. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

To sum the whole matter up, if plaintiff was negligent it was in attempting to cross the street at all when two automobiles were approaching from opposite directions, and likely to pass each other about where he was attempting to cross. If this is negligence, then foot passengers will have to keep off the crossings of our business streets. That crossing a street is often dangerous there is no doubt; but it does not follow that it is negligence. On the busy streets of our cities every time a man attempts to cross, in the congestion of teams and automobiles, he takes his life in his hands; but it is one of the dangers incident to the strenuous life of the city. Where this accident occurred, there does not seem to have been a great amount of traffic. The two cars in question, according to plaintiff's testimony, were about equidistant from him, and from 700 to 800 feet apart. Plaintiff, for all that appears, might have had to wait a long time to find the street entirely free from danger. Having attempted to cross, as we think he was probably justified in doing, he seems to have looked about him with a considerable degree of diligence, and probably was negotiating his passage with as much skill as would the average man. There seems to have been the whole width of the street for these automobiles to pass each other, and the plaintiff had no reason to suppose that they would attempt to pass so close together that he could not avoid one without getting into the path of the other. The State Motor Vehicle Law, § 20b (St. 1917, p. 401), requires that vehicles proceeding in opposite directions shall pass each other to the right, giving as nearly as possible one-half the road to each.

We cannot say that the evidence was insufficient to support the findings.

Judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

40 Cal. App. 135

IRWIN v. SILVA et al. (Civ. 1931.)

(District Court of Appeal, Third District, California. Feb. 27, 1919. Rehearing Denied by Supreme Court April 28, 1919.)

1. MECHANICS' LIENS ⚷132(1) — TIME OF FILING LIEN CLAIM—WORK OR MATERIALS FURNISHED NOT UNDER CONTRACT.

Under the Mechanics' Lien Law (Code Civ. Proc. § 1187), while for work done under contract between the owner and contractor mechanics or materialmen can, at their election, file a claim either within 30 days after ceasing of labor or of furnishing material, or within 30 days after the completion of the original contract between owner and contractor, yet, where the work is not done under a contract, liens must be filed within 30 days after ceasing of labor or furnishing materials.

2. MECHANICS' LIENS ⚷132(4)—STATUTES—CONSTRUCTION — "CONTRACT"—"ORIGINAL CONTRACT."

The word "contract," as used in Code Civ. Proc. § 1187, providing that "every original contractor, claiming the benefit of this chapter within 60 days after the completion of his contract," shall file his lien, was intended to be used and understood in the sense employed by the term "original contract" in section 1183, and refers only to work done upon such a contract between owner and contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract; Second Series, Contract to Answer for Default of Another.]

3. MECHANICS' LIENS ⚿118, 132(4)—TIME OF FILING CLAIM—ESTOPPEL OF LANDLORD.

The provisions of Code Civ. Proc. § 1187, as to filing notice of completion of contract, does not apply where the work was done or material furnished without a contract, and the owner is not estopped by such section, in proceedings for foreclosure of the mechanics' or materialman's lien, from maintaining a defense on the ground that the lien was not filed within time.

Appeal from Superior Court, San Joaquin County; M. D. Young, Judge.

Action by S. J. Irwin, doing business under the firm name and style of the Irwin Lumber Company, against John Silva as tenant, and John Emrick as owner of premises, to foreclose a mechanic's lien. Judgment in favor of plaintiff as against the tenant and in favor of the defendant owner, and plaintiff appeals. Judgment affirmed.

Gordan A. Stewart, of Stockton, for appellant.

Webster, Webster & Blewett, of Stockton, for respondent.

HART, J. The action was brought to foreclose a mechanic's lien on certain property belonging to the defendant, John Emrick. The land was under lease to defendant John Silva, who obtained from plaintiff lumber and material which he used in constructing certain buildings for his own use. Defendant Silva defaulted, judgment was in favor of defendant Emrick, and the appeal is by plaintiff, on the judgment roll, from said judgment.

It was found by the court:

That between the 5th day of June, 1915, and the 16th day of November, 1915, plaintiff sold and delivered to defendant Silva lumber and materials which were used by him in the erection of certain buildings; that said buildings were constructed by defendant Silva with the knowledge of the defendant Emrick; that during the course of construction of said buildings, and before they were completed, portions of them were occupied by defendant Silva. "That the defendant John Silva continued to work intermittently in and about said buildings and improvements up to the 4th day of December, 1915, at which time said buildings were completed. That said buildings were constructed by said John Silva in person and not by a contractor. That on the 8th day of February, 1916, and within 90 days after the last delivery of said lumber and building material and the completion of said buildings," plaintiff filed a claim of lien. "That no notice was ever filed by the defendants, or either of them, * * * setting forth the date when said buildings were completed, or any of the facts required to be set forth in section 1187 of the Code of Civil Procedure. * * * That the defendant John Emrick knew at all times that said buildings were in the course of construction, and he at no time gave notice that he would not be responsible for any bills incurred in the delivery of said lumber."

As conclusion of law the court declared:

That $540.45 was due plaintiff from defendant Silva, but "that the plaintiff is not entitled to a decree against the defendant John Emrick establishing a lien upon the lands and premises of the said John Emrick in satisfaction of the judgment of the plaintiff against the defendant John Silva, * * * by reason that said claim of lien is null and void and of no force and effect, not having been filed within the time required by law."

The only question presented for our decision is: What time has a materialman in which to file a claim of lien for materials furnished and used in the construction of a building where it is not constructed under contract?

Section 1187 of the Code of Civil Procedure provides:

"Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record * * * a claim of lien. * * * Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, * * * shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building * * * by the owner, or his representative; or the acceptance by said owner * * * of said building, * * * or cessation from labor for thirty days upon any contract or upon any building, * * * or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record * * * a notice setting forth the date when the same was completed, or on which cessation from labor occurred. * * * In case such notice be not so filed then the said owners and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter; provided, that all claims of lien must be filed within ninety days after the completion of any building, * * * or the alteration, addition or repair thereto."

It will be observed that the lien was filed after 60 but within 90 days after the time at which the court finds that the buildings were completed. But the plaintiff relies upon and invokes the estoppel created by the latter part of section 1187, where there is default on the part of the owner of land upon which a building has been erected to file for record within the time prescribed by the section a notice setting forth the date when the same was completed, or on which cessation of labor occurred. On the other hand, the respondent contends, and upon that theory the court below decided the case, that the estoppel raised by said section has no application to a case where, as is the claim here, the building is not constructed or the improvement made under a contract. In other words, it is contended that the estoppel referred to is not available to the claimant where the building is constructed or the improvement is made by the owner of the land himself, either actually or constructively.

The position of counsel for the respondent, as above stated, follows from their construction of the following portion of said section, or from the signification they ascribe to the word "contract" as employed therein, "The owner may within ten days after completion of any contract," etc., implying, as is the theory, that the estoppel which follows from the failure of the owner to file the notice prescribed has relation to a contract, and that, unless therefore the work is done under a contract, the estoppel cannot be made available as against the defense by the owner that the lien has not been filed within the time fixed by said section.

No case has been cited, and, after some independent research, we have found none, in which the precise question presented here has ever been considered and decided by any of the appellate courts of this state. We are therefore driven to a determination of the problem submitted entirely by what we consider to be a reasonable construction of the language of section 1187 of the Code of Civil Procedure.

Counsel for the appellant, as in support of his contention as to the meaning and scope of that portion of said section which relates to the estoppel, lays particular stress upon the proposition that it is thereby provided that the estoppel shall apply to "any proceedings for the foreclosure of any lien provided for in this chapter." It is argued that this language clearly implies that the estoppel is applicable in any proceedings for the foreclosure of any lien authorized by any section or provision embraced within the chapter of the Code relating to the liens of mechanics, laborers, materialmen, etc., and therefore may be invoked as well in a case where the work has not been done under a contract as in a case where the work has been done under a contract. But whether this argument be sound or not must be determined from an ascertainment of the meaning of the preceding language of the section. The language "shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter" obviously means, not necessarily all liens "provided for in this chapter," but any lien "provided for in this chapter" as to which it was the legislative intent that the estoppel might be invoked; so, after all, we are, as stated, required to turn to the language itself providing for the estoppel to ascertain in what cases the estoppel may be relied upon by a lien-claimant. And in getting at the true meaning of the provision as to the estoppel—that is, to ascertain in what cases the Legislature intended that the estoppel may be invoked—we will be greatly assisted by an examination of the preceding parts of said section and other provisions of the lien law.

[1] It is important to note the initial language of section 1187, viz.:

"Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record," his lien, etc.

It seems to us to be perfectly plain that that language was intended to mean that, in the case of any work being done under a contract between the owner of the property upon which the improvement is to be made and a contractor, the persons furnishing either labor or materials in such case may, at their election, select one of two alternatives as to the time of filing their liens for the same, to wit, either within 30 days after they have ceased to labor or to furnish materials or within 30 days after the completion of the original contract between the owner and the contractor, but that where the work is not done by or under such a contract—as for instance, where the work is done by the owner of the property himself, either actually or presumptively, laborers and materialmen must file their liens within 30 days after they have ceased to labor or ceased to furnish materials. That the second alternative or option was not intended to apply to the latter class is, it seems to us, indubitably shown by the use of the words, "if any," immediately preceding the words, "original contract." The phrase, "if any," as so employed, was certainly intended to and does operate as a limitation upon the second option—that is, the option to file the lien within 30 days after the completion of the original contract, if there be any such contract. If there be no contract, then the lien claimants furnishing labor or materials are afforded full opportunity to preserve their remedy by lien by filing the same within 30 days after they have ceased to labor or to furnish materials.

The theory upon which those bestowing labor upon or furnishing materials to be used in the construction of a building, where the work is done or to be done by contract between the owner and a contractor, are afforded by the statute two different occasions upon which they, at their option, may file their liens may thus be explained: In the case of work done by or under contract, the contractor himself employs the labor and orders the materials essential to the completion of his contract, and, it may be added, is primarily liable for the labor bestowed upon and the materials furnished for the construction or repair of the building or other structure. It is safe to say that in such a case the contractor is required, in many instances, to rely upon the money he is to receive as the contract price with which to pay for the labor and materials employed by him in the execution of the contract, and it follows that, in such circumstances, he must obtain credit to enable him to carry out the terms of his contract. The contract may provide for the payment of the contract price in installments, of which it may be agreed that some shall not be paid until the contract has been fully completed, or substantially so. The Legislature, having this situation in view, very properly and wisely, therefore, took the pains to provide for such a contingency by giving to laborers and materialmen, in the case of work done by contract, the option of filing their liens within the time specified as well after the completion of the contract as after the cessation of labor or of the furnishing of materials, thus enabling them to extend the credit to the contractor, if they wish to do so, and at the same time enabling the contractor to go on with the completion of his contract without that embarrassment or handicap which might follow as against him from the filing of liens before the completion of the work. In such case, the laborers and materialmen would not be required to exercise constant watchfulness to ascertain precisely when the time for filing their liens would begin to run, for then they would know from the contract itself, which should be on file in the county recorder's office, about when it would be completed, or may rely for knowledge of that fact upon the notice of completion which the owner is required to file, in the case of a statutory as well as in that of an actual completion (Boscus v. Waldmann, 31 Cal. App. 245, 254, 255, 160 Pac. 180), to preserve in himself the right to object if the lien is not filed within the statutory time.

The situation is entirely different where the work is not done by contract. The owner in such case is primarily responsible for the claims of laborers and materialmen furnishing the labor and the materials to carry on the work. Then in that case there may be no definite plans or definite time fixed for the completion of the work, with the result that the work may be extended over a long period of time to comport with the convenience of the owner. The work may be, in point of magnitude, of little consequence, and material for its purpose may be ordered and delivered but not put into the building or structure for months after its delivery, and thus claimants in such a case, if they were required to wait until the filing of a notice of completion by the owner, would have to wait an indefinite time before they could file their liens, without prematurely doing so. Such lien claimants can, themselves, it is obvious, always know, independently and without the aid of extrinsic evidence or notice, when they have ceased to labor or to furnish materials, and thus more than other persons are in a position to know the date from which the time within which they must file their liens, if they would enjoy the benefit of such protection, begins to run. They are not required to be incessantly on the alert and so watch the progress of the work for the purpose of ascertaining when it is completed.

[2] But it is hardly necessary to proceed further in the discovery of reasons which justify the conclusion that in but one contingency are the laborers and materialmen at liberty, under the statute, to file their liens after the completion of the work. It may be added, however, that the initial language of section 1187 clearly and unquestionably provides for two different courses which the owner of land is at liberty to adopt for the erection or improvement of structures thereon, to wit: (1) Where the work of construction or repair is done under a contract between the owner of the land upon which the improvement is to be made and a contractor, in which case either the original or subcontractor employs the labor and orders the materials. (2) Where the owner, either by himself directly or by agent, presumptively or constructively, does the work and employs the labor and orders the materials; and that from this proposition it becomes the more clearly apparent that wherever the term "contract" is employed in the statute it was intended to be so used and to be understood in the sense in which it is employed

in section 1183, the initial section of the chapter upon the subject of liens. And that the sense in which that word or the phrase, "original contract," is used in the latter section, is that of work to be done by or under a contract between the owner and a contractor is plainly evidenced by the provision contained in said section 1183 to the effect that the liens "in this chapter provided" shall not in the case of any claimants, other than the contractor, be limited, as to any amount, by any "contract price agreed upon between the contractor and the owner, except," etc., the provision as to the effect of the filing of "such original contract" before the commencement of the work upon the rights of those performing labor thereon or furnishing materials thereunder, the provision for the filing of a bond with "such contract" in the office of the county recorder, the effect of which is, in addition to securing to lien claimants, other than the contractor, the payment of their liens, to restrict the right of recovery as against the owner to the "contract" price, and the provision that any change, alteration, or modification "of any such contract between the owner and his contractor" shall not have the effect of releasing or exonerating any surety or sureties upon any bond given under this section. All these provisions, we say, unquestionably, refer and apply to cases where the work is done, not by the owner himself, either actually or constructively, but by or under contract between the owner and a contractor, and from this, as before declared, the proposition seems to be clearly deducible—indeed, so much so as to transfer it far beyond the realm of doubt—that wherever the word "contract" or the phrase "original contract" is thereafter used in the law it must have been so employed in the sense in which section 1183 uses it, unless there is discernible from the statute itself some overruling reason for applying the term or the phrase in a different sense. No just reason has been shown and, after a painstaking consideration of the lien law in its entirety, none has occurred to us, supporting the contention of the appellant with respect to the sense in which the Legislature intended the word "contract" as used in that part of section 1187 relating to the filing of notice by the owner of the completion of the work was to be understood and applied. Indeed, the construction above given section 1183 and the initial language of section 1187, about the correctness of which construction it seems to us there can be no doubt, is itself sufficient to negative the contention that the word "contract" as used in the provision relating to the filing of notice of completion by the owner is to be interpreted to mean the "building" or the "structure" or the "work," whatever may be its character, to be done. As pointed out, there is apparent no good or any reason why that word should be given such a meaning. To require the owner, in cases where he has himself, either actually or by presumption, done the work, to file a notice of completion would add nothing to the rights of lien claimants in such cases, it would benefit them in no way, it would afford them no better or greater or more advantageous opportunity to preserve their right to liens than by the provision that they may file their liens within thirty days after they have ceased to labor or to furnish materials. Besides, as already shown, the exercise of the second option provided for in a case where the work is done by contract could not affect the owner where he does the work himself as it does a contractor in the former case, for while the provision may, as shown, help the contractor in certain indicated circumstances, and at the same time afford ample protection to claimants, yet where the work is done by the owner himself it can be of no just benefit to him, since he must himself pay for the labor and materials employed in the work, and may proceed with the work according to his own wish and convenience. He may, as before stated, extend the work of construction over a long period of time—in fact, indefinitely—or do it by piecemeal, if he is without the means to press it on to completion as early or soon as ordinarily he might, and yet in such case he cannot suffer by reason thereof as could a contractor, who is, ordinarily, bound to complete his contract within a specified or reasonable time.

But there is another and, we think, a well-nigh conclusive reply to the contention that the provision for the filing by the owner of a notice of the completion of the contract applies to the case where the work is not done under contract, and it is this: The provision with respect to the filing of a notice of completion as it read prior to the revision of the lien law by the Legislature of 1911 (St. 1911, p. 1313) was in the following language:

> "The owner of any property on which labor has been performed, or for which materials have been furnished to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any work mentioned in section 1183 of this Code, must, within ten days after the completion thereof, or within forty days after the cessation from labor upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or the repair thereof, file for record * * * a notice setting forth," etc.

See Stats. 1897, p. 202.

We have seen no cases which have construed the section as it thus read prior to 1911, but undoubtedly the language quoted could reasonably have been so construed as to have made it applicable to cases where the work was not done by contract as well as those cases where the work was done by contract, and it is most probably true that, when so applying it, it was found to be so unnecessary—so impotent in the achievement of any useful purpose—that the Legislature of 1911, having so viewed it, ex industria, changed it so as that it would read as it now exists. At any rate, we can conceive of no stronger reason calling for the amendment than that of avoiding the absurdity of requiring the owner, where he has himself done the work, to file a notice of completion when at the same time there exists a provision which affords the laborer and materialman in such a case the right of filing their liens within 30 days after they have ceased to labor or to furnish materials, an event produced by their own acts or conduct and which, therefore, they of necessity have actual knowledge of.

[3] It follows, of course, from the view of section 1187 above given, that only those whose rights would be affected by the filing of the notice of completion may invoke the estoppel provided for in said section when no such notice is filed. If, in other words, the provision as to the notice of completion applies only when there is a contract, then, obviously, the estoppel is applicable and may be invoked only when there is a contract. There being no contract in this case—that is, the buildings for which the plaintiff furnished materials not having been constructed by or under contract between the owner and a contractor but constructively by the owner himself—the provision of section 1187 as to the filing of notice of completion does not, as to the appellant, apply, and as an essential corollary of that proposition the estoppel provided for in said section does not apply, and therefore cannot be invoked in this case. In a word, the plaintiff, by reason of the circumstances of this case, comes within that class of lien claimants who have available to them under the statute but a single course to pursue to preserve their remedy by lien, viz.: to file their liens within 30 days after they have ceased to labor upon or furnish material for the work to be done.

The effect of the construction herein of the statute, as amended in 1911, is obviously not to impair in any way the rights of any claimants, but, on the contrary, it seems to us, is to make it fair and just to all lien claimants. And no discrimination can result from the statute as it is so construed. The statute deals with two general classes of cases, and as we construe it those of each class are treated alike. The contingency upon the happening of which each class must act to preserve his rights is plainly pointed out and affords to every claimant full opportunity for protecting his rights under the statute. If our construction of section 1187 would lead to any other result, we would, of course, be compelled to hold, in the face of plain, ordinarily understandable words and language, that the Legislature did not intend to say what the face of the language of the statute clearly and naturally implies and signifies. But, as we have shown, to give to all claimants their constitutional right to liens, and at the same time give to owners just protection, there is no necessity for such a construction of the law established for the enforcement of liens as it exists at the present time. As declared, the law, as we here construe it, in no way curtails or qualifies or impairs the rights of any of the claimants of either class, but leaves all with equal rights, according to the several contingencies upon which they may preserve their right of lien, and affords them as well as the owners of property ample protection.

Accordingly, we conclude that the decision below is correct, and the judgment is therefore affirmed.

We concur: BURNETT, J.; BUCK, Presiding Judge pro tem.

180 Cal. 225

MALLETT v. DOHERTY. (L. A. 4681.)

(Supreme Court of California. April 15, 1919. Rehearing Denied May 15, 1919.)

1. Logs and Logging 🔑3(7) — Sale of Timber—Construction of Contract.

Instrument granting timber on tract with covenants that landowner would permit removal within a specified time *held* not to convey absolute title to timber, but only right to take such timber as should be removed within specified period.

2. Vendor and Purchaser 🔑231(16) — Bona Fide Purchaser—Timber—Recorded Contract as Notice.

Instrument giving right to remove timber from a tract within a certain period is, when recorded, notice of such rights to a subsequent purchaser of the land from the landowner.

3. Logs and Logging 🔑3(11)—Removing Timber—Time.

Where person holding contract right to remove timber from a tract during a certain period is prevented by the landowner from exercising such right, the time for removal should be extended by adding to it the period of such interruption.

Department 1.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by J. H. Mallett against W. J. Doherty. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Alfred Siemon and W. W. Kaye, both of Bakersfield, for appellant.

Borton & Thiele, of Bakersfield, for respondent.

LAWLOR, J. This action was brought by the plaintiff against the defendant to quiet the title of the former to an undivided one-half interest in certain standing timber.

On October 5, 1905, the Kern County Lumber Company, a corporation, being the owner of a tract of land on Mt. Breckenridge, in Kern county, executed and delivered an instrument in writing which purported to convey the standing timber on the said land to the plaintiff. This instrument was duly acknowledged and recorded.

The plaintiff, on October 27, 1905, assigned to the Madera Sugar Pine Company, a corporation, the Fresno Flume & Irrigation Company, a corporation, the Sanger Lumber Company, and the West Side Lumber Company, a corporation, an undivided one-half interest in the said timber.

On November 12, 1908, the Kern County Lumber Company conveyed to the defendant the land upon which the said timber stands. This deed was placed in escrow with the Producer's Savings Bank in Bakersfield on June 19, 1909, with escrow instructions to the effect that the deed be not delivered until the balance of the purchase price, which included a subsisting mortgage of $5,000 on the land, was paid by the defendant. The final payment was made and the deed delivered on May 22, 1912.

In his complaint, filed on December 6, 1912, the plaintiff alleged that he was the absolute owner of an undivided one-half interest in the timber, with a right to the free use of the land without charge for the purpose of removing the timber until the 5th day of October, 1915. It was further alleged that the defendant claims the ownership of the land and the timber; that on November 1, 1912, the defendant evicted the plaintiff from the real property, and ever since then has held possession thereof against the plaintiff. The plaintiff prayed that the defendant be required to set forth his right to the timber, and the real property; that a decree be entered quieting the title of the plaintiff to an undivided one-half interest in the timber; that the defendant be enjoined from claiming any right, title, and ownership therein; and that he be enjoined from hindering and preventing or in any way obstructing the plaintiff in the free use and occupation of the land for logging purposes and for the purpose of cutting and removing the timber.

The defendant answered and denied that the plaintiff is the absolute owner of, or has any interest in, the timber or any right to the use of the land for the removal thereof. He further denied that the plaintiff had ever been in possession of the land or that he had been evicted therefrom, alleging that he himself was the absolute owner of both the land and the timber.

The defendant pleaded separately section 318, section 319, subdivision 1 of section 337, subdivision 2 of section 338, and subdivision 3 of section 338 of the Code of Civil Procedure as a bar to the complaint "and the cause of action attempted to be set forth therein."

The case was tried by the court without a jury. Judgment was entered in favor of the defendant, from which the plaintiff appeals. The plaintiff also appeals from an order denying his motion for a new trial, and the case comes here upon a bill of exceptions used on the hearing of the said motion.

The instrument referred to reads as follows:

"That for and in consideration of the sum of three thousand dollars, the said party of the first part does hereby grant, bargain, sell and convey to the party of the second part, all timber suitable for sawmill purposes, and standing and being upon the following described real estate, * * * together with the free use and occupation of said premises and appurtenances, without charge, for the purpose of cutting, hauling, and sawing said timber.

"And it is further understood and agreed that

> the party of the second part shall have six (6) years from the date of this agreement to remove said timber and an extension of four years thereafter, if the party of the first part shall not have sooner disposed of said land, and in the event of said land being sold, it shall be upon the express condition that no part of the timber hereinbefore mentioned shall be cut or used in the manufacture of timber, during said term of four years."

The timber had not been removed by the plaintiff or his co-owners within the six-year period, which expired on October 5, 1911, nor at the commencement of this action, on December 6, 1912.

It is the position of the appellant that the instrument conveyed to him absolute title to the timber, so that he could remove it at any time, even after the expiration of ten years, and that the stipulation for the removal of the timber was merely a covenant and the timber remained his property even though it was not removed within the time specified.

As we understand the position of the respondent, it is that the intention of the parties was fully expressed in the contract, and that they intended "that the right to remove the timber and the title of the plaintiff to the timber should terminate and be at an end together."

On the question of the plaintiff's title to the timber and the right to use the land for the removal of the timber, the court found:

> "That the plaintiff was not * * * at the time of filing complaint herein and never at any time since has been the owner, either absolute or otherwise, of an undivided one-half interest * * * in the timber. * * * That the plaintiff did not have * * * at the time of filing his complaint herein and has not had at any time subsequent thereto the free use and occupation of all or any of the above-described lands without charge or otherwise, * * * until the 5th day of October, 1915, * * * for the purpose of cutting, sawing, hauling, and removing said timber. * * *"

No other findings were made by the court.

In support of his contention that the instrument conveyed to him absolute title to the timber, the appellant relies on the companion cases of Peterson v. Gibbs, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107, and Gibbs v. Peterson, 163 Cal. 759, 127 Pac. 62. We are of the opinion that these cases are not determinative of this case. In the Peterson-Gibbs Cases the instrument involved provided, not merely that the vendees of the timber should have a period of ten years within which to remove it, but also that if it was not removed within ten years the vendees should thereafter pay a yearly rental of $200 for the privilege of removing such timber, and it was agreed, "that all the privileges granted herein are to continue until such timber is removed." In view of the provision for the payment of rent after the ten-year period, this court construed the instrument as an absolute conveyance without condition. This obviously is correct, for the provision for the payment of rent for an indefinite period after the expiration of the ten years in case the timber should not be removed indicates clearly that it was the intention of the parties that the vendees should have the right to remove the timber after the specified term. The court said: "The question in each case is as to what is the contract between the parties." The doctrine of the Peterson-Gibbs cases was followed in Ciapusci v. Clark, 12 Cal. App. 44, 106 Pac. 436, and in Anderson v. Palladine (App.) 178 Pac. 553; the court in each of those cases construing the instruments as giving the purchaser of the timber the right to remove it after the expiration of the time specified.

[1-3] The instrument herein contains no language indicating that the appellant was to have more than ten years within which to remove the timber. While the language is somewhat involved, the instrument is, in effect, equivalent to one conveying the timber, "the same to be removed within ten years." This finds support in the provision:

> "That in the event of said land being sold, it shall be upon the express condition that no part of the timber hereinbefore mentioned shall be cut or used in the manufacture of timber, during said term of four years."

It is conceded that this restriction was intended to apply to the purchaser of the land. Since it is plain that the appellant was entitled to an aggregate term of ten years, and this action was brought before such term had expired, it will not be necessary to consider the arguments of respective counsel as to the meaning of the phrase, "shall not have sooner disposed of said land," including the question whether it was "disposed of" on the date of the execution of the deed or when it came out of escrow. It may be mentioned that the lumber company failed to put the "express condition" in the deed when the land was sold to the defendant, but this in no way affects the rights of the plaintiff as to the time for the removal of the timber, since the instrument conveying it to the plaintiff was recorded, and the defendant was therefore put upon constructive notice of the provision.

The rule of construction as to contracts for the sale of standing trees to be removed within a specified time is thus stated in 28 Am. & Eng. Ency. of Law, p. 541:

> "Contracts for the sale of standing trees to be removed within a specified time have generally been construed by the courts as sales of only so many trees as the vendee might cut and remove within the time designated, the balance remaining the property of the vendor."

See, also, 25 Cyc. 1549; 17 R. C. L. 1084; and 55 L. R. A. 526.

The weight of authority is in accord with this rule. McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Baxter & Co. v. Mattox, 106 Ga. 344, 32 S. E. 94; Howard v. Lincoln, 13 Me. 122; Webber v. Proctor, 89 Me. 404, 36 Atl. 631; McIntyre v. Barnard, 1 Sandf. Ch. (N. Y.) 52; Patterson v. Graham, 164 Pa. 234, 30 Atl. 247; Golden v. Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32; Saltonstall v. Little, 90 Pa. 422, 35 Am. Rep. 683; Williams v. Flood, 63 Mich. 487, 30 N. W. 93.

It is to be noted that the instruments in the above cases, like the one at bar, employ words of present grant.

The question of a forfeiture arising from a condition subsequent has been argued at great length by counsel. But the question is not involved in this case, for the reason that it was the intention of the parties that the right to take the timber should be limited to ten years. The legal result follows that the vendee would be entitled to only so much of the timber as he might remove within the time, the balance remaining the property of the vendor. As stated, however, the ten-year period had not expired when the complaint was filed. There is no finding on the issue that the plaintiff was ejected from the property. If the plaintiff was prevented by the defendant from going on the land and cutting the timber, the period of interruption should be taken into account and the term extended by operation of law for the time during which the plaintiff was so prevented from exercising his right.

The judgment is reversed, and a new trial ordered for the purpose of determining whether the appellant has any time remaining within which he may remove the timber and decree accordingly.

We concur: OLNEY, J.; SHAW, J.

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180 Cal. 181

Ex parte KAVANAUGH. (Cr. 2241.)

(Supreme Court of California. March 28, 1919.)

Habeas Corpus ⟹30(2) — Questions for Determination—Sufficiency of Information.

Whether the specific acts alleged as constituting the felony of drawing a bank check with intent to defraud, as defined by Pen. Code, § 476a, fail to sufficiently show the public offense attempted to be charged cannot be considered on habeas corpus.

In Bank.

Petition by Mae Kavanaugh for a writ of habeas corpus. Writ denied.

Geo. D. Collins, Jr., of San Francisco, for petitioner.

PER CURIAM. The information in the superior court upon which the judgment against petitioner is based clearly attempted to charge the felony defined by section 476a of the Penal Code. Whether the specific facts alleged as constituting the particular offense failed to sufficiently show the public offense attempted to be charged is a question which cannot be considered on habeas corpus under the well-settled rule of this jurisdiction. Matter of Ruef, 150 Cal. 665, 89 Pac. 605. See, also, Ex parte Greenall, 153 Cal. 770, 96 Pac. 804.

As to the second point, in view of the facts and exhibits shown by the petition, it must be held that the superior court did vacate the order suspending the execution of the judgment.

The application for a writ of habeas corpus was denied for these reasons.

ANGELLOTTI, C. J., and SHAW, WILBUR, LENNON, OLNEY, LAWLOR, and MELVIN, JJ., concur.

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180 Cal. 231

MARSH v. LAPP. (L. A. 4742.)

(Supreme Court of California. April 15, 1919.)

1. Appeal and Error ⟹110—Orders Appealable—Denial of New Trial—Statute.

An appeal from an order denying a motion for new trial is no longer allowed, and must be dismissed. Code Civ. Proc. § 963, as amended by St. 1915, p. 209.

2. Appeal and Error ⟹757(1)—Briefs—Sufficiency—Portions of Record.

Where an appeal is taken under the alternative method, and defendant does not print in his briefs, in accordance with the statutory provisions, such portions of the record as he relies upon, his appeal deserves no consideration. Code Civ. Proc. § 953c.

3. Appeal and Error ⟹840(4)—Overruling of Demurrer to Complaint—Filing of Amended Complaint.

Defendant cannot urge on appeal that his demurrer to the first amended complaint on the ground of uncertainty was improperly overruled, where the record shows a second amended complaint was filed, since only the pleadings upon which the issues were joined may be attacked on appeal.

4. Pleading ⟹406(7) — Objections — Waiver—Uncertainty.

Although defendant demurred to the first amended complaint for uncertainty and the demurrer was overruled, where defendant failed to specifically demur to the second amended complaint, he waived the objection of uncertainty.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Chattel Mortgages 🔑262(1)—Sale of Personal Property—View of Property.

Code Civ. Proc. § 694, requiring that in the case of an execution sale of personal property capable of manual delivery the property must be within the view of those attending the sale, does not apply in a case where a tenant, as mortgagor, has waived his right under the statute by removing part of the mortgaged chattels, after the landlord, mortgagor, had published notice of the sale under terms of mortgage securing rent.

Department 2.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action be Ceceil L. Marsh against C. E. Lapp. From a judgment for plaintiff and an order denying a motion for new trial, the defendant appeals. Appeal from order denying new trial dismissed, and judgment appealed from affirmed.

Clyde R. Burr and Harold G. Ferguson, both of Los Angeles, for appellant.

O'Melveny, Stevens & Millikin and Alex. Macdonald, all of Los Angeles, for respondent.

LENNON, J. [1] The defendant appeals from a judgment in plaintiff's favor, and attempts to appeal from an order denying his motion for a new trial. The appeal from such order, being no longer allowed by statute, must be dismissed. Code Civ. Proc. § 963, amended 1915 (St. 1915, p. 209); Regoli v. Stevenson, 176 Pac. 158.

[2] The appeal is under the alternative method. Since defendant does not print in his briefs, in accordance with the statutory provisions, such portions of the record as he wishes to rely upon, his appeal deserves no consideration. Code Civ. Proc. § 953c; Frankfort, etc., Co. v. Bernardini, 174 Pac. 33. We have, however, examined the record sufficiently to dispose of the case upon its merits.

In February, 1915, the defendant was in possession of the Alta Vista Apartments, in Los Angeles, under a lease from the plaintiff, secured by a mortgage on defendant's furniture. The defendant being in arrears in rent in the sum of $3,619.42, and demand having been duly made, defendant defaulted. On February 23d, in accordance with the terms of the mortgage, plaintiff served on defendant a notice of sale of the furniture to satisfy the indebtedness, to be held March 3d, at the Alta Vista Apartments, where the furniture was. About March 1st, defendant attempted to remove the furniture, and succeeded in removing about half of it, which he stored in a warehouse. Pursuant to the notice, the sale was held at the apartment house. The auctioneer offered all the furniture for sale, and the plaintiff purchased it. The present action, in claim and delivery, was brought to recover the furniture thus purchased.

[3, 4] But two points are made on the appeal. The first is that defendant's demurrer to the amended complaint on the ground of uncertainty was improperly overruled. But the record shows that the plaintiff filed, by leave of court, a second amended complaint, and that this was not met by demurrer, and that the action was tried upon it. The last amended complaint superseded the first amended complaint, and the original complaint, and consequently the sufficiency of the latter cannot be considered. Only the pleadings upon which the issues were joined may be attacked on appeal. Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; Bray v. Lowery, 163 Cal. 256, 260, 124 Pac. 1004. Defendant by failing to specially demur to the second amended complaint waived the objection of uncertainty.

[5] Defendant's second point is that, even though the property in question was sold for the sum of $3,619.42, which was admittedly the full value of all the property, both in the apartment house and in the warehouse, the sale was nevertheless invalid as to the property in the warehouse, because violative of the provision of section 694 of the Code of Civil Procedure, which requires that in the case of an execution sale of personal property capable of manual delivery the property must be "* * * within view of those who attend the sale. * * *" Under the circumstances of this case there is no merit in this point. The statutory rule is intended for the protection of the judgment debtor, and he may waive his right thereunder if he sees fit to do so. Lexington Bank v. Wirges, 52 Neb. 649, 72 N. W. 1049. The removal of the property by defendant after notice of the sale amounted to such a waiver, and he cannot now be heard to complain of a result produced by his own voluntary act. Foster v. Goree, 5 Ala. 424, 429.

The appeal from the order denying a new trial is dismissed, and the judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

180 Cal. 239

In re MINEAR'S ESTATE. (L. A. 6032.)

(Supreme Court of California. April 18, 1919.)

WILLS 🔑535 — CONSTRUCTION — RIGHTS OF CHILDREN NOT NAMED IN WILL.

Where will recites that testator is a single man who has never been married and provides that if he has other "heirs" than those named, they shall each receive only $5, persons not named, whether children or otherwise are intentionally excluded so that they are not entitled to share in his estate as if he had died intestate, under Civ. Code, § 1307.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

In the Matter of the Estate of W. L. Minear. Claim by alleged heirs and from a decree denying their claim, they appeal. Decree affirmed.

Ernest F. Baker and William Weinstein, both of Los Angeles, and Jacob Weinberger, of San Diego, for appellants.

Eugene Daney, S. W. Switzer, Johnson W. Peterbaugh, and M. H. Fleming, all of San Diego, for respondent.

At the close of the argument OLNEY, J., delivered the opinion of the court, SHAW and LAWLOR, JJ., concurring.

The decedent in this case died, leaving a will disposing of all of his estate to parties other than the appellants. The latter claim to be children of the testator and that they are entitled as such to inherit in spite of the will under section 1307 of the Civil Code, which provides that "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate, and suceeds thereto as provided in the preceding section."

The sole question in this case is, therefore, whether or not it appears from this will that the omission of any provision for the appellants was intentional. The material portions of the will upon this point are two: First, "I am a single man, I have never been married," and, second, "Now if there should be any other or others than the ones that I have named in my will above that claim to be my lawful heirs and can and do prove that they are to each of them I will $5.00 five dollars if there should be any such." The point is made that this case is to be distinguished from the Estate of Lindsay, 176 Cal. 238, 168 Pac. 113, where a clause almost exactly the same as the second clause in the present will was involved on the ground that it appeared from the will itself in the Lindsay case that there were children and that, therefore, the testator by the general clause providing for a gift of five dollars to any one who should establish heirship must be taken to have had his children in mind, but that in this case there is no reference in the will to children and that, therefore, the general expression "my lawful heirs" must be taken not to have reference to children and it must be presumed that the testator had forgotten his children and unintentionally omitted to provide for them.

It seems to us very clear that this contention is not sound; that it is in fact refuted by the language of the will, "I am a single man. I never have been married." Taking the two provisions together, we think it is perfectly clear that what the testator in effect said was this: "I never have been married, therefore I have no children. But if any persons other than those named in my will prove they are my heirs (either as children or otherwise) I give each of them $5.00." The true construction of the will we believe to be that the testator intended to exclude from any substantial share in his estate any one not named in his will, whether a child or otherwise.

The decree appealed from is affirmed.

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180 Cal. 233

McCOMBS et ux. v. CHURCH et ux. (L. A. 4640.)

(Supreme Court of California. April 15, 1919.)

1. VENDOR AND PURCHASER 🔑80 — EXCHANGE—SALE BY ACRE INSTEAD OF BY FIXED BOUNDARIES.

In an action arising out of an exchange of real estate, evidence *held* to show that the parties contemplated an exchange at a fixed price per acre, and not a sale in gross of property with fixed boundaries.

2. VENDOR AND PURCHASER 🔑65(2) — EXCHANGE OF LANDS—"MORE OR LESS."

The words "more or less," as they appear in instruments involved in an exchange of real property, ordinarily would tend to show that the sale was one in gross, rather than by the acre only, in the absence of contrary showing, but, where a contrary showing was made, such words cannot be said to conflict with the parties' intention that payment be made for the exact amount conveyed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, More or Less.]

3. APPEAL AND ERROR 🔑499(3)—REVIEW—NECESSITY OF OBJECTIONS BELOW.

The objection that parol proof was introduced to alter terms of written agreements of the parties cannot be considered, where the record does not show that such objection was made in the trial court.

4. Evidence ⚷433(8) — Parol Evidence —Varying Written Agreement—Mistake.

In an action involving writings evidencing an exchange of real property, the objection to the parol proof to alter and vary terms cannot stand, where the writings themselves, through mistake, do not express the intention of the parties or one of them.

5. Pleading ⚷433(9)—Inferences in Aid of Pleading — Objections after Judgment.

The objection that a complaint did not state a cause of action because it failed to aver that the mutual mistake pleaded as a cause of action did not arise from plaintiff's negligence cannot be sustained after judgment, where the absence of such negligence is fairly inferable from the allegations of the complaint, and no demurrer was interposed.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by N. McCombs and wife against W. J. Church and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Valentine & Newby, of Los Angeles, for appellants.

Muhleman, Crump & Williams, of Los Angeles, for respondents.

LENNON, J. This is an appeal from a judgment in favor of the plaintiff in an action arising out of an exchange of real estate. The merits of the appellant's motion for a new trial, which was denied, are involved in the appeal from the judgment.

The facts are these: The plaintiffs owned and resided upon a tract of land in Orange county which they believed contained 10 acres. The plaintiff N. McCombs brought the defendant Church to this tract and pointed out its boundaries, stating that he bought it for 10 acres, and that he supposed it to contain that much. The exchange, which also involved properties belonging to Church, was made by Church for the land as pointed out by McCombs. It was thought by both parties at this time that the tract contained 10 acres.

An agreement in writing consisting of a proposal and an acceptance was executed wherein the McCombs' property was thus described:

"Second piece of property owned by N. McCombs, situate in Orange county, state of California, containing ten acres, two miles west of Fullerton, California, on good roads boulevard, improved with five-room California cottage, six acres in two year old valencias, four acres in one year old valencias, two acres oat hay, three acres potatoes, two acres cabbages."

The valuation fixed upon the property was $11,000. This was subsequently merged in a new written agreement consisting of escrow instructions deposited with a title insurance company. In execution of the escrow instructions, McCombs executed a deed to Church for—

"lots 7 and 8 of Stern and Nicolas subdivision of sections 31 and 32, township 3 south, range 10 west, S. B. B. & M., as appears on a map plat thereof recorded March 9, 1903, in Book 3, page 13, of the Miscellaneous Maps, records of Orange county, California, estimated to contain 10 acres of land more or less."

In keeping with the escrow agreement, Church executed a mortgage back to McCombs on the same lands.

Five months later the deed and mortgage were sent to another title company for recordation; McCombs having announced the perfection of his title. The deed and mortgage were returned by the title company with a letter calling attention to the fact that the east acre of lot 8 had been sold, and that the description in the plaintiff's deed and the defendants' mortgage back should except from the description of lot 8 the acre so sold from said lot 8. The eastern boundary of the land of the plaintiffs was marked by a fence which was to the west of the easterly acre theretofore sold. The fence was pointed out by the plaintiff N. McCombs as his boundary line. His property was planted in oranges. The property to the east was not. The defendant actually received the property pointed out by the plaintiff N. McCombs with the boundaries indicated by him.

Upon receipt of the letter from the title company calling attention to the fact that one acre out of lot 8 had been previously sold, McCombs and Church, believing that this fact reduced the acreage of the land conveyed from 10 to 9 acres, effected a new agreement whereby the $1,300 mortgage was canceled and in lieu thereof a payment of $200 in cash was made, and the escrow instructions and agreement amended accordingly. The deeds were delivered and recorded. Immediately thereafter the plaintiffs learned from an inquiry addressed to the recorder of Orange county that the aforesaid lots 7 and 8 contained in the neighborhood of 10.80 acres, and that therefore the land conveyed to Church contained in the neighborhood of 9.80 acres (in fact 9.88 acres), and not 9 acres merely. They at once wrote to Church, stating the circumstances and demanding payment for the excess over 9 acres on the basis of $1,100 per acre. The defendants having refused to comply with this demand, the plaintiffs instituted the present action.

The trial court found that the exchange or sale was by the acre at the fixed price of $1,100 per acre, and that the plaintiffs did not intend to convey the excess of .88 of an acre to the defendants, and would not have conveyed this excess save through mutual mistake. Judgment was accordingly decreed for the plaintiffs in the sum of $973.50, or the value of .88 of an acre on the basis of $1,100 an acre with interest at 7 per cent. and the costs of the action. No complaint is made as to the form of the judgment.

[1] Despite appellants' contention to the contrary, we find there is some evidence to support these findings. Thus the testimony of the witness La Due, a real estate broker, called on behalf of the plaintiff is to the effect that, when negotiating for the plaintiff with Church for the exchange, he specifically told Church that the price of the land in controversy was $1,100 an acre, or $11,000 for the 10 acres. That this was the ultimate understanding of the parties themselves is evidenced by the fact that, when it was thought that the exchange involved not 10, but 9 acres, the contract was modified to cover the supposed deficiency in acreage by canceling the $1.300 mortgage and substituting in lieu thereof the payment of $200 in cash. If, as the appellant now contends, the agreement was for the sale in gross of property with fixed boundaries, he had received all the land he had bargained for at the price which he had agreed to pay therefor, and there was no basis for the new agreement. The adjustment seems then to have been made on the theory that the land was sold on the basis of $1,100 an acre.

[2] The words "more or less," as they appear in one or more of the written instruments involved in the exchange, might ordinarily tend to show that the sale was one in gross rather than by the acre, but this would be so only in the absence of a showing, such as was made here, that it was the intent of the parties to the contract to consummate a sale by the acre at so much per acre. Where, as here, it is shown that the parties undertook the one to convey, and the other to receive, a tract of land at so much per acre, the words "more or less" in the instruments involved in the transaction cannot be said to conflict with the intent of the parties that payment should be made for the exact amount of land conveyed, be it "more or less" than the round number chosen to describe the acreage. Hutchings v. Moore, 61 Ky. (4 Metc.) 110; Paige v. Sherman, 6 Gray (Mass.) 511; Barnes v. Gregory, 1 Head (Tenn.) 239.

[3, 4] It is suggested, rather than clearly contended, that the findings of the trial court in the particulars stated rested in part upon parol proof which tended in a measure to alter or vary the terms of the written agreement of the parties, and that therefore such proof was inadmissible. The answer to this suggestion, however, is to be found in the fact that the record does not show any objection to such proof upon the ground that it was parol and proffered for the purpose of varying or altering the agreement of the parties. Moreover, "this * * * is a case where the writing itself, through mistake, does not express the intention of the parties who entered into it, or one of them, and does not, therefore, contain the real contract between the parties." Kee v. Davis, 137 Cal. 456, 70 Pac. 294.

[5] The contention is made that the complaint does not state a cause of action because it fails to aver that the mutual mistake pleaded as a cause of action did not arise from the negligence of the plaintiff. No demurrer, general or special, was interposed by the defendants. If it be granted that such an allegation was essential to the statement of the plaintiffs' cause of action, still the fact that the plaintiffs' carelessness or neglect did not contribute to the mistake involved is fairly inferable from all the allegations of the complaint. Therefore, in the absence of a demurrer, the complaint must be held sufficient to support the judgment. Hyland v. Hyland, 19 Or. 51, 23 Pac. 811.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

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40 Cal. App. 202

MONTZ v. NEVINS. (Civ. 2725.)

(District Court of Appeal, First District, Division 2, California. March 7, 1919.)

1. MALICIOUS PROSECUTION 🔑59(10)—DEFENSES—ADVICE OF COUNSEL—ADMISSIBILITY OF EVIDENCE.

In an action for malicious prosecution based upon the issuance of a warrant charging grand larceny in the removal of a house in violation of a contract of sale, it was error to refuse to permit defendant to show that the material facts in regard to the removal of the house were communicated to his counsel, notwithstanding that some of the facts and circumstances were so communicated a month or two earlier than on the date on which plaintiff's arrest was advised.

2. MALICIOUS PROSECUTION 🔑71(2)—PROBABLE CAUSE—QUESTIONS OF LAW AND FACT.

Probable cause is to be determined by the court when the facts are uncontroverted; but, when the evidence is conflicting as to any of the facts, the existence of such facts is for the jury, and the question whether the facts found establish probable cause is for the court.

3. MALICIOUS PROSECUTION 🔑21(1)—PROBABLE CAUSE—ADVICE OF COUNSEL.

In an action for malicious prosecution, the defense of advice of counsel goes to the question of probable cause and must be considered in determining that matter.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action for malicious prosecution by Simon J. Montz against E. S. Nevins. Judgment for plaintiff, and defendant appeals. Reversed.

Irvine P. Aten, of Fresno, J. G. Devaul, Everts & Ewing, and M. G. Gallaher, all of Fresno, for appellant.

C. K. Bonestell, of Fresno, and Kitt Gould, of Clovis, for respondent.

LANGDON, P. J. This is an appeal from a judgment for the plaintiff for $1,000 in an action for damages for malicious prosecution, pursuant to a verdict of a jury. The facts of the case are, briefly, as follows:

The plaintiff and the defendant were negotiating for an exchange of lands, and upon August 28, 1913, agreed upon the terms of exchange which were set forth in contracts of that date. Plaintiff was in possession of certain lots under contract of purchase, and the defendant owned other lands in the vicinity. After entering into possession, the plaintiff placed a small frame building on the lots he had contracted to purchase; the house being rested upon small cement blocks. Under the bargain for exchange of lands, the defendant was to deed to the plaintiff 10 acres of land, and the plaintiff was to execute a mortgage upon these 10 acres to secure the payment of certain moneys to the defendant, and was to convey to defendant his equity in the lots, together with the house thereon. After signing the contracts, plaintiff learned that under the government survey there was a reservation of a right of way for a road along each section line, and that this reservation as applied to the 10 acres would subject them to an easement over what amounted to about one acre. He demanded that the defendant deed to him another acre somewhere in the neighborhood as a condition of carrying out the bargain for the exchange.

Defendant consulted counsel and under his advice on November 10, 1914, tendered to the plaintiff a deed to the 10 acres demanding of the plaintiff the execution of the mortgage and the conveyance of the lots, of which the plaintiff was then in possession. The plaintiff refused to act, and the matter on November 10, 1914, was left in an unsettled condition. Plaintiff later made application to Elizabeth Stanford, one of the record owners of the lots occupied by him, for an extension of time within which to pay overdue installments. On November 30, 1914, he received a letter from said Elizabeth Stanford in response to his request, granting such extension to January 17, 1915. Defendant on December 3d procured a deed from Elizabeth Stanford to the same lots, which deed contained the following clause:

> "This conveyance is received by the grantee herein with full knowledge of a certain contract relating to said lots made on the 17th of January, 1913, between Samuel R. Elliott and Lottie M. Elliott. Elizabeth Stanford, first parties and Simon J. Montz as second party, and the grantee accepts this conveyance with knowledge of all the rights of said S. J. Montz arising by reason of said contract."

On December 9, 1914, defendant wrote to plaintiff that he had a deed to the lots and that plaintiff's rights were forfeited. On Saturday, December 12, 1914, defendant learned that the plaintiff had jacked up and was preparing to move into the county road the small house. Defendant again consulted his attorney, who was the assistant district attorney of Fresno county, and was told by him that, if the house was of sufficient value, its removal would constitute grand larceny, and, if it was removed, to swear out a warrant for the plaintiff's arrest. This advice was given on Saturday, and the defendant applied Saturday night to a justice of the peace for a warrant, stating the facts to him. The justice refused to issue a warrant to the plaintiff on the ground that at that time no crime had been committed and suggested to the defendant that he might procure an injunction. Defendant stated that it was too late. Sunday, defendant found the plaintiff with a group of men in the act of removing the house. There was a wordy altercation in which, among other things, the defendant stated that he would hold all the men engaged in the activities responsible if the house were removed. Montz at that time told Nevins that he had a right to move the house, that it belonged to him, and that the matter was none of Nevins' business. On Monday, acting under the advice of the assistant district attorney, the defendant swore to a warrant before another justice of the peace, charging plaintiff with grand larceny. Plaintiff was held to answer before the superior court, and subsequently, on the motion of the district attorney, the charge was dismissed. Later plaintiff brought this action for malicious prosecution, in which judgment was rendered for the plaintiff for $1,000, from which judgment defendant appeals. The foregoing facts are admitted.

Appellant objects to certain rulings of the trial court upon evidence, and to certain instructions, and contends, first, that the court erred in granting plaintiff's motion to strike out the testimony of the witness Gallaher to the effect that in October, 1914, Mr. Nevins, the defendant, called at the office of the said Gallaher, who was his attorney, for private legal counsel as to certain contracts between himself and the plaintiff and was advised by the attorney that he could not advise him as to the matter unless he saw the contracts and after seeing the contracts he would probably be able to advise the defendant. The plaintiff objected to this testimony on the ground that the only question before the court and before the jury was what was the conversation between the attorney and Mr. Nevins when Mr. Nevins went there to obtain the filing of the criminal complaint. The argument is made by appellant that Mr. Gallaher was the attorney for Mr. Nevins in all transactions with the plaintiff concerning this land, and that he became familiar with the facts and circumstances in regard to the relations of the parties through a period of two or three months' time; and that defendant should have been allowed to show as a part of his affirmative defense that all the facts concerning the entire matter were known to his attorney, whether these facts were communicated at the time of the arrest or at an earlier date.

We believe that appellant's position is well taken.

In the case of Brown v. Smith, 83 Ill. 291, it was held that one who procured the arrest of his divorced wife and her sisters on a charge of malicious mischief, and breaking into his house, which the wife refused to leave after the divorce, is not precluded from setting up the defense of advice of counsel on the ground of failure to disclose the facts, because he did not state to counsel the relations existing between himself and wife as to occupancy of the premises, where the counsel had represented him in the divorce suit and knew the facts. To the same effect is the case of Dennis v. Ryan, 65 N. Y. 385, 22 Am. Rep. 635; Peterson v. Toner, 80 Mich. 350, 45 N. W. 346. While no case in this state has been cited to us deciding this particular question, we find the following statement in the case of Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31:

> "In an action for malicious prosecution upon a criminal charge, in order that the defendant may escape responsibility for the prosecution upon the ground that he acted in good faith upon the advice of counsel that there was probable cause for believing the plaintiff guilty of the crime charged, he must prove that before receiving the advice he fairly and fully stated to his counsel, or at least that his counsel knew, all the facts within defendant's knowledge. * * *"

[1] Under these decisions, and under the logic of the situation, we are of the opinion the court erred in not permitting the defendant to proceed with his proof that the material facts were communicated to counsel by the defendant, despite the fact that some of the facts and circumstances may have been communicated a month or two earlier than the date on which the arrest was advised. Naturally, if a man is dealing with his attorney in regard to a particular transaction, and his attorney knows the facts in connection with such transaction—when the situation later changes in regard to some important matter, the client will merely narrate the new facts. It would be unnatural and wasteful of time and energy for him to begin at the beginning, and repeat in detail the facts already communicated by him, or otherwise known to his attorney. It is in the usual course of business under such circumstances for a man merely to advise his attorney of the additional facts relating to the subject-matter and assume that the earlier facts are present in the mind of the attorney. In this case such an assumption was warranted, according to the testimony of the attorney himself.

As all evidence regarding information given to counsel prior to the time that the arrest was advised was stricken out, and as the jury was later instructed that matters stricken out were not to be considered by them in reaching their verdict, the jury must have disregarded, under this ruling and instruction, all disclosures made by defendant to his counsel at any period except at the time of the arrest. As the question of whether or not the defendant had made a full and fair disclosure of all material facts to his attorney was one of the decisive questions before the jury, we think this error was clearly prejudicial to the defendant.

[2] The appellant presents another question in his objections to a certain instruction to the jury. The court instructed the jury that there was a want of probable cause. The rule is that probable cause is to be determined by the court when the facts are uncontroverted. Potter v. Seale, 8 Cal. 220; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174. But when the evidence is conflicting as to any of the facts, the existence of the facts in dispute is to be found by the jury, and the question whether the facts found by the jury establish probable cause is to be decided by the court. Sandell v. Sherman, 107 Cal. 391, 394, 40 Pac. 493; Booraem v. Potter Hotel Co., 154 Cal. 99, 97 Pac. 65.

[3] While there are different rules followed in other jurisdictions (note to Van Mater v. Bass, 18 L. R. A. [N. S.] 51), in California, by the weight of authority, the rule is that the defense of advice of counsel goes to the question of probable cause, and must be considered in determining that matter. Potter v. Seale, 8 Cal. 220; Levy v. Brannan, 39 Cal. 485; Dunlap v. New Zealand etc. Co., 109 Cal. 365, 42 Pac. 29. The defense of advice of counsel has several elements, such as full and fair disclosure to counsel, good faith in acting upon the advice given, etc. On some of these elements, the evidence in the present case was conflicting. It was proper, therefore, for the jury to have found whether or not the defense of advice of counsel was established before the court determined the question of probable cause; and the court should have instructed them that if from the evidence they find that Nevins in good faith acted on the advice of counsel after a full and fair disclosure of the facts, there was

probable cause; but if, on the other hand, they should find from the evidence the fact that Nevins did not in good faith, and after a full and fair disclosure of the facts, act upon the advice of counsel, that there was a want of probable cause.

The instruction given by the court has removed from the consideration of the jury the facts making up the affirmative defense of advice of counsel, in their relation to the question of probable cause. It is not necessary for us to go into a close analysis and comparison of the results of different instructions given under divergent theories of this defense prevailing in different jurisdictions, in order to decide whether this error was prejudicial or not under the special facts of this case. The first error considered here was sufficiently prejudicial, we think, to make it necessary to send the case back for a new trial, and the error in the instruction is discussed here so that it may not recur at the new trial.

Since the case will have to go back for a new trial and the same rulings upon evidence are unlikely to occur again, it becomes unnecessary for us to discuss the other objections of the appellant.

The judgment is reversed.

We concur: HAVEN, J.; BRITTAIN, J.

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40 Cal. App. 177

BELTRAN v. HYNES et al. (Civ. 2840.)

(District Court of Appeal, First District, Division 1, California. March 5, 1919. Rehearing Denied by Supreme Court May 1, 1919.)

EXECUTORS AND ADMINISTRATORS ⚿315(6)—DISTRIBUTION — NOTICE — CONCLUSIVENESS OF DECREE.

Where due notice was given of hearing of petition for distribution, and no fiduciary relation existed between the distributee, nephew of deceased, and an illiterate nonresident niece of deceased, and there was no fraud, distributee was under no duty to notify niece of death of deceased, even if he knew of niece, and her right is barred by the decree of distribution.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Casimira Beltran against W. J. Hynes, as administrator of estate of Juana Beltran de Marshall, deceased, and others. From judgment sustaining demurrer to the complaint, and an order discharging an order to show cause why preliminary injunction should not issue, plaintiff appeals. Affirmed.

Bradley V. Sargent and Vincent Surr, both of San Francisco, for appellant.

Cullinan & Hickey, of San Francisco (S. M. Shortridge, A. E. Bolton, and Chas. S. Peery, all of San Francisco, of counsel), for respondents.

KERRIGAN, J. This is a suit in equity to enjoin an administrator from delivering certain property to defendant under a decree of distribution.

The trial court sustained a demurrer to the complaint without leave to amend, and discharged an order to show cause why a preliminary injunction should not issue. The appeals are from such judgment and order.

From the record it appears that Juana Beltran de Marshall died testate on July 7, 1912, and that a decree was entered in her estate distributing the property to defendant Jose Maria Beltran, a nephew of deceased. This decree was entered January 5, 1916, and was subsequently affirmed on appeal. This action was brought to enjoin the administrator from delivering the property under the decree, and for judgment that Jose Maria Beltran holds the title thereto in trust for plaintiff.

By her complaint plaintiff alleges herself to be a niece of decedent, and recites that she is an illiterate single woman 84 years of age, and that she is a resident of the village of Cosala, in the Republic of Mexico, and that she never heard of or knew of the death of Juana Beltran de Marshall, or of the judgment for the distribution of her estate, until long after the time for appeal from said judgment had elapsed. She further alleges that defendant Beltran did not notify her of the death of decedent or of the proceedings on distribution.

No claim is made that due and legal notice as provided by law was not given of the hearing of the petition for distribution, nor is there any claim of the existence of any fiduciary relation existing between plaintiff and defendant, or of extrinsic or collateral fraud. Under these circumstances, the demurrer was rightfully sustained. Defendant was under no legal duty to notify plaintiff of the death of deceased, even assuming that he knew the plaintiff (Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158); and, proper notice having been given of the hearing, plaintiff is barred by the decree (Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814; Warren v. Ellis, 179 Pac. 544, decided by this court January 31, 1919).

Affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

40 Cal. App. 192

POST v. FETTERMAN et ux. (Civ. 2331.)

(District Court of Appeal, Second District, Division 1, California. March 7, 1919.)

Appeal and Error 🔑1011(1) — Review—Questions of Fact.

The appellate court will not set aside a judgment merely because a material finding of fact is based upon conflicting evidence.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by M. E. Post against George C. Fetterman and wife. Judgment against the defendant named alone, and in favor of defendant's wife, and plaintiff appeals. Affirmed.

Jesse F. Waterman, of Los Angeles, for appellant.

F. E. Davis, of Los Angeles, for respondents.

CONREY, P. J. This action is upon a promissory note executed by the defendants to the plaintiff. The court found that as to the defendant Rosa Fetterman the note was executed without consideration and held that she was not liable thereon. Judgment was entered against the defendant George C. Fetterman alone. Plaintiff appeals from the judgment entered in favor of Rosa Fetterman.

Appellant claims that the finding above noted is not supported by the evidence. This is the only ground of appeal presented for our consideration. The note was given on account of moneys which had been advanced by plaintiff for the benefit of George C. Fetterman. The plaintiff testified that when Mr. Fetterman requested him to advance this money Fetterman promised that he would have his wife sign the note when the amount was fixed, and that a result of that conversation he advanced the money. Mr. Fetterman, on the other hand, testified that prior to the time of the plaintiff's paying out any money, the matter of a note to be given by George C. Fetterman and Rosa Fetterman was not mentioned at all, and that the plaintiff never at any time requested of him that he should have his wife sign the note. Mrs. Fetterman testified that she did not receive anything at all for the execution of the note, and that she simply signed the note at the request of her husband without reading it. No new consideration accompanied the making of the note.

Appellant's counsel argues that the testimony of Mr. Fetterman is not entitled to credit, because he verified the answer and cross-complaint and on the witness stand admitted certain facts which are in conflict with some of the allegations of his pleadings which he had verified. Nevertheless the trial court had the right to believe his testimony on the question here at issue. No sufficient reason has been shown to this court on appeal to set aside the judgment merely because a material finding of fact is based upon conflicting evidence.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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40 Cal. App. 197

PALO ALTO MUTUAL BUILDING & LOAN ASS'N v. MULLEN et ux. (Civ. 2715.)

(District Court of Appeal, First District, Division 2, California. March 7, 1919. Rehearing Denied by Supreme Court May 5, 1919.)

1. Appeal and Error 🔑1011(1)—Review—Questions of Fact.

A finding on conflicting evidence *held* not subject to review.

2. Mortgages 🔑116 — Construction — Obligations Secured—Future Advances.

A mortgage securing future advances "and the fulfillment of any covenants or agreements which the parties hereto, their heirs or assigns, may hereafter agree in writing shall be secured hereby," *held* to limit the necessity of an agreement in writing to such covenants or agreements, and not to apply to further advances.

Appeal from Superior Court, County of Santa Clara; J. R. Welch, Judge.

Action by the Palo Alto Mutual Building & Loan Association against Peter Mullen and wife to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. H. H. Hart and T. John Butler, both of San Francisco, for appellants.

J. S. Hutchinson and Walter Slack, both of San Francisco, for respondent.

HAVEN, J. Action for foreclosure of a mortgage executed on January 28, 1909, by Peter Mullen and Mamie Mullen, his wife, to Palo Alto Mutual Building & Loan Association. Said mortgage secured a note of the mortgagors in the sum of $4,000 and further advances under the terms of the clause hereinafter set forth. The sum of $3,500 only was advanced on the $4,000 note, which sum has been fully repaid. The present action is brought to recover the sum of $1,000, with interest and costs, alleged by plaintiff to have been advanced to the mortgagor Peter Mullen under the terms of the mortgage, and the payment of which is alleged to have been secured by the following clause of the mortgage:

> "And also to secure such further advances as may be made to the mortgagors, or either or any of them, by the mortgagee, or on their account, before the satisfaction hereof, and the fulfillment of any covenants or agreements which the parties hereto, their heirs or assigns, may hereafter agree in writing shall be secured hereby."

The judgment was for the plaintiff for the amount of the advance, with interest thereon and costs incurred, with a decree declaring the same to be a lien upon the property described in the mortgage and ordering said property sold and the proceeds applied in payment of that debt. The personal judgment was against the mortgagor Peter Mullen alone, but the interest of the mortgagor Mamie Mullen in the property was ordered sold under the foreclosure decree. The defendants appeal from this judgment, contending: First, that the $1,000 in controversy was not advanced under the terms of the mortgage; and, secondly, that under the clause above quoted, no advancement was secured by the mortgage unless agreed upon in writing by both of the mortgagors.

It is admitted that the sum of $1,000 was paid to the defendant Peter Mullen by check of plaintiff on June 1, 1911. The controversy is over the question as to whether this payment was made as a further advance under the terms of the mortgage and was intended to be secured thereby, or whether, on the other hand, it was a personal payment from one Marshall Black, the secretary of the plaintiff, on his own account and was not made by the plaintiff as an advance under the terms of the mortgage. Upon this disputed fact the evidence introduced by plaintiff was as follows:

At the time the payment was made to the defendant Peter Mullen, he signed a receipt reading as follows:

> "No. 5887. Palo Alto, Cal., June 1, 1911.
>
> "Received from Palo Alto Mutual Building & Loan Association one thousand & no/100 dollars, on account of secured advance on loan No. 497. Peter Mullen."

[1] The check was handed to him by the bookkeeper of the secretary Black, who testified that he was instructed by Mr. Black, at the time the check was issued, to charge it to Mr. Mullen's loan account. In connection with this testimony, the check book and account books of the plaintiff were offered in evidence. From these it appeared that the bookkeeper marked the stub of the check as follows: "To Peter Mullen, secured advance $1,000." The first entry in the account books was made in the cash journal and there appeared as, "Secured Advance Peter Mullen, $1,000." The item was also entered in the general ledger of the plaintiff on the page designated as, "Secured Advances," and was again posted in the "Secured Advance Ledger," where it appeared under the name, "Peter Mullen." It further appeared that in posting the item to the general ledger it was first entered in an account designated as "Suspense Account," which account was conceded to have been a personal account of the secretary Black. The bookkeeper testified that this last entry was an error, and that it was corrected as soon as discovered, and the court so found. The defendant Peter Mullen and the secretary, Marshall Black, both testified that the instructions given to the bookkeeper were to enter this item under the personal account of Black, and that neither of them had any knowledge that the transaction was claimed to have been an advance under the terms of the mortgage until shortly before the present suit was commenced, which was more than three years after the payment of June 1, 1911. It appears from the evidence that the secretary Black had purchased an automobile from the defendant Peter Mullen, who had demanded payment therefor. The check of $1,000, which is the basis of this action, was given by Black to Mullen at the time of said demand. It is admitted that this was a personal purchase by Black, and it is contended by the appellants that the whole transaction was had by Black personally and that the plaintiff had no connection therewith, except that Black used the plaintiff's funds in payment of his personal debt. Upon this conflicting evidence the court found that the sum of $1,000 was advanced and loaned by plaintiff to the defendant Peter Mullen under the authority of said mortgage "as a further advance under the terms of said mortgage, which said sum said defendant Peter Mullen then and there agreed in writing should be a secured advance under said mortgage." The above finding is supported by the documentary evidence above referred to and by the testimony of the bookkeeper. Appellants' contention upon this finding goes no further than to show that the evidence upon the issue was conflicting. The finding cannot, therefore, be disturbed by this court.

It is next insisted that, even if the $1,000 was paid to and received by the defendant Peter Mullen as an advance, the clause of the mortgage above quoted does not warrant the conclusion that such advance was secured thereby, for the reason that the defendant Mamie Mullen, who was one of the mortgagors, did not agree in writing that the same should be so secured. The determination of this contention depends upon the proper construction of the clause in the mortgage as to further advances above set forth. On behalf of the appellants, it is argued that the last clause, "which the parties hereto, their heirs or assigns, may hereafter agree in writing shall be secured hereby," should be read as referring both to further advances and to the covenants or agreements referred to in the latter portion of the clause. On behalf of respondent, it is contended that by the disputed clause two distinct objects are sought to be secured, viz., (a) "such further advances," and (b) "the fulfillment of any covenants or agreements"; and that the restrictive clause introduced by "which," contained in the last three lines of the above provision of the mortgage, refers to the second of these objects only, namely, to the covenants or agreements. To state it in a different form, it is contended by respondent that the clause is divided into two distinct parts, the first terminating with the word "hereof" followed by a comma, and that the balance of the clause is entirely separate from that which precedes it. The trial court adopted the construction contended for by respondent and included its interpretation of the disputed clause in its findings in the following language:

> "That, in addition to securing said note for $4,000, above referred to, said mortgage was given by said defendants, Peter Mullen and Mamie Mullen, and each of them, to secure such further advances as might be made to said defendants, Peter Mullen and Mamie Mullen, or either of them, by plaintiff before the satisfaction of said mortgage, and which said further advances said Peter Mullen and Mamie Mullen, and each of them, in and by the terms of said mortgage agreed to pay to plaintiff, in gold coin of the United States; that said mortgage was also given to secure the fulfillment of any covenants or agreements which said Peter Mullen and Mamie Mullen, their heirs or assigns, might thereafter agree in writing with the plaintiff should be secured thereby, and also to secure the fulfillment of each and all the covenants and agreements in said mortgage contained."

[2] We are of the opinion that the construction contended for by respondent and adopted by the trial court is the correct interpretation of the clause above referred to, and that the necessity of an agreement in writing is limited to "any covenants or agreements" and does not apply to the "further advances" designated in the first part of the clause referred to. It follows that the trial court did not err in decreeing that the amount of the disputed advance, with interest and costs, constituted a lien upon the real property described in the mortgage and ordering a foreclosure thereof.

We have examined the other contentions of appellants as to attorney's fees and costs, and do not find any error in the action of the trial court with regard thereto.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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40 Cal. App. 219

CELIANO et ux. v. GIORDANENGO.

(Civ. 2664.)

(District Court of Appeal, First District, Division 1, California. March 10, 1919.)

1. JUSTICES OF THE PEACE 🔑128(3)—SUIT TO SET ASIDE—JUDGMENT—COMPLAINT—SUFFICIENCY.

A complaint to set aside a justice's judgment for failure of the return of service of summons to show service on each of the defendants therein, failing to allege that defendants were not in fact served with summons, as required by Code Civ. Proc. § 410, is demurrable.

2. JUDGMENT 🔑128(3)—SUIT TO SET ASIDE—COMPLAINT—SUFFICIENCY.

In a suit to set aside a judgment in a justice court action, on the ground of failure of the return of service of summons to show service on each of defendants, a complaint which failed to aver that plaintiffs in the equity suit had a good defense on the merits was demurrable.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Suit by Costanzo Celiano and wife against Giuseppe Giordanengo. From a judgment on an order sustaining a general demurrer to plaintiffs' complaint, plaintiffs appeal. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellants.

John J. Mazza, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment entered upon an order sustaining a general demurrer to plaintiffs' complaint.

The plaintiffs herein were the defendants in a justice's court action, and bring this suit in equity for the purpose of setting aside the judgment obtained against them therein, basing their right to this relief upon the ground that the proof of service of summons in said action fails to show that it was served upon each of them as defendants therein.

[1, 2] Whatever merit there may be in this point as an abstract proposition of law, it can avail the plaintiffs nothing in this proceeding, for two reasons: (1) That the complaint fails to allege that the defendants in the former suit were not in fact served with summons as required by section 410 of the Code of Civil Procedure; and (2) that they, as defendants in said justice's court action, had a good defense on the merits thereof.

A defective return of process duly served is not sufficient ground for equity to interfere. Pico v. Sunol, 6 Cal. 294; Eichhoff v. Eichhoff, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; 23 Cyc. 996. And it is the established law in this state that a bill of equity must allege and show that the complainant has a good and meritorious defense to the action at law. Burbridge v. Rauer, 146 Cal. 21, 79 Pac. 526; Bell v. Thompson, 147 Cal. 689, 82 Pac. 327; Matson v. Batto & Sons, 173 Cal. 800, 161 Pac. 1144. See also Freeman on Judgment, § 498; 23 Cyc. 1031.

Under these authorities it must be held that the equitable relief of setting aside a judgment obtained in a court of law will not be granted without an affirmative showing in the complaint that the complainant, as defendant in said action, has a good defense on the merits. It should have been made to appear in the complaint in this proceeding that a like judgment would in all probability not result from a new prosecution of the action at law.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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40 Cal. App. 190

RAMSAY et al. v. McCREERY ESTATE CO. (Civ. 2580.)

(District Court of Appeal, First District, Division 1, California. March 6, 1919. On Petition for Rehearing, April 4, 1919.)

1. Appeal and Error ⚷977(3)—New Trial ⚷6—Discretion of Court—Review.

The granting of a new trial depends upon the legal discretion of the court, guided by the circumstances of the case; and, when such discretion has not been abused, the order will not be disturbed.

2. New Trial ⚷71—Discretion of Court—Evidence—Sufficiency.

In an action for wrongful death, allowance of a new trial after verdict for plaintiffs *held* not an abuse of discretion, in view of the evidence, although conflicting.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Mary E. Ramsay and others against the McCreery Estate Company, a corporation. From an order granting defendant's motion for a new trial after verdict and judgment for plaintiffs, plaintiffs appeal. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellants.

L. A. Redman, Jewel Alexander, and H. H. McPike, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an order granting the defendant's motion for a new trial after verdict and judgment for plaintiffs.

The action was brought by the widow and children of one Adam Ramsay to recover damages for his death which it is alleged was caused by the negligent operation by defendant of an elevator in a building owned by it, and in which the deceased was employed by a company having offices therein. Ramsay was 60 years of age, and received a salary of $250 a month. The jury rendered a verdict for the plaintiffs in the sum of $25,000. The trial court set this verdict aside upon the ground of the insufficiency of the evidence to support it, and plaintiff appeals from this order.

[1] The granting of a new trial depends upon the legal discretion of the court, guided by the circumstances of the case. The motion is addressed to the sound discretion of the trial court; and, when that discretion has not been abused, the order upon the motion will not be disturbed. We have carefully examined the record, and we fail to find any abuse of discretion in the granting of the order.

The only witness to the accident was the operator of the elevator, and his testimony, both before the coroner's jury and at the trial, was mostly given through an interpreter. In substance it appears therefrom that Ramsay left his office, which was located on the sixth floor of the building, about 9 o'clock in the evening, went to the elevator and rang the bell. The operator, who was also a janitor of the building, was at that time engaged in his work on the seventh floor; but, hearing the bell, he entered the elevator and started it down to the sixth floor. When at a short distance above said floor he brought the car to a stop preparatory to slowly lowering it and adjusting it to the floor level. After bringing the car to a stop he started it again very slowly, and again lowered it a short distance, holding the controller bar in his left hand, and while the car was slowly descending he raised with his right hand the latch to the door, and began to open it slowly as the floor of the car was descending to a position flush with the sixth floor. At that time Ramsay, who was standing in front of the door, called out "Quick, quick," and when the door had been opened slightly he took hold of the partially opened door with both hands and shoved it back, against the protest of the operator, who called upon him to stop. When Ramsay attempted to enter the car, the floor of which was still somewhat above the level of the floor of the building, he stumbled and fell against the right side of the operator, pivoting him around so that the operator's left hand shoved the controller bar forward, causing the elevator to reverse its motion and quickly rise. As Ramsay fell against the operator and down upon the floor the operator grabbed hold of him, but before he could drag him into the car the floor thereof had ascended to the top of the door, and Ramsay was caught between the grillwork above the door and the floor of the elevator, and his body fell into the pit. From this evidence it is manifest that the deceased met his death from his own imprudence in attempting to enter the elevator in the manner indicated.

[2] Plaintiffs contend, however, that statements made by the operator immediately after the accident to certain police officers as to the manner in which the accident occurred are contrary to and inconsistent with his testimony at the trial. They also claim that his testimony at the trial is in conflict with his testimony given at the coroner's inquest. No useful purpose would be subserved by an analysis of these claimed inconsistencies. Assuming that they exist, and that they support plaintiffs' claim for negligence, the trial court, having heard the evidence and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, had the right, if dissatisfied with the verdict, and, if it was of the opinion that it was clearly against the weight of the evidence to set it aside and grant a new trial, even though there was a substantial conflict, as it is not bound by the rule as to conflicting evidence. The opinion of the trial court being that the evidence was insufficient to support the verdict, its discretion in granting a new trial can be reviewed only when it is made to appear that that discretion was abused. As before stated, the record shows no such abuse.

For the reasons given, the order of the trial court is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

On Petition for Rehearing.

WASTE, P. J. A rehearing in this case is denied. In denying the petition, however, the opinion is corrected in the following particulars: On page 2, line 25, the word "manifest" is stricken out, and in lieu thereof the words "claimed by defendant" are inserted. On page 3, line 3, after the word "and" insert "that together with the presumption of negligence arising by reason of the accident."

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40 Cal. App. 221

FORD v. FREEMAN et al. (Civ. 2546.)

(District Court of Appeal, First District, Division 1, California. March 10, 1919. Rehearing Denied by Supreme Court May 8, 1919.)

1. APPEAL AND ERROR 🔑2—APPEALS FROM JUDGMENT—MATTERS REVIEWABLE.

Where judgment was entered June 12, 1911, notices of intention to move for new trial filed September 8th and 11th following, and notices of appeal filed December 7th and 8th following, *held* that court on appeals from judgment could consider insufficiency of evidence to justify findings and judgment of trial court, though order denying motions for new trial was not entered until December 4, 1916, after amendments to Code Civ. Proc. §§ 956, 963.

2. ATTORNEY AND CLIENT 🔑166(1) — CONTINGENT FEE—CONTRACTS BETWEEN ATTORNEYS—EVIDENCE.

In action between four attorneys involving their rights to share equally in contingent fee, *held* under the undisputed evidence that plaintiff, cross-complainant, and defendants were associated together as attorneys of record for one client from the inception of his action until the termination thereof, and that each performed such services as were required of him.

3. ATTORNEY AND CLIENT 🔑151 — ATTORNEYS ENGAGED IN SAME LITIGATION—CONTINGENT FEE—RIGHTS.

In action between four attorneys involving their rights to share equally in contingent fee, *held* that if there was no express agreement as to an equal division of contingent fee in question, the attorneys were joint adventurers in the conduct of the litigation for a common client, so that they were entitled, in any event, to share equally in compensation.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by George K. Ford against Frank Freeman and others, in which William M. Cannon filed a cross-complaint. From an adverse judgment, plaintiff and cross-complainant appeal. Reversed.

Stanley Moore, of San Francisco (Garret W. McEnerney, of San Francisco, of counsel), for appellant Ford.

J. E. Reardon, of San Francisco (Garret W. McEnerney, of San Francisco, of counsel), for appellant Cannon.

George R. Freeman, of Willows, for respondents.

RICHARDS, J. These are two appeals from a judgment in favor of defendants, which, by stipulation of the parties, were printed in the same transcript and have been briefed and argued together.

[1] The judgment was entered June 12, 1911. The notice of appeal of the plaintiff Ford was filed December 7, 1911. The cross-complainant Cannon's notice of appeal was filed November 8, 1911. The plaintiff's notice of intention to move for a new trial was filed September 8, 1911, and that of the cross-complainant was filed September 11, 1911. The order denying both motions was entered December 4, 1916, after the amendment to section 963 of the Code of Civil Procedure, taking away the right of appeal from orders denying motions for a new trial,

and also after the amendment of section 956 of the same Code, providing that upon appeal from the judgment the court may review orders made on motion for a new trial. Upon this state of the record the respondents herein assert that this court cannot consider the point as to the insufficiency of the evidence to justify the findings and judgment of the trial court. There is no merit in this contention. Wilcox v. Hardisty (Sup.) 171 Pac. 947.

In order for a proper determination of this cause it is necessary to give a brief review of the facts of this case, which are substantially undisputed. They are these: On April 10, 1901, one Samuel C. Pierce received serious personal injuries while in the employ of the Mountain Copper Company, in the mine of said company in Shasta county. In the month of January, 1902, Pierce employed the plaintiff herein, George K. Ford, an attorney having his offices in San Francisco, to institute an action against the Mountain Copper Company for damages arising out of his said injuries, upon a contingent fee of 50 per cent. of the recovery, the agreement to this effect being in writing. It was understood at the time that Mr. W. M. Abbott would be associated with Ford in said litigation. It was at first contemplated that the action would be commenced in Shasta county. Not long after the employment of Mr. Ford he in the city of San Francisco met the defendant, Frank Freeman, also an attorney, having his offices in Willows, Glenn county, and in a conversation there held told the latter that he had a case similar to one in which Freeman had been recently interested, and that he would like to associate Freeman with him in his case. Ford and Pierce differ as to which first suggested the employment of Freeman, but the difference is immaterial. In the early part of July, 1902, Mr. Abbott, who had already prepared certain tentative forms of complaint, wrote to Mr. Freeman, stating the desire of Mr. Ford, Mr. Pierce, and himself to associate Mr. Freeman with Ford and himself in the case. A correspondence followed, in which Freeman expressed his willingness to come into the case, after which Pierce came into consultation with Freeman, who took his statement and the names of his witnesses, and also took steps looking to the preparation and filing of a complaint. Shortly thereafter Mr. Abbott, having undertaken certain other employments, withdrew from the case, and it would seem that Mr. Ford also had concluded to withdraw, leaving Pierce free to make such arrangements as he might see fit with Freeman as to its further conduct. There is some confusion in the evidence as to this matter, but at any rate not long thereafter, in the early part of September, 1902, Pierce and Freeman entered into a writing by which Freeman alone undertook to conduct Pierce's litigation for a contingent fee of one-half of the recovery. Thereafter, and on September 20, 1902, Freeman requested Mr. Donahue, who shared offices with him in Willows, to be associated with him in the case. About the 1st of October, 1902, Donahue came down to San Francisco and met Mr. Ford in the office of Mr. Cannon there. Mr. Cannon had formerly been a partner of Mr. Freeman in the practice of the law, and the relations between himself and Mr. Freeman and Mr. Donahue were cordial. At the time of his visit to San Francisco Mr. Donahue had drafted and brought down with him a form of complaint for the institution of an action on Pierce's behalf in the federal court, and for that reason stated to Mr. Cannon that he and Mr. Freeman wished to associate him in the case. Cannon assented to this, and they went over the complaint together, and agreed it should be redrafted. This was done by Cannon, who testified that at the time the matter of Mr. Ford's connection with the case was discussed. At that time Ford and Cannon were not acquainted. Upon this occasion also Cannon states that the matter of the division of the fee was considered, and that Donahue then stated that the fee in case of a recovery was to be divided equally among the four attorneys. Whether or not this be taken as an undisputed fact is not very material, for the reason that, we think, the practically uncontradicted proofs show that not long thereafter a letter was written by Donahue to Ford to the effect that the fee in the event of recovery was to be divided equally among the four attorneys in the case. Mr. Donahue states that he does not remember having written such a letter, and the letter itself was destroyed in the great fire of 1906; but the number and clear recollection of the witnesses who testify to the existence and contents of this letter put the matter beyond dispute. The complaint when drafted by Mr. Cannon was signed by him with the names of the four attorneys, and in that form was filed on October 6, 1902. The case proceeded through the successive steps usual to the preparation and trial of a cause, and it cannot be questioned that during all of its stages the names of the four attorneys appeared as attorneys of record in the case, and that each and all of them knew that such was their, and each of their, ostensible relation to the case. The part which each took in the preparation and trial of the case was not equal. Mr. Ford, while frequently consulted and occasionally corresponded with by the defendants herein, did not actively take part in the trial. Mr. Cannon, on the other hand, took the leading part in the trial of the cause and the preparation and hearing upon appeal. As costs and expenses were required, each of these paid such expenses as the occasion required. Upon the trial the plaintiff Pierce recovered a judgment for $15,000, which judgment was affirmed upon appeal on February 25, 1905. On the day of the affirmance of the judgment, Mr. Freeman took from Mr. Pierce an assignment of it to himself, and thereafter, and on August 30, 1905, received from the Mountain Copper Company the sum of $15,100 in full satisfaction of the said judgment. One half of this sum Freeman delivered to the plaintiff Pierce. The other half was substantially divided between himself and Donahue. The cross-complainant Cannon herein, having learned of the settlement of the suit, began inquiring as to his proportion of the fee. These inquiries, in the absence of Mr. Freeman in the East, resulted in the sending by Mr. Donahue of a check for $750 to Mr. Cannon, which the latter received as upon account, still insisting upon his right to an equal one-fourth of the fee. Ford had received nothing, and had been out quite a sum in expenses, and, being able to get no satisfaction, commenced this action.

His complaint herein, after referring briefly to Pierce's injuries and cause of action, alleges an agreement between himself, Freeman, Donahue, and Cannon for an equal division of the contingent fee in event of a recovery, and that the contract which Pierce made with Freeman was made for the benefit of the four, and that whatever sum he had received thereunder he had received in trust to divide the same equally among the four; and that said Freeman had received the sum approximately of $7,500 as such fee, and to be held as such trust, and that he and said Donahue had converted the same to their own use, and had failed and neglected to pay to the plaintiff herein his equal share of the same. He further averred that the defendants were insolvent, and hence prayed for a receivership to take charge of and properly disburse the said trust fund, and for general equitable relief. The defendants Freeman and Donahue appeared and answered this complaint, denying all of the material averments as to the interest and right of the plaintiff in or to any portion of the aforesaid fee. Mr. Cannon, who had been also made a defendant, appeared with a cross-complaint, setting forth substantially the same matters contained in the original complaint. The defendants also answered this cross-complaint with like denials.

Upon the trial of the cause the foregoing facts were established by practically undisputed proofs. The trial court made its findings and rendered its judgment in the defendants' favor. It found that while the plaintiff Ford had originally had an agreement with Pierce for the prosecution of his case upon a contingent fee of one-half of the recovery, this agreement had been abandoned and terminated by him prior to the making of the Freeman contract; that the said contract between Freeman and Pierce had been entered into by Freeman alone and for his own use and benefit, and that neither the plaintiff Ford nor the cross-complainant Cannon were in any wise interested therein; that the said plaintiff Ford and cross-complainant Cannon did in fact perform services in the prosecution of the Pierce action subsequent to the execution of the Freeman contract, and that said Freeman had paid to said Cannon the sum of $750, but had not paid to the plaintiff any sum whatever; that said Freeman had collected on account of the judgment obtained in said action the sum of $15,170.80, and had delivered to said Pierce his due share of said sum, and that as to the portion thereof retained by him no trust existed in favor of either Ford or Cannon. As a conclusion of law from these findings of fact the court adjudged that the plaintiff and cross-complainant take nothing, and that the defendants Freeman and Donahue have judgment for their costs.

[2, 3] The appellants herein contend that the foregoing findings of the trial court are unsupported by the evidence, and that the judgment based thereon must be reversed. We agree with this contention. The undisputed evidence in this case shows that the plaintiff Ford, the defendants Freeman and Donahue, and the cross-complainant Cannon were associated together as attorneys of record for Pierce from the inception of his action against the Mountain Copper Company until the termination of said action through the settlement thereof by the defendant therein, after judgment for practically the whole amount of such judgment; that they each performed such services as such attorneys of record in said action as were required of them during the course thereof. The practically undisputed evidence also shows that prior to the inception of such action the defendant Donahue, purporting to act on behalf of both himself and his associate Freeman, had an understanding, evidenced by a letter written by him to the plaintiff Ford, the contents of which were fully and sufficiently proven, to the effect that these four attorneys were each to share equally in the contingent fee of one-half of the recovery in said action in the event that a recovery was had therein. If the defendant Donahue was acting with authority from his associate Freeman in thus creating this understanding, then both defendants are bound by it, and the trial court should have found that such was the agreement. If on the other hand said Freeman, as the sole contracting attorney in the contract with Pierce, was not to be held bound by the understanding thus set forth by Donahue, then it undisputably follows that there was no agreement between these four lawyers as to

the matter of fees; and, if this be taken to be the fact, then it also undisputably follows that these four attorneys were joint adventurers in the conduct of a litigation for a common client, their and each of their fees being contingent upon the success of their mutual endeavors to obtain a recovery for their client in the case, none of them being entitled to any fees from each other or from the client in the absence of such recovery. Nowhere is there any hint in the case of any other understanding between these four attorneys, unless the understanding to precisely the same effect undertaken to be expressed by the Donahue letter is to be given effect. This being so, we think the rule declared in 6 Corpus Juris, § 334, should be given application to this case. Said rule is expressed as follows:

> "Attorneys who jointly undertake to prosecute or defend a lawsuit are entitled, in the absence of an agreement to the contrary, to share equally in the compensation."

The same rule in slightly different form is expressed in 2 Thornton on Attorneys, § 469, while the following cases fully sustain the rule: Robarts v. Haley, 65 Cal. 397, 4 Pac. 385; Gill v. Mayne (Iowa) 162 N. W. 24; Seneff v. Healy, 155 Iowa, 82, 135 N. W. 27; Columbus v. Sheehy, 43 App. D. C. 462.

If the foregoing views of the facts and the law of this case be correct, it follows that the trial court should have found, either that there was an express agreement between these four attorneys as to an equal division of this contingent fee, or else the court should have found as a fact that there was no agreement whatever between them upon the subject of fees, in which case the court should have found as a legal result the existence of an implied agreement growing out of their common adventure for an equal division of whatever their share in the recovery might be. In either event the defendants would not have been entitled to a judgment in their favor. By reason of the failure of the trial court to make a finding either way upon this vital issue in the case, the judgment must be reversed. It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 194

CHURCH et al. v. GRADY. (Civ. 2656.)

(District Court of Appeal, First District, Division 1, California. March 7, 1919.)

1. Pleading 🔑254—Amendment—Demurrer to Amended Pleading.

Where a complaint has been amended, the sufficiency of the amended pleading is alone in question as against demurrer.

2. Evidence 🔑32—Judicial Notice—Municipal Ordinances.

Courts of record do not take judicial notice of municipal ordinances.

3. Municipal Corporations 🔑122(1)—Ordinances—Pleading—Sufficiency of Designation.

In pleading a municipal ordinance or a right derived therefrom, it is sufficient to refer to such ordinance by its title and the day of its passage, in view of Code Civ. Proc. § 459.

4. Municipal Corporations 🔑567(2)—Public Improvements—Foreclosure of Assessment Lien—Sufficiency of Complaint.

In a suit to foreclose a street assessment lien, an allegation in the complaint, that the "board of public works duly and regularly made an assessment to cover the sum due," sufficiently alleged all the steps preceding the assessment necessary to authorize the board to make it, including the requirement that the resolution of the board of public works contain a reference to the plans and specifications for the improvement contemplated.

5. Municipal Corporations 🔑568(1)—Public Improvements—Foreclosure of Lien—Burden of Proof—Demand for Payment.

In a suit to foreclose a street assessment lien, it is essential to prove a demand on the owner of the assessed property for the payment of the assessment as required by ordinance.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by David O. Church and another against John H. Grady. From a judgment for plaintiffs and the denial of a new trial, defendant appeals. Reversed.

E. J. Lynch, of San Francisco, for appellant.

J. A. Mueller, of San Francisco, for respondents.

WASTE, P. J. This is an action to foreclose a street assessment lien. The original complaint was apparently framed on the theory that the work was done under the authority of the charter of the city and county of San Francisco. At the trial plaintiffs admitted that the requirements of the charter, necessary to confer jurisdiction in such matters, had not been complied with.

The cause was submitted to the court for decision and was decided in favor of defendant. Thereupon plaintiffs waived counsel fees and assumed defendant's costs to that date. The court set aside the submission, and permitted plaintiffs to file amendments to their complaint, setting forth facts tending to establish that the proceedings were had under Ordinance No. 2439 (New Series) of the city and county of San Francisco, commonly known as the "Street Improvement Ordinance." By stipulation of counsel said amendments were deemed denied by the answer of the defendant. No further evidence was introduced. The cause was resubmitted, and decision and judgment went in favor of plaintiffs. Defendant made a motion for a new trial, one of the grounds being insufficiency of the evidence to justify the decision. The motion was denied. Defendant appeals, urging the same point as one of the grounds for a reversal of the judgment.

[1] Whatever defects may have existed in the original complaint, the demurrer to which was overruled, that pleading was superseded by the complaint as amended after the trial. The sufficiency of the last pleading is alone in question. Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523. Appellant contends that the complaint, as amended, does not state facts sufficient to constitute a cause of action, by reason of a failure to properly allege the passage and existence of the ordinance of the city and county of San Francisco under which the plaintiff now contends the proceedings were taken.

[2, 3] It is a general rule, supported by unbroken authority in this state, that courts of record do not take judicial notice of municipal ordinances. Metteer v. Smith, 156 Cal. 572, 105 Pac. 735. In pleading an ordinance of a municipal corporation, or a right derived therefrom, it is sufficient to refer to such ordinance by its title and the day of its passage. Section 459, Code Civ. Proc. Plaintiff apparently attempted to comply with the section of the Code in pleading the ordinance in question. The result is rather an allegation by way of parenthesis than of positive averment, but the title of the ordinance, and the day of its passage, are readily ascertainable.

Dealing with this precise question, our Supreme Court has held that when the question of the sufficiency of a complaint to withstand a general demurrer, and therefore to support a judgment, arises, "courts have always discriminated between insufficient facts and an insufficient statement of facts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained." Amestoy v. Electric R. T. Co., 95 Cal. 311, 30 Pac. 550.

[4] The ordinance requires that the resolution of the board of public works, if its intention be to recommend to the supervisors that improvements be ordered to be made, shall contain a reference to the specifications, or plans and specifications, prepared for the improvement contemplated. Appellant contends that, while the complaint contains an allegation that such plans and specifications were prepared, it is insufficient because it does not state that the resolution contained the required reference. It is to be observed that the complaint does not state that the resolution did not comply with the ordinance. Furthermore, the complaint alleges that "on the 25th day of May, 1914, the board of public works duly and regularly made an assessment to cover the sum due for the said work so performed and specified in said contract" (referring to the contract and work upon and for which the assessment was made). This is a sufficient allegation that all the steps preceding the making of the assessment, necessary to authorize the board to make it, had been taken in the manner provided by law. Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225.

The complaint originally contained no allegation of demand, on the owner of the property assessed, for the payment of the amount of the assessment. Both the charter and the ordinance require that such demand shall be made. No testimony was offered to establish such fact. The warrant, assessment, and diagram admitted in evidence were not accompanied by the affidavit of demand and nonpayment required by the charter, and by the ordinance, in order to constitute prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings, and of the right of the plaintiff to recover in the action. Charter of the City and County of San Francisco, art. 6, c. 2, § 15; Ordinance 2439 [N. S.] pt. 1, § 22.

[5] The complaint as amended, after the first submission of the case, alleged that personal demand was made by an agent of plaintiff. This allegation was deemed denied, under the stipulation before mentioned; but no further evidence was offered to establish the fact. There was therefore an utter failure of proof on a vital element in the case. Guerin v. Reese, 33 Cal. 292; McBean v. Martin, 96 Cal. 188, 31 Pac. 5. Notwithstanding such failure of proof, the court found that demand was made as alleged in the complaint. This finding was not justified, because it was not supported by any evidence.

The failure of plaintiff to prove a compliance with the essential requirement of the ordinance, respecting a demand, is fatal to the judgment. McBean v. Martin, supra.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

180 Cal. 260

MULLER v. STANDARD OIL CO. et al.
(L. A. 4635.)

(Supreme Court of California. April 22, 1919. Rehearing Denied May 22, 1919.)

1. DEATH 🔑24 — CONTRIBUTORY NEGLIGENCE OF PARENT — VIOLATION OF ORDINANCE—UNLAWFUL USE OF SIDEWALK.

A father is guilty of negligence where he permits his four year old son to use a tricycle on a sidewalk in violation of an ordinance, as the father himself is guilty of such violation under Pen. Code, § 31, and where such negligence proximately causes injury resulting in the child's death the father cannot recover.

2. DEATH 🔑76 — PROXIMATE CAUSE OF DEATH OF CHILD—NEGLIGENCE OF PARENT.

In a father's action for death of his four year old son crushed by a truck, at an alley crossing, *held*, under the evidence, that the boy's use of a tricycle on sidewalk in violation of an ordinance with the father's consent proximately caused the accident.

Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by John Muller against the Standard Oil Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Mott & Dillon, Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for appellants.

Geo. M. Harker and R. T. Lightfoot, both of Los Angeles, for respondent.

WILBUR, J. Peter Muller, a boy of four years of age, while riding on a sidewalk on the west side of San Pedro street at its crossing with the alley midway between Fourth and Boyd streets in Los Angeles, was killed by being crushed under the right rear wheel of a five-ton oil truck owned by the defendant Standard Oil Company, driven by defendant Bechtel, an employé. The truck was proceeding easterly out of the alley across the sidewalk and onto San Pedro street. The father, John Muller, sues for damages caused to himself by the death of said child, and alleges that the same was due to the negligence of the driver of the truck. Judgment, after verdict for $5,000, was in favor of the plaintiff. Defendants appeal.

The testimony shows, without contradiction, that the truck was being operated very slowly, between 3 and 5 miles an hour. The driver testified that he looked up and down the sidewalk and the street and that he sounded his horn when within 30 or 40 feet of the sidewalk; that he did not see the child or know of the accident until some bystander yelled, "Stop"; that he stopped within a few feet and found on looking back that the child had been killed. On the south side of the alley is the north wall of the Santa Rosa Hotel, which extends to the sidewalk, and the front or east side of the hotel is flush with the sidewalk. On the north side of the alley and flush with the edge of the alley is a one-story dwelling, the front of which is 7½ feet from the sidewalk line, but in front of which a porch extends several feet towards the sidewalk. Next to that house and within 40 feet of the alley plaintiff resided. Respondent's theory is that the child was riding south on the sidewalk on his tricycle and was struck by some portion of the front end of the truck and thrown underneath the truck, falling in front of the rear wheel on the opposite side. Appellants' theory is that the boy rode directly under the truck between the front and rear wheels and fell in front of the rear wheel on the opposite side. The city of Los Angeles has an ordinance prohibiting the use of tricycles upon sidewalks. The appellants contend, not only that they were not negligent, but that the child and its parents were guilty of negligence. At the conclusion of plaintiff's testimony, appellants moved for a nonsuit, upon the ground that the evidence showed that the child was negligent, in violating a municipal ordinance, and that the parents were negligent in allowing him to ride upon the sidewalk on his tricycle. The motion was denied, and the denial of this motion is now urged as error. The court instructed the jury that while it was negligence per se to violate a city ordinance, as the child was under 14 years of age, in order to establish negligence by reason of the violation of a city ordinance, it was necessary to prove that the child knew of the wrongfulness of its conduct. Pen. Code, § 26. It may be assumed for the purposes of this decision that the child, because it was too young to know that it was violating a city ordinance, was not guilty of negligence. If, however, the father was guilty of negligence in the care of the child, which proximately caused the injury, he cannot recover. Meeks v. Southern Pacific R. R. Co., 56 Cal. 513, 38 Am. Rep. 67; Fox v. Oakland Con. St. R. R. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216. The child had been using the tricycle for over two years. Respondent in his brief assumes that it was the custom of the child to play on the sidewalk with his tricycle. The father testified:

> "Und everybody stop, or give it vistle; on the alley everybody stop, what I see all the time, und give it vistle, or I think hees got killed on the sidewalk over there some time."

Plaintiff also testified that immediately before the accident the child had been given a penny to go to a candy store at the corner of Fourth and San Pedro streets on his tricycle; that he went to and returned from the candy store, both times crossing the alley on the sidewalk; that he again left on his tricycle not two minutes before the accident. The court, in its instructions to the jury upon that subject, stated that if the child was a dutiful and obedient child up to the time in question, and by the consent of the father and mother had gone on his tricycle to the candy store to buy a stick of candy, had been told to immediately return to the house, and that he had done so, "but that then and immediately thereafter and of his own volition and without the consent of its parents, or either of them, either express or implied, the child decided to take another ride on his tricycle, and again started south on the sidewalk toward and onto or across the alleyway in question, and while on his second trip he was run over and killed by the negligence of the defendants, and without any negligence of the parents, or either of them, proximately contributing thereto, then such action of the mother in permitting the child to go in the first place on the sidewalk and to get his candy and return would not excuse the defendants in this case."

[1] The use of the tricycle by a child for more than two years, with the knowledge and consent of his parents, coupled with the fact that immediately before the accident the child had been permitted to use his tricycle upon the sidewalk, twice crossing the alley in question, was in fact a consent on the part of the parents to use the tricycle on the sidewalk at the time of the accident, in violation of the city ordinance. The parents themselves, by consenting and encouraging their child to use the tricycle upon the sidewalk, were thus guilty of a violation of the ordinance. Pen. Code, § 31. There is no doubt that the use of the tricycle was a proximate cause of the accident. No witness saw the child in front of the truck. It appears from the testimony of every witness that saw the child when run over that he fell from his tricycle directly under the truck, either because riding over the edge of the curb which separated the alley and the sidewalk the tricycle tipped over, or because the child suddenly turned the same, or because he was struck by some part of the truck; the latter being the contention of the respondent. The plaintiff's witness Barlag, who was within 10 or 15 feet of the boy at the time he was killed, testified:

> "I seen the boy when he fell under the truck. He fell on the south side. He fell under the wheel. He was not lying down. He fell off his tricycle on the ground and under the wheel."

On cross-examination he stated:

> That in his opinion the boy was going south. When he first saw the boy he was under the truck. "He was not lying down. He fell under the truck. The first I seen he was under the truck on the tricycle and he fell under the wheel. I don't know whether he was struck by the front wheel or not. When he fell his head fell right under the wheel."

The plaintiff's witness, Thomas Russell, did not see the boy, but stated that when the radiator of the truck was two feet beyond the line of the Santa Rosa Hotel he saw no one in front of the truck at that time; that, though he continued to look at the truck from that time forward, he did not see the accident. Plaintiff's witness James Russell testified:

> That the rear wheel passed over the boy's head. "He was almost in an upright position when I first saw him, and he just crumpled under the rear wheel. I don't think he was standing on his feet. I could see his head up above under the truck. He was on the ground. I saw the bicycle laying there. I didn't pay much attention to it. The driver didn't know that he had hurt anybody until he had stopped the truck."

Defendants' witness E. A. Farris stated:

> That he stopped his truck in front of plaintiff's house in order to wait for the truck to emerge from the alley, having seen it coming out before he reached the line of the sidewalk, but he did not see the child on the sidewalk. "He was under the truck when I first saw him; just went under the wheel, the tricycle and all—under the right-hand rear wheel. I seen the boy just as he fell, just as he went under the wheel, just as the wheel went over him. * * * He fell off. It looked like there was a curb or something or other. He made a turn, just tumbled right off under it.
>
> "Q. Off the edge of the curb, you mean? A. No, there seemed to be a jump-off or something there. He just keeled right over under the wheel."

No other witnesses saw the accident. The defendant Bechtel testified that he did not see the child, although he looked to the front and both sides, and all the witnesses seems to agree that he knew nothing of the presence of the child until after he had stopped his truck. The only evidence from which the jury could infer that the defendants were negligent was that relating to the speed of the truck, the nature and character of the accident, the testimony which might have justified the jury in finding that the truck driver did not sound his horn nearer than 30 or 40 feet to the sidewalk, if at all, and the inference which the jury might have drawn from the facts and circumstances at the time of the accident that, although the truck driver and other witnesses testified that he looked up and down the street, he did not in fact look with due care.

[2] Assuming, however, that there was sufficient evidence to sustain the verdict of the jury holding the defendants negligent, it is clear from the evidence that the use of the tricycle by the child was as truly a proximate cause of the accident, under the circum-

stances, as was the use of the truck by the defendants. The conduct of the plaintiff in allowing the child to use the tricycle in violation of the city ordinance was negligence on the part of the father, and because such negligence contributed to the injury he cannot recover.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; OLNEY, J.; MELVIN, J.

LAWLOR, J. I dissent. Assuming that a case of negligence per se was established against the plaintiff, yet, upon the evidence before us and the finding implied by the verdict of the jury and the denial of the motion for a new trial that such negligence did not enter into and form a part of the efficient cause of the injury, such finding should not be disturbed for the reason that, in my opinion, we would be bound by a finding either way.

180 Cal. 252

WILKINSON v. STANDARD ACCIDENT INS. CO. OF DETROIT, MICH.

(S. F. 8085.)

(Supreme Court of California. April 21, 1919. Rehearing Denied May 19, 1919.)

1. Insurance 🔑665(6)—Accident Insurance—Suicide—Evidence.

In action on accident policy involving issue of whether insured was shot by accident or committed suicide, evidence *held* sufficient to sustain jury finding that death of insured was due to accident, and not to suicide.

2. Evidence 🔑568(1)—Conclusion—Accident Insurance—Cause of Death—Weight.

In action on accident policy involving question of suicide, the fact that beneficiary, who was insured's wife, testified at the inquest immediately following insured's death that he had committed suicide, is not conclusive upon question of whether death was due to suicide or accident, being merely an inference.

3. Evidence 🔑568(1)—Conclusion—Weight—Accident Insurance—Cause of Death—Newspaper Report.

In action on accident policy involving the issue of whether insured accidentally shot himself or committed suicide, the fact that newspapers reported that he had committed suicide was not conclusive upon such issue, being merely an inference.

4. Insurance 🔑646(7)—Accident Insurance—Suicide—Presumption.

In action on accident policy involving the issue of whether insured committed suicide or was shot by accident, the presumption is against suicide and in favor of accident, in view of Code Civ. Proc. § 1963, subd. 1, providing that a person is presumed to be innocent of crime or wrong.

5. Trial 🔑191(3)—Instruction—Assumption of Fact.

Instruction, "Where the insured is found dead under such circumstances that death may have been due to suicide or to accident, the presumption is against suicide, and in favor of accident," is not bad in assuming a fact not in evidence.

6. Trial 🔑234(7)—Instruction—Burden of Proof.

In action on accident policy involving issue of whether insured's death was due to accident or suicide, where evidence thereon was purely circumstantial, instruction that presumption was in favor of accident was proper, and did not operate to shift burden of proof as to cause of death from plaintiff to defendant.

7. Insurance 🔑634(1)—Accident Insurance—Warranties—Pleading.

Where warranty is not promissory in character, and there is nothing to be performed thereunder, it is unnecessary to allege truth thereof; an averment of performance being required only where insured has warranted that he will do something.

8. Insurance 🔑558(1)—Proof of Loss—Waiver.

In view of Civ. Code § 1440, insurer waived condition of policy requiring written proof of loss by refusing to furnish beneficiary blank form of proofs and denying liability upon policy and informing beneficiary that it was useless for her to make proof of loss.

9. Insurance 🔑556(1)—Proof of Loss—Waiver—Authority of Agent.

Insurer's Pacific Coast superintendent, who had authority to look after insurer's interests generally, with power to issue policies without consulting home office, and with duty of looking into accidents where liability was claimed against company, and through whom policies were canceled and return of premiums offered, had authority to waive condition of policy requiring written proofs of loss by refusal to furnish blank forms and denial of liability.

10. Insurance 🔑179, 268—Accident Insurance—Warranties—Separable Contracts.

Where accident policy was issued for husband and wife, misrepresentation of wife's age had no effect upon contract insuring husband, the policy being separable into two distinct contracts of insurance, one insuring husband, and the other the wife.

11. Insurance 🔑268—Warranties—Falsity.

An agreement between insurer and insured that the falsity of any statement in an application for insurance will avoid the policy is binding, regardless of materiality of statement.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mattie M. Wilkinson against the Standard Accident Insurance Company of

Detroit, Mich. Judgment for plaintiff, and defendant appeals. Affirmed.

Johnston & Jones, of Fresno, and Myrick & Deering, of San Francisco, for appellant. M. K. Harris and Geo. Cosgrave, both of Fresno, for respondent.

LENNON, J. This action was brought upon a policy which insured the plaintiff's husband, John H. Wilkinson, against death or disability resulting from accident. From a judgment in plaintiff's favor defendant appeals.

On October 5, 1914, Wilkinson was found dead in his bedroom by his wife. There was no direct evidence as to the cause of the death, and the findings and judgment of the trial court rest upon the following uncontroverted facts and circumstances: Wilkinson's wife had gone to his room upon hearing the report of a revolver. The body was found prostrate in front of a white enameled washbowl, with a bullet hole in the forehead. There were no powder marks or burns on the face. A revolver lay near the knee, about three feet from the right hand. There was a medicine chest above the bowl with a mirror on its door. On the lower part of this mirror, and on the woodwork below it, was a spattering of blood and brain matter. There was no such spattering on the bowl or in the water which was in the bowl. A small drawer below the mirror, which had theretofore been known to contain Wilkinson's revolver, as well as his shaving materials, was open, with the leather holster still lying in the drawer. There was a nick on the edge of the washbowl, together with a black mark, as if some hard object had fallen, chipping and discoloring the surface. These marks were not upon the bowl prior to the shooting. The bullet went straight into the forehead, slightly tearing the skin. Such a wound, in the opinion of defendant's expert witnesses, would cause one to crumple up and fall immediately to the floor, and blood would spurt back out of the wound. The absence of powder marks on the flesh could be accounted for by the experts only upon the theory that the revolver had been placed directly against the skin. On the other hand, a firearms expert testified on behalf of the plaintiff that a shot fired within a foot of the object penetrated would leave powder marks on the surface around the hole; while, if the muzzle of the weapon were pressed against the surface, "it will burn and smudge—crock," and be very apt to explode the gun. He also testified that Wilkinson's revolver could have been discharged by a blow on the hammer, and that it was light on the trigger. One of defendant's witnesses testified to having seen Wilkinson going into the hotel where Wilkinson lived on the evening of the shooting; that he was in the company of two persons; that he did not seem to have full control of himself, and seemed to be mildly resisting the efforts of his companions to get him into the hotel. This testimony, however, was contradicted by plaintiff. No motive for suicide was shown or attempted to be shown, and the evidence shows without conflict that Wilkinson was a man of happy disposition; that he was free from domestic or business troubles; and that he was cheerful and in excellent health up to the time of his death.

[1] Plaintiff's theory is that the circumstances attending the killing showed that Wilkinson, in taking his revolver from the drawer above the bowl, had accidentally dropped the weapon, and that it had fallen onto the bowl in such a position as to cause it to discharge a bullet into his head. Defendant's contention, on the other hand, is that there was no evidence in the case to support the theory of accident, but that, on the contrary, the circumstances shown absolutely precluded the possibility of accident, and therefore compel the conclusion that the deceased committed suicide. We cannot concur in this contention. It is neither inherently incredible nor altogether impossible that Wilkinson could have been accidentally shot and still have fallen backward. It is conceivable that he could have been standing erect, with his head inclined forward toward the bowl. In view of the reflexes of the human body, it is also conceivable that his head was in a sufficiently different position by the time blood spurted from the wound so that the blood discharged would reach a higher place than that from which the shot was fired. Moreover, it is not clear from the testimony that the body did fall straight backward, as defendant assumes, rather than crumpled up, as its witnesses testify would be the case if deceased had been bending forward at the time of the shot. It is not inconceivable that the gun was accidentally discharged while being taken from the drawer, which was just below the mirror and the spattering of blood. In brief, we do not feel justified in holding as a matter of law that, under all the circumstances and the possible inferences to be drawn therefrom, the evidence adduced upon the whole case is not sufficient to support the finding of the jury, implied from their verdict, that the death of the deceased was due to accident, and not to suicide.

[2, 3] The fact that plaintiff assumed in her testimony at the inquest immediately following her husband's death that he had committed suicide, as did the newspaper reporter who wrote an account of the episode, can have no conclusive effect, since this was no more than an inference in each instance. While it is possible that, had we been sitting as the jury in this case, we should have come to a different conclusion from that at which the jury did arrive, still, upon the whole case, it is not open to us to say, as a matter of law, that there was no sufficient evidence to support the verdict and judgment.

Appellant assails the following instruction to the jury:

> "Where the insured is found dead under such circumstances that death may have been due to suicide or to accident, the presumption is against suicide and in favor of accident."

[4] The contention that there is no such presumption in this state cannot be sustained. This presumption necessarily and logically follows from the statutory presumption "that a person is innocent of crime or wrong." Code Civ. Proc. § 1963, subd. 1; Jenkin v. Pacific Mut. Life Ins. Co., 131 Cal. 121, 63 Pac. 180.

[5] The instruction does not assume a fact not in evidence. The instruction was simply directed to the issue, plainly pointed by the pleadings, as to whether the decedent met his death through accident or suicide.

[6] It did not operate to shift the burden of proof from plaintiff to defendant, nor was it contradictory of the court's other and general instruction that the burden of proof was on the plaintiff to prove death by accident. As was said by Mr. Justice Sloss from the bench during the oral argument of the case:

> "There is no inconsistency in saying the burden of proof is upon one party, and at the same time that certain circumstances will furnish a presumption which is an element of proof or item of evidence to be weighed in determining whether he has sustained that burden."

Admittedly the facts of the present case exclude every cause of death save those of accident or suicide, and it is conceded that the solution of the question as to how the decedent came to his death is dependent entirely upon circumstantial evidence. In this particular the case is distinguishable from the case of Weil v. Globe, etc., Co., 179 App. Div. 166, 166 N. Y. Supp. 225, where there was the direct and uncontradicted evidence of several witnesses that the deceased deliberately jumped in front of a moving train. In that case the trial court charged the jury that:

> "If the facts are equally susceptible of either construction—that is, suicide on the one hand; accident on the other—it will be presumed that the death was the result of an accident, and not of a wrongful intent."

This instruction was criticized and condemned by the court of last resort, chiefly because it ignored the direct evidence that the deceased voluntarily threw himself in front of an approaching train, and invoked the aid of a presumption "which is available only for the purpose of taking the place of direct testimony with the burden of proof," and also because it was tantamount to charging the jury that, if the evidence was equally balanced, the law permitted the presumption to weigh in favor of the plaintiff, and thereby shifted the burden of producing a preponderance of the proof to the defendant. In other words, the instruction condemned in the case cited was predicated upon the erroneous assumption that the evidence of the cause of death was wholly circumstantial and was equally susceptible to one of two opposing theories, whereas the instruction under review here merely postulates the opposing theories of accident and suicide, and did no more in our opinion than correctly charge the jury that, when weighing the evidence, they should give due weight to the presumption which the law indulges against suicide. Such an instruction is appropriate and proper in cases where the determination of the cause of death is dependent wholly upon circumstantial evidence which will fairly support either a finding of accident or one of suicide. Weil v. Globe, etc., Co., supra; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Standard Life, etc., Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116; Jenkin v. Pac., etc., Co., 131 Cal. 121, 63 Pac. 180. And that, we think, is the condition in the present case.

Other grounds which have been urged for a reversal of the judgment were, we think, correctly disposed of by the appellate court for the First district in an opinion written by Mr. Justice Kerrigan, and we therefore adopt that opinion, which is as follows:

"It is claimed that the demurrer to the complaint should have been sustained; that certain warranties were untrue, for which reason the policy never attached to the risk; and that no written proof of death was given as required by the policy.

"The contention that the demurrer to the complaint should have been sustained is based upon the ground that it does not appear therefrom that the warranties set forth in the policy were true, and for the further reason that the complaint simply alleges that oral proof of death was given, whereas the policy required written proof.

[7] "With regard to the first objection it is sufficient to say that the warranties referred to were not promissory in character. Where nothing is required to be performed by an insured under a warranty, there is no necessity for averring performance, for the reason that there is nothing to be performed, and under such circumstances an averment of performance would be useless and without meaning. When a thing is warranted by the insured to exist or a representation to be true at a time when a policy becomes consummated as a contract, he has done all that he can do. Cowan v. Phœnix Ins. Co., 78 Cal. 181, 20 Pac. 408; Berlinger v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922. It is only where the insured has warranted that he will do something that an averment of performance is required.

[8] "Nor do we think that there is any merit in the argument that the averment in the complaint with reference to loss under the policy is insufficient. The allegation upon this subject recites that plaintiff gave to defendant complete oral proof of the facts and circumstances surrounding the death of insured, and that, though requested, defendant refused to furnish

to plaintiff the blank form of proofs, and denied all liability upon the policy, and informed plaintiff that it was useless for her to make proof of loss. Such denial of liability constitutes a waiver of the condition requiring proof of loss. Civ. Code, § 1440; McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862; May on Insurance, 469.

"The further objection that the complaint is insufficient for the reason that it does not appear therefrom that the waiver of the provision requiring proof of loss was written upon or attached to the policy is disposed of in the opinion of Mr. Justice Sloss in McCollough v. Home Insurance Company, supra, and requires no discussion.

[9] "Nor do we think the evidence supports appellant's contention that there was a lack of authority in the agents in making the waiver. We do not deem it necessary to review in detail the voluminous evidence upon the subject. Briefly, the evidence is as follows: One C. F. Briggs was the Pacific Coast superintendent of defendant company, and had been acting as such for 25 years. Geo. R. Andrews was an agent of defendant at Fresno. Briggs had authority to look after the interests of the company generally. It was within his power to issue policies without consulting the home office, and also to take up policies. The general course of the company in the Pacific territory was to act through Briggs. It was his business, among other things, to look into all cases when accidents happened and a liability was claimed against the company. He had the power to appoint agents to solicit insurance, and appointed Andrews. He also had power to settle cases for the company. The secretary of the company testified that, when defendant wanted to cancel a policy and obtain its return from a policy holder, Briggs made the demand on the Pacific Coast, and that, when denial of liability in death claims was made, the general custom of the company was to convey the information direct from the home office to the policy holder, or by special authority to Briggs; and that, when they wished to offer the return of a premium that had been paid, they had Briggs return it.

"Upon receiving news of the circumstances of the death of insured Briggs instructed Andrews to pay back the premium amounting to the sum of $60, and demand the policy. This Andrews did, at the same time advising the plaintiff that he did it under instructions from Briggs. The company, in the meantime being fully advised of all the proceedings, and within the time when proof of loss might have been furnished, ratified the action of Briggs in refusing to pay the plaintiff's claim and instructed him to recover the policy. This is evidenced by the correspondence between the company and Briggs. The action of the company could hardly be expected to be otherwise from the facts it had before it.

"We are further of the opinion that the claim that the evidence is insufficient to support the verdict because certain warranties contained in the policy were untrue is without merit. The untruthfulness of the warranties complained of consists in: (1) That the insured gave the age of his wife as 26 when she was in fact 30; (2) that insured was not at the time of the issuance of the policy a member of a firm, but was an officer of a corporation of the same name.

[10, 11] "With reference to the first alleged false warranty, the policy provided as an additional benefit for a limited insurance in favor of the beneficiary if such person was over the age of 18 years and under the age of 60. It is true that courts have generally held a warranty as to age of the insured to be material. Here, however, the policy, as plaintiff contends, is separable into two distinct contracts of insurance—one insuring the deceased; the other insuring the plaintiff herself. Any misrepresentation respecting the beneficiary could in no manner have any effect upon the contract insuring deceased. The false statement here made was therefore a matter not material to the contract of insurance of deceased, and had nothing to do with it. It is undoubtedly true, as claimed by the appellant, that an agreement between insurer and insured that the falsity of any statement in an application for insurance will avoid the policy is binding, and that in such case the question of its materiality is of no consequence; but the policy here involved contained no such provision.

"The alleged breach of warranty concerning the occupation of deceased was surely not material, and appellant's contention with reference thereto requires no discussion."

For the foregoing reasons, the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; OLNEY, J.; LAWLOR, J.

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180 Cal. 240

TOLBARD v. CLINE, Sheriff, et al.

(L. A. 4738.)

(Supreme Court of California. April 19, 1919.)

1. Fraudulent Conveyances ⟹298(3) — Husband and Wife ⟹49½(8) — Conveyance by Wife—Fraudulent Intent—Evidence.

In a husband's action to enjoin the sale of alleged community property on execution against his wife, evidence *held* to justify finding that the original deeding of the property to the wife was intended as a gift to her, and that her transfer to a third person, who conveyed to the husband, was made with the intention to defraud creditors.

2. Pleading ⟹236(3)—Amendment—Discretion of Court.

The amendment of a pleading during trial lies within the sound discretion of the trial court, and may be allowed though the defense set up has been known for a considerable time before the trial.

3. Appeal and Error ⟹1071(6)—Harmless Error—Failure to Find.

In a husband's action to enjoin sale on execution against his wife of property conveyed to him by the wife through a third person, failure to find whether the property originally deeded by the husband to the wife was paid for by the husband out of community funds *held* harmless to the husband; there having been no dispute on the question, as both the husband and wife testified that property was so paid for.

4. TRIAL ⚷397(1)—FAILURE TO FIND—IMMATERIALITY.

In husband's action to enjoin sale on execution against his wife of property conveyed by wife to him through third person, failure to find that judgment against wife on which execution was issued was on her own contractual obligation, and that the husband was not interested in it, was immaterial, where there was a finding that the wife had made the contract, one of lease, independently, and on her own responsibility.

Department 1.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by W. S. Tolbard against John C. Cline, as Sheriff of the County of Los Angeles, and Lillie Ward. From judgment for defendants, and from an order denying his motion for new trial, plaintiff appeals. Judgment and order affirmed.

Alfred W. Allen and Fred W. Heatherly, both of Los Angeles, for appellant.

Lee C. Gates and W. S. Allen, both of Los Angeles, for respondents.

LAWLOR, J. This action was brought to enjoin the defendants from selling certain property against which an execution had been levied. The case was tried before the court sitting without a jury. Judgment was entered in favor of the defendants. The plaintiff appeals from the judgment and from the order denying his motion for a new trial.

On March 7, 1913, Mrs. Lillie Ward, one of the defendants herein, leased to Mrs. R. A. Tolbard, wife of the plaintiff, an apartment house for "five years from March 7, 1913, at $300 per month, payable in advance." The rent for the first and last month of the term was paid on the execution of the lease.

At the time of making the lease the two pieces of property which are involved in this action stood in the name of Mrs. Tolbard. This property is situated in the city of Long Beach. "Parcel A," also referred to as the "home place," was deeded to Mrs. Tolbard "as her separate estate," while the deed to "Parcel B" was silent as to whether or not it was to be her separate estate. The evidence showed without conflict that both parcels were paid for by the plaintiff out of community funds.

On May 4, 1914, Mrs. Tolbard deeded the property to Mrs. Iola Thompson, who later transferred it to the plaintiff. Thereafter, and for the months of August to December, 1914, inclusive, Mrs. Tolbard failed to pay the rent as provided in the lease. It appears that Mrs. Ward had had some trouble in collecting the rent for the months of April and May, 1914, and that on May 1, 1914, she had threatened to levy against the abovementioned property, standing at that time in Mrs. Tolbard's name, if the rent were not paid. The plaintiff denies, however, that the transfer of the property to Mrs. Thompson, and thence to him, was made for that reason.

Mrs. Ward recovered judgment against Mrs. Tolbard for the amount of the unpaid rent, and execution was levied on the property above described as parcels A and B. The plaintiff by this action seeks to restrain the sale of this property, alleging in his complaint that it is community property, and therefore not subject to his wife's debts.

The defendants denied that the property is community property, and alleged that it is the separate property of the wife, conveyed fraudulently to avoid payments of the rent under the lease. In an amended answer it was alleged further that the plaintiff, by his representations and conduct, is estopped to deny his wife's title to the property.

The court found: That the property in question had been deeded to Mrs. Tolbard, that "Parcel A" stood of record "as her separate property," and that "Parcel B" was in her name presumptively as her separate property. That at the time the lease of the apartment house was entered into between Mrs. Tolbard and Mrs. Ward the plaintiff had told Mrs. Ward that this property was owned by his wife, and that Mrs. Ward might look to that property as security for the payments of rent to become due under the lease. That Mrs. Tolbard had taken Mrs. Ward to see the property and pointed it out as her own separate property. That, relying upon the conduct, representations, and statements made by the plaintiff and his wife, Mrs. Ward had entered into the lease without any bond to secure the payments of the rent, which she would not otherwise have done. That, having made such representations with full knowledge and notice of all the facts and circumstances of the lease, and regarding the title of record of the property, plaintiff had full knowledge and notice of the fact that Mrs. Ward was extending credit to Mrs. Tolbard upon the faith of the representations and statements and conduct of the plaintiff and Mrs. Tolbard as to the ownership of said properties, and therefore plaintiff is estopped to deny that she was the owner. That Mrs. Ward had difficulty in collecting the rent for the apartment house for the months of April and May, 1914, and that she had told Mrs. Tolbard that she would proceed to collect the rent out of the property of Mrs. Tolbard if the rent were not paid. That the transfer of the properties through Mrs. Thompson to the plaintiff was made with the "intent and design to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sequester said properties and to hinder this defendant, Lillie Ward, from subjecting said properties to the payment of the rent then due, or to become due under the terms of the lease of said apartments." That the plaintiff, on or about the last day of April, 1914, knowing that his wife was unable to pay the rent, and anticipating trouble with Mrs. Ward over the matter, with the intent and design to defraud Mrs. Ward and to keep her from subjecting the properties to the payment of any rent due or to become due under the lease, counseled with one E. J. Starr, a notary public of Long Beach, regarding the transfer of the title of the said properties, and authorized Starr to make such disposition of the properties as to him might seem best to keep Mrs. Ward from selling them to satisfy her claims for rent. That Starr accordingly, on May 4, 1914, caused deeds to be made, transferring the properties from Mrs. Tolbard to Mrs. Thompson, and that on the same day Starr caused deeds to be made conveying the said properties from Mrs. Thompson to the plaintiff. That the deeds from Mrs. Tolbard to Mrs. Thompson were recorded and returned to Starr, but that the deeds from Mrs. Thompson to the plaintiff were never recorded. That these deeds, in a packet with other papers, were, in the latter part of June, 1914, given by Starr to the plaintiff, who put the packet away without examining the contents. That the deeds to Mrs. Thompson and from her to the plaintiff were without consideration, and were never delivered, and that the property is still presumptively the separate property of Mrs. Tolbard.

From these findings the court concluded as matter of law that the plaintiff is not entitled to an injunction restraining the defendants from selling the said properties on execution.

The appellant's chief contention is that there was no evidence on which the court could base its finding that the property involved in this controversy was the separate property of Mrs. Tolbard, and that the transfer to Mrs. Thompson was for the purpose of defrauding Mrs. Ward.

Section 164 of the Civil Code provides:

> "All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property."

Fulkerson v. Stiles, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181, was an action brought by the husband against a judgment creditor of his wife to quiet title to land standing in her name, against which an execution had been levied for debts of the wife incurred before the property was deeded to her. It was held that in the absence of evidence of a gift, the facts that the property had been bought out of community funds, and that the husband and wife both testified that a gift was not intended, negative the presumption that would otherwise arise under section 164, Civil Code, that it was her separate property.

[1] But that case is not in point. The record shows that there was evidence on which to base both of these findings—that the deeding of the property to Mrs. Tolbard was intended as a gift to her, and that the transfer to Mrs. Thompson was made with the intention to defraud Mrs. Ward. The plaintiff testified that he knew that his wife was to take title. "I told my wife she could have the property deeded to her." G. W. Scott, the real estate dealer, testified that Mrs. Tolbard directed that the property be deeded to her "as her separate property." Mrs. Ward testified that the plaintiff told her at the time they were about to enter into the lease that Mrs. Tolbard owned parcels A and B. His actions and conduct indicate that a gift to his wife was intended; for while it is true that both the plaintiff and his wife testified to the contrary, and that the property had been put in Mrs. Tolbard's name merely for the sake of convenience, yet the fact that no attempt was made to put the property in the plaintiff's name until Mrs. Ward had threatened to levy against it to collect her rent, taken in the light of all the other circumstances, is evidence tending to prove that the intention was to make a gift.

The testimony of Mrs. Ward that Mrs. Tolbard said to her on May 16, 1914, "Well, Mrs. Ward, I have fixed my property now so you can't touch it; go ahead," tends to support the finding of fraud in the transfer of the property to Mrs. Thompson. Mrs. Tolbard denied having made such a statement, but her denial only created a conflict in the evidence, which the court resolved against her. In fact, the record shows that there was a substantial conflict in the evidence throughout, and we cannot hold that the findings of the court are without support.

As already stated, the defendants in their amended answer claimed that the plaintiff is estopped to deny that the property was the separate property of his wife. The plaintiff contends that this defense should not be entertained for the reasons that the amended answer was improperly allowed, that the defense of estoppel was not sufficiently pleaded, and that the evidence does not support the finding of estoppel.

[2] Appellant urges that the court erred in permitting the amendment to the answer to be filed during the trial, especially so since the defense of estoppel set out in the amendment was known for a considerable time before the trial. It is well established that the amendment of a pleading lies within the sound discretion of the trial court. In Pierson v. McCahill, 22 Cal. 131, this court said:

> "The fact that the new matter set up by the amendment was well known to the defendant when he filed his original answer was no good reason why he should not have been permitted to amend. The rules relating to the amendment of pleadings are properly very liberal, and much is left to the judgment and discretion of the court below."

We think that the trial court did not abuse its discretion in allowing the amended answer.

It is immaterial whether the matter of estoppel was sufficiently pleaded or whether there were sufficient facts upon which to base such a defense. It having been proved that the property was not community property, but that it was the separate property of Mrs. Tolbard, the question of estoppel does not enter. Such a bar could have been raised only where it had been found that the property was community property, subject to the control of the plaintiff.

[3] It is contended that the court failed to find whether the property deeded by the plaintiff to Mrs. Tolbard was paid for by plaintiff out of community funds. The court did not make a specific finding on this issue. The plaintiff and Mrs. Tolbard both testified that the property was thus paid for. So even if such a finding should have been made, the plaintiff was not prejudiced by the failure of the court to make it. There was no dispute on the question. The real dispute was as to whether, when the plaintiff deeded the property to Mrs. Tolbard, it was to be her separate property or to remain community property, but standing in her name for the sake of convenience, as was testified.

[4] Nor was it material that the court failed to find that the judgment against Mrs. Tolbard, on which execution was issued, was on her own contractual obligation, and that the plaintiff was not interested in it. The finding that Mrs. Tolbard had entered into the lease independently and on her own responsibility sufficiently answers this point.

The judgment and order are affirmed.

We concur: SHAW, J.; OLNEY, J.

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180 Cal. 265

HURLBUT v. QUIGLEY. (Sac. 2722.)

(Supreme Court of California. April 25, 1919.)

1. Bills and Notes 🔑223—Indorsement—Effect.

An indorsement is a written contract, the effect of which the law declares.

2. Bills and Notes 🔑422(2) — Indorsement—Enlarged Liability.

The writing above indorsers' names, declaring that they waive presentment, etc., is a part of the contract of indorsement, enlarging liability.

3. Bills and Notes 🔑422(2) — Indorsement—Joint and Several Agreement.

The words above indorsers' name, "I hereby waive presentment," etc., are governed by Civ. Code, § 1660, declaring that a promise made in the singular number, but executed by several persons, is presumed to be joint and several.

4. Contracts 🔑184—Joint and Several—Presumption.

By express provision of Civ. Code, § 1659, where all the parties uniting in a promise receive some benefit from the consideration, past or present, their promise is presumed to be joint and several.

5. Bills and Notes 🔑422(2) — Joint Indorsement—Evidence.

Circumstances *held* to show that accommodation indorsement of company's note by stockholders and officers, under words of waiver of presentment, etc., was joint and several.

6. Bills and Notes 🔑517 — Indorsers — Time of Delivery.

Evidence *held* to show that company's note to bank was not delivered till after it was indorsed by all the accommodation indorsers.

7. Bills and Notes 🔑266 — Indorsers — Contribution.

Any of joint accommodation indorsers of note paying more than his share has right of contribution from the others.

8. Evidence 🔑461(1) — Parol Evidence —Intention—Nature of Liability of Indorsers.

Circumstances showing an intention of several accommodation indorsers, whose names appear successively on the back of a note, to act jointly in the matter, may be proved by parol.

9. Limitation of Actions 🔑49(6) — Contribution—Accrual of Cause.

Cause of action for contribution between accommodation indorsers of note is not on the contract of indorsement, but on implied contract, and accrues only when one of them has paid more than his share.

10. Bills and Notes 🔑96 — Accommodation Indorsement—Consideration.

Original debt of company to bank is sufficient consideration for accommodation indorsement, before delivery, by company's officers and stockholders, of company's note to bank in satisfaction of prior obligations.

11. Bills and Notes 🔑430 — Payment — New Note.

Debt represented by note of company to bank is not paid by company giving new note to cover the same and other subsequent indebtedness; the new note not having been offered or accepted as a satisfaction of the old note, but merely as additional evidence of the original debt.

12. BILLS AND NOTES 🔑266 — INDORSERS —CONTRIBUTION—COMPLAINT.

Complaint by one indorser of note against another indorser thereof for contribution *held* to sufficiently allege a joint indorsement, it setting forth a company's note with names indorsed on the back, under agreement, made in the singular number, waiving presentment, etc.; and alleging the company executed the note, and that at the same time and as part of the same transaction the three indorsers signed such agreement.

13. EVIDENCE 🔑80(1) — PRESUMPTION — LAW OF OTHER STATE.

The law of another state is presumed to be the same as that of the forum.

14. PLEADING 🔑9 — SUFFICIENCY — STATING FACTS WITHOUT CONCLUSION.

A pleading is sufficient if it states the facts on which the law takes effect, without stating the conclusion of law.

Wilbur, J., dissenting.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by E. H. Hurlbut against J. R. Quigley. Judgment for plaintiff, and defendant appeals. Affirmed.

L. L. Dennett, of Modesto (J. C. Needham, of Modesto, of counsel), for appellant.

Hawkins & Hawkins, of Modesto, for respondent.

SHAW, J. The plaintiff, the defendant, and William Trebilcock became accommodation indorsers upon a promissory note for $6,000, payable to the First National Bank of Central City. The plaintiff was, by suit, compelled to pay the whole thereof. He thereupon brought the present action to recover from Quigley one-third of the amount he had thus been compelled to pay and recovered judgment in the court below. From this judgment the defendant appeals.

The complaint alleged that the Gilpin Lumber Company executed a note to the First National Bank of Central City, bearing date July 10, 1911, for $6,000, and:

> "That at the same time and as a part of the same transaction, and for value received, the plaintiff, E. W. Hurlbut, and the defendant, J. R. Quigley, and one Wm. Trebilcock signed the following agreement on the back of the said note and indorsed the same as follows, to wit:
>
> "For value received I hereby waive presentment, demand and notice of protest on the within note. E. W. Hurlbut.
> "Wm. Trebilcock.
> "J. R. Quigley."

The theory of the complaint is that Hurlbut, Trebilcock, and Quigley were joint indorsers of the note, and that therefore one who paid more than his one-third share thereof had the right to sue the others for contribution. It is claimed that the evidence does not show a joint indorsement.

The theory of the appellant is that the note, with the writing and the names of Hurlbut and Trebilcock indorsed thereon, was delivered to the bank, and that thereafter Quigley wrote his name under the names of the other two indorsers. On this assumption the argument is that, with respect to the two other persons, Quigley is a successive indorser and not a joint indorser with them, and, consequently, that he and Hurlbut are not joint sureties, and that Hurlbut has no right of contribution from him. We find that the evidence warrants a different conclusion, and one which will support the judgment given for the plaintiff.

There was evidence to the effect that Quigley, Hurlbut, and Trebilcock were stockholders and officers of the Gilpin Lumber Company at and for years prior to the time of the execution of the note of July, 1911; that the company's place of business was in Colorado; that it borrowed large sums of money upon its notes from time to time from banks upon an arrangement, which was carried out, that Hurlbut, Trebilcock, and Quigley should indorse the same as sureties; that in July, 1911, the company owed the First National Bank of Central City, Colo., $6,000, of which $3,000 was evidenced by its note indorsed by Quigley and the other two under the arrangement stated, and the balance was in the form of an overdraft; that the company desired to give a new note for said debts; and that the bank thereupon agreed to accept the company's note for $6,000 indorsed by Hurlbut, Trebilcock, and Quigley, as sureties, in satisfaction of such note and overdraft. Quigley at that time lived in California, but was still a stockholder and officer of the company. Thereupon the note was drawn and properly signed by the officers of the lumber company, indorsed by Hurlbut and Trebilcock, and handed to an officer of the bank to be forwarded to Quigley, in California, for his signature as indorser. The note was so forwarded and was returned by Quigley to the bank in September, 1911, about two months after its date, with signatures as above shown. The bank then accepted the note as the obligation of the parties thereto and canceled the previous note for $3,000. There is no evidence tending to show any understanding between the three indorsers that they were to be liable successively in the order in which their names appeared upon the note, or that their relation was to be other than that of simultaneous accommodation indorsers. As stockholders they were all interested in the credit of the corporation.

[1-4] "An indorsement is a written contract of which the law declares the effect; and

when counted upon it is the foundation of the action." Haines v. Tharp, 15 Ohio, 133; Goldman v. Davis, 23 Cal. 256; Citizens' Bank v. Jones, 121 Cal. 32, 53 Pac. 354. Where an indorser precedes his signature by a statement such as that in the indorsement above shown, it constitutes "a valid indorsement with an enlarged liability"; such enlargement in the present case being a waiver of some of the conditions imposed by law upon the payee in favor of the indorser. Buck v. Davenport Savings Bank, 29 Neb. 407, 45 N. W. 776, 26 Am. St. Rep. 392; Helmer v. Commercial Bank, 28 Neb. 474, 44 N. W. 482; Heard v. Dubuque, etc., Bank, 8 Neb. 10, 30 Am. Rep. 811. The writing above the indorsers' names, therefore, constituted a part of the written contract of indorsement. The contract of an indorser, except so far as he qualifies it in writing, is that if the instrument is dishonored he will, upon compliance by the holder with certain conditions, pay the amount of the note. Civ. Code, § 3116. It constitutes, therefore, a conditional promise to pay the note. "A promise, made in the singular number, but executed by several persons, is presumed to be joint and several." Civ. Code, § 1660. See, also, Farmers' Exchg. Bank v. Altura, etc., Co., 129 Cal. 269, 61 Pac. 1077; 1 Dan. Neg. Inst. § 94; Maiden v. Webster, 30 Ind. 317; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716; Monson v. Drakeley, 40 Conn. 559, 16 Am. Rep. 74; Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27. "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." Civ. Code, § 1659.

[5] It follows therefore that the circumstances above related rebut any presumption that the indorsers did not intend to become jointly bound and, further, in view of the above authorities, that the agreement written on the back of the note, being joint and several in its effect, and a part of the contract of indorsement, made the entire contract joint and several in character.

The case, with respect to the liability of the several indorsers and their relation to each other, is almost identical with Farmers' Exchg. Bank v. Altura, etc., Co., supra. In that case Hutson executed a note to the Altura Company, and thereupon it was taken by Otis, president of the company, to the plaintiff bank, duly indorsed by the company, to be discounted for the benefit of the company. The bank required security, and the words, "I hereby waive demand and notice of demand, protest and notice of protest, and nonpayment," were stamped upon the back of the note. Otis then took the note in this condition to procure accommodation indorsers. He then procured, underneath the words above quoted, the names of five persons, written one under the other and on different days. The note was then delivered to the bank and by it discounted for the company. The court below found that all of the persons thus indorsing the note had waived protest, notice of protest, and nonpayment of the note. The court held that this finding was sustained by the facts above stated. Referring to cases where it was held that such an indorsement constitutes a waiver only by the first person whose signature appears thereunder, there being nothing to indicate the intention to sign jointly, the court said that, under the circumstances shown, this rule did not prevail; that the first indorser "was an accommodation indorser like the rest of them, and signed as they did for the benefit of the mining company of which he and they were stockholders"; and in effect that, as they all signed before the note was delivered, they were all alike bound by the waiver of notice, etc., appearing above their signatures.

[6, 7] Upon the evidence in this case the court below properly found that there was no delivery of the note until after it had been received by the bank from Quigley after he had indorsed the same in company with the other indorsers, and that he thereby became a joint and several indorser with the others. This being the case, the right of contribution would exist in favor of any of the joint indorsers who paid more than his share of the debt. The judgment so far as this point is concerned is supported by sufficient evidence.

[8] The appellant attempts to invoke the rule, which has been laid down in some cases, that, where names appear as accommodation indorsers in successive order on the back of a note, they are, in the absence of evidence to the contrary, presumed to be successive indorsers and not joint indorsers. It is well settled, however, as the above cases indicate, that circumstances showing an intention to act jointly in the matter may be proven by parol evidence, and the presumption of successive indorsements overcome. 8 Cor. Jur. 381; Enterprise B. Co. v. Canning, 210 Mass. 285, 96 N. E. 673; Shea v. Vahey, 215 Mass. 82, 102 N. E. 119.

[9] The action is not barred by the statute of limitations. The cause of action for contribution does not accrue at the time of execution of the contract by which persons become joint sureties, but only when one surety pays more than his share of the debt. Hurlbut was compelled to pay this debt on January 26, 1916, and the action was begun on May 17, 1916. The period of limitation is two years. The action for contribution is not an action on the contract of indorsement, but is an action to enforce the equitable right of contribution upon the implied contract of each to the other, that they will share the burden equally. Chipman v. Morrill, 20 Cal. 136; Sherwood v. Dunbar, 6 Cal. 53; Richter

v. Henningsan, 110 Cal. 537, 42 Pac. 1077; Bunker v. Osborn, 132 Cal. 483, 64 Pac. 853.

[10] There was a sufficient consideration for Quigley's indorsement. His indorsement and that of the others were all made before delivery of the note, consequently the original debt was a sufficient consideration for the contract of indorsement. Savage v. Fox, 60 N. H. 17; 8 Cor. Jur. 211, § 343; McDonald v. Randall, 139 Cal. 255, 72 Pac. 997; Rohrbacher v. Aitken, 145 Cal. 485, 490, 78 Pac. 1054.

[11] There is no merit in the claim that the original debt was paid by the Gilpin Lumber Company after the execution of the note in controversy. It is true that a new note was afterwards given by the company to cover the same indebtedness with other indebtedness subsequently accrued; but this new note was neither offered nor accepted by the bank as a satisfaction of the note in question here, but merely as an additional evidence of the original debt. Such a transaction is not a payment.

[12-14] Upon the decision of this case in department it was stated that the complaint did not sufficiently allege a joint indorsement and, consequently, that the judgment could not be sustained. This objection is not mentioned in the briefs. Nevertheless, we have given it further consideration, and we are satisfied that the complaint is sufficient on this point. We have already shown that the contract of indorsement is a written contract of which the law declares the effect. In this state the law on the subject is declared in section 3116 of the Civil Code. It is presumed, in the absence of evidence to the contrary, that the law is the same in Colorado. That section recognizes that such contract may be qualified. We have also shown that the qualification written on the note here involved and signed by the indorsers made the entire contract of indorsement joint and several in character as between the parties thereto. The complaint sets forth the note with this contract indorsed thereon, in full. It therefore charges that the contract of indorsement is joint and several. Furthermore, it alleges that the Gilpin Lumber Company "executed and delivered" the $6,000 note, and that "at the same time and as a part of the same transaction" the three indorsers "signed" the agreement so written on the back of the note and indorsed the same. This means that the indorsements were simultaneously delivered. It is the final delivery as a complete contract that constitutes execution. Therefore it alleges that the indorsed agreement was executed simultaneously by all the indorsers. The allegation that they all signed the agreement is an allegation that Quigley signed it. He would be bound by it as matter of law. A pleading is sufficient if it states the facts upon which the law takes effect. The conclusion of law need not be stated. As it appears from the pleading that the contract of indorsement was joint and several and that Quigley and the others simultaneously executed it, the conclusion must be that it charges a joint indorsement by Quigley and the others.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

WILBUR, J. I dissent. In view of the fact that the prevailing opinion holds that the complaint is sufficient, while the contrary opinion prevailed in department, it seems proper to express in a dissent the view taken in department, to which I still adhere.

In Navajo County Bank v. Dolson, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787, the court in bank, speaking through Justice Angellotti, where a note had been indorsed by three persons (the defendants) before its delivery, as an accommodation to the payor, said:

> "It cannot be doubted that if the note was a negotiable instrument the defendants were mere indorsers, with no other liability than that of indorsers. As such, notice of dishonor or nonpayment would be essential to their liability in the absence of waiver on their part of the right to such notice."

The main opinion holds that the words, "For value received I hereby waive presentment, demand and notice of protest on the within note," convert the indorsements which would otherwise be construed as successive indorsements into joint indorsements. This view, it seems to me, does not give sufficient weight to the effect of an indorsement as provided by the law. It is conceded that without the waiver clause the effect of the indorsement of Hurlbut, as between Hurlbut and Quigley, was that Hurlbut, the first indorser, agreed to reimburse Quigley, the last indorser, upon proper presentment, demand, and notice, in the event that Quigley was called upon to pay the note, and the effect of Quigley's indorsement was that Quigley would pay the note to the payee, in the event that the payor failed to do so, upon proper presentment, demand, and notice, with recourse, in case of such payment for reimbursement against Hurlbut. This rule is thus stated in Daniel on Negotiable Instruments, § 704:

> "But in the absence of any agreement among accommodation indorsers, the law fixes their liability in accordance with the order of the names on the paper, and the indorser who pays a bill or note has recourse against a prior indorser for reimbursement."

The same rule concerning indorsers is stated in a note in 28 L. R. A. (N. S.) 1039:

"Their liability, inter se, in the absence of an express agreement to the contrary, is that expressed by the paper itself, and their liability is successive, and not joint; consequently they are not cosureties and the doctrine of contribution does not obtain. * * * The only question, in the absence of an agreement to the contrary, is what is the prima facie liability of the parties as shown by the paper itself."

The rule may perhaps best be stated in the language of section 3116, Civil Code, in force at the time of the transaction:

"* * * Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him: * * * (4) That if the instrument is dishonored, the indorser will, upon notice thereof duly given to him, or without notice, where it is excused by law, pay the same with interest."

Now where notice is waived the giving of notice is "excused by law"; and do not we have here a situation expressly provided for by section 3116, namely, that the first indorser warrants to the last indorser that he will, without notice, pay the same with interest? If we hold, as I agree may properly be done, that the waiver clause applies to all the subsequent indorsements (although there are authorities in other states to the contrary (Daniel Neg. Inst. § 1092a [6th Ed.] p. 1247), it seems to me that we give full effect to such clause by holding that this waiver is a joint and several agreement of waiver, the legal effect of which is to remove from the indorsement the condition implied by law that the obligation to pay shall be conditioned upon proper presentment, demand, and notice, so that Hurlbut's agreement to pay the payor of the note in the case of the default of the payee, or to reimburse Quigley in the event that Quigley is called upon to pay the same, is no longer conditioned upon presentment, demand, and notice, but absolute without such presentment, demand, and notice, while Quigley's agreement to pay the payee of the note with recourse on Hurlbut for reimbursement also becomes absolute, instead of conditional upon such presentment, demand, and notice. To hold that because the indorsers join in the one agreement to waive notice, etc., they thereby completely change the contract implied by law, so that instead of Hurlbut's agreement to pay Quigley we have an implied agreement that Quigley will pay to Hurlbut, seems to me to give an effect to such waiver wholly foreign to its language and evident purpose. The main opinion states that the effect of the waiver and indorsement simply constitutes a contract of indorsement with enlarged liability, while the effect of the decision is that where several indorsers join in such waiver their contract becomes one of guaranty, or suretyship; a joint obligation to pay the payee in the event of the payor's default, with the obligation to mutually contribute in the event any one is called to pay more than his proportion to the payee. The rules of the law merchant, previously in effect, governing such cases, have been incorporated into our Civil Code, in the Uniform Negotiable Instrument Law, since the case was tried, and may well be stated in the language of section 3148, Civil Code, as amended in 1917 (St. 1917, p. 1543), providing as follows:

"Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser."

Section 3149, Civil Code:

"As respects one another indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally."

Section 3145, Civil Code, provides as follows:

"Where a person not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

It seems to me, therefore, that the fact that the indorsers joined together in the waiver does not affect that part of the contract relating to their obligation to pay one another and to pay the payee. I do not believe that the mere waiver of notice can convert an agreement which the law expressly provides shall be that of indorser into a mere contract of guaranty.

180 Cal. 246

CITIZENS' SAV. BANK OF SAN DIEGO v. MACK et al. (L. A. 4734.)

(Supreme Court of California. April 21, 1919.)

1. CORPORATIONS ⚷123(6)—PLEDGE OF STOCK —SUBSEQUENT LOANS—RIGHTS OF LENDER— EQUITIES IN THIRD PERSON.

Other loans subsequently made by a lender on the security of corporate stock to the holder thereof would have been protected by pledge of stock despite lender's knowledge of equities of third person in stock if subsequent loans had been result of compelling initial loan agreement or necessarily the result of incidental contractual relations of the parties, the lender not being protected where it was optional with it to make any loan in excess of the original amount advanced.

2. MARSHALING ASSETS AND SECURITIES ⚷4 —REQUIREMENT OF FORECLOSURE—STATUTES AND EQUITABLE RULES.

Where bank loaned on pledge of corporate stock, also taking mortgages as security, it was properly required, a third person having equities in the pledged stock, first to foreclose its mortgages before resorting to a sale of the stock, in view of Civ. Code, §§ 2899, 3433, and equitable rule that when creditor has lien on two funds, and another lien on only one, he will be compelled to exhaust fund on which he has exclusive lien, and to resort to other for deficiency only.

Department 2.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Citizens' Savings Bank of San Diego against A. F. Mack and the Bentley Ostrich Farm and Henry Eummelen. From a portion of the judgment, plaintiff appeals. Affirmed.

See, also, 31 Cal. App. 506, 160 Pac. 1096.

Albert J. Lee, of San Diego, for appellant.
Doolittle & Morrison, of San Diego, for respondents.

LENNON, J. The plaintiff by this action sought to restrain by injunction the defendant Bentley Ostrich Farm from canceling certain certificates of its corporate capital stock standing on its books in the name of the defendant Henry Eummelen, and to prohibit the corporation defendant from issuing to the defendant Mack other certificates in lieu thereof evidencing in the aggregate 280 shares of the corporate stock, and also to restrain the defendant Mack from receiving under claim of ownership or otherwise all or any portion of the said stock. The appeal, presented on the judgment roll alone, is only from that particular portion of the judgment which in effect decreed that the plaintiff held the certificates of stock in controversy as a pledge to secure the payment of only $12,000, instead of $24,000, and provided that before a sale of 280 shares of said stock could be resorted to in satisfaction of the loan, which the trial court found were owned by the defendant Mack, the plaintiff must first foreclose the real property mortgage executed to plaintiff by defendant Eummelen simultaneously with the pledge of the stock as additional security for the loan of $24,000, which was ultimately made by the plaintiff to the defendant Eummelen. In this behalf the portion of the judgment appealed from directed that the proceeds of the sale of the mortgaged property be applied first to the satisfaction of a second loan of $12,000, and that then the plaintiff might have recourse to a sale of said stock in satisfaction of the unpaid balance, if any, of the $12,000 originally loaned to the defendant Eummelen, and secured by a pledge of the stock and a first mortgage on real property as well.

The facts of the case, as evidenced by the pleadings, proof, and findings, are these: In November, 1911, W. H. Bentley was the owner and holder of 840 shares of the issued capital stock of the Bentley Ostrich Farm. In that month, the defendant Henry Eummelen represented to A. F. Mack, defendant and respondent herein, that a controlling interest in said ostrich farm could be had for $50,000. Thereupon an agreement was entered into by and between Mack and Eummelen, whereby they were to jointly purchase the said 840 shares, each to advance one-half of the purchase price, and each in return to receive 420 shares of said stock. Eummelen alone conducted the negotiations with Bentley, acting all the while for himself, and as agent of Mack. During the course of the negotiations, Eummelen informed Mack that he was unable to contribute $25,000 in cash as payment for his portion of the purchase price, and represented to Mack that Bentley was willing to take from Eummelen, in lieu of cash, his promissory note extending over a period of two years if Mack would pay $15,000 in cash and give his promissory note for $10,000, and that if Mack would do this Bentley would convey to Mack in addition to the said 420 shares of stock certain real property situate in the city of San Diego, which was mortgaged for $1,500 and valued at $3,000. Mack was willing, and accordingly paid Bentley the sum of $15,000 in cash and delivered his promissory note to Bentley in the sum of $10,000. Bentley in turn executed to Mack a deed to said real property. The representations made in the first instance by Eummelen to Mack that the purchase price of the stock was $50,000 were false, and willfully and knowingly made by Eummelen, who at all times knew that the price of the stock was but $30,000, and in fact had, during the negotiations for the sale of the stock, agreed with Bentley, without Mack's knowledge, that the purchase price thereof was to be but $30,000. A sale of the stock was consummated by Eummelen and Bentley at that price, but as a payment in full for his 420 shares he gave Bentley only a promissory note for $5,000. In March, 1912, Mack discovered the fraud that had been thus perpetrated upon him, and on August 12, 1912, instituted an action, which sought and secured a judgment, entered on August 4, 1913, decreeing that he was the owner of such portion of the 840 shares of stock purchased as the sum that he had personally paid toward the purchase price of the stock bore to the amount actually paid therefor, namely, 700 shares, and that the defendant Eummelen held 280 shares of said stock in trust for Mack. On June 20th, the defendant Eummelen placed with the Citizen's Savings Bank of San Diego, the plaintiff in the present action, as a pledge to secure a loan of $12,000, and such further sums as might thereafter be advanced, not to exceed the sum of $24,000, stock certificates certifying that in the aggregate the defendant Eummelen was the owner of 420 shares of stock in the Bentley Ostrich Farm. The stock so pledged, being the one-half of that purchased from Bentley for himself and Mack, was only part of the security placed for this loan, a real property mortgage also being executed to the bank by Eummelen on certain property owned by him. On December 27, 1912, plaintiff advanced to Eummelen as a loan the further sum of $3,000, and on February 6, 1913, the additional sum of $9,000, taking, however, as added security from Eummelen a second mortgage on the aforesaid real property which is situate in San Diego county. On August 4, 1913, ten days after the entry of the judgment in the action instituted by Mack decreeing Eummelen a trustee of the 280 shares of the stock which had been pledged to the plaintiff by Eummelen, the plaintiff appeared and interposed in that action a motion to vacate and to set aside the judgment, to the end that it might be allowed to intervene. From the order denying the motion the plaintiff here appealed, but the order was affirmed. Mack v. Eummelen, 31 Cal. App. 506, 160 Pac. 1096.

The principal point argued in support of the appeal is to the effect that the relative rights and obligations of the parties to the pledge of the stock were definitely determined by the initial loan agreement of June 20, 1912, and that as a consequence it was not only the plaintiff's right, but his unavoidable contractual obligation as well, to make further loans to the pledgor of the stock up to the limit of $24,000, and that this was so despite the fact that prior to the making of the second and third loans of respectively $3,000 and $9,000 plaintiff had, as the trial court found, actual notice of the fact that the defendant Mack had instituted an action for the recovery of 280 shares of the pledged stock upon the claim that he was the equitable owner thereof. This contention is rested primarily upon the authority of Jones on Pledges, § 106, where it is said:

> "A promissory note pledged before maturity as collateral security for future advances is good in the creditor's hands for all advances made before notice of equities between the original parties; but not for advances made after such notice—*unless the creditor at the time of taking the security bound himself to make advances to a definite amount.*"

It will be noted that the last clause of the quoted section, italicized by us, is not supported by the citation of any authority, and that the cases cited by the author to support the preceding portions of the text have no relation to the principles enunciated in the last clause, which, in so far as our research shows, rests upon no authority save the dictum of the author. It is clearly contrary to the settled, fundamental, and familiar principles which measure the rights and obligations of bona fide pledgees. The general rule which provides protection for loans advanced upon the security of a pledge before but not after actual notice of the fact that third persons own or claim to own all or a portion of the subject-matter of the pledge is doubtless subject to exceptions. The proper limitations to be placed upon the rule in exceptional cases, and which Jones probably had in mind but did not fully express in his work on pledges, is to be found by analogy in his work on chattel mortgages (5th Ed. § 97). There he declares:

> "That advances made by a mortgagee after he has actual notice that others have preferred rights in the property will be postponed to the rights acquired by such other persons unless the mortgagee be under a binding contract to make the advances, or it is essential to his own security to complete the advances contemplated by the mortgage. If he has the option to make the advances or not as he chooses, the mortgage as to each advance made upon it is to be regarded as a fresh mortgage."

We apprehend that a "binding" contract is one under which the mortgagee was legally obligated to make the loan called for by the initial loan agreement, and for the breach of which he could be held liable. The case of Preble v. Conger, 66 Ill. 370, is an apt illustration of the application of the exception to the general rule which permits and protects future advances originally contemplated by the mortgage, even though made after notice of existing preferred rights of third parties. In this case the mortgagees had become the guarantors of the mortgagor to third parties for the building of a hotel according to contract and had taken a chattle mortgage from the contractor to indemnify them as a security for the payment of whatever sum might become due for advances and for payments made in discharge of the guaranty. In this situation, the court held that the mortgagees had the right to make on the strength of the mortgage such advances and payments, as well after notice as before, as were necessary for the discharge of their obligation.

[1] By a parity of reasoning, it might be readily and rightfully said that the second and third loans made by the plaintiff to the defendant Eummelen would have been protected by the pledge of the stock in question despite the plaintiff's knowledge of the equities of the defendant Mack if the loans had been the result of a compelling initial loan agreement or necessarily the result of the incidental contractual relations of the parties. But no such situation is shown either by the pleadings or by the proof. On the contrary, it was shown that it was optional with the plaintiff to make any loan in excess of the original $12,000 on the pledge of the stock. That this is so evidenced, we think, by the fact that the plaintiff insisted upon having, and did receive, separate notes and a second real property mortgage as evidence of and security for the second and third loans.

The facts of the case at bar do not either directly or by analogy fall within the reasoning of Thompson v. Toland, 48 Cal. 99, and Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58, and the general rule declared in section 2991 of the Civil Code. At no time was the stock placed by Mack in the hands of Eummelen so as to make him apparent owner thereof for the purpose of transfer.

[2] The further contention of the appellant that the trial court erred in adjudging that the plaintiff must first foreclose its mortgages before resorting to a sale of the pledged stock is not, we think, well taken. That requirement is within the purview of sections 2899 and 3433 of the Civil Code and well within the principle enunciated in the case of Kent v. Williams, 114 Cal. 537, 46 Pac. 462. Moreover, it is in thorough accord with the well-established rule in equity that, where a creditor has a lien upon two funds and another lien upon only one of them, he will be compelled to exhaust the fund upon which he has an exclusive lien and will be permitted to resort to the other for deficiency only. United States v. Duncan, 12 Ill. 523, Fed. Cas. No. 15,003; United States v. Mott, 1 Paine, 188, Fed. Cas. No. 15,826.

The contention that the trial court erred in refusing to strike out portions of the defendant's answer was not argued and, apparently, is without merit.

Our conclusions upon the merits of plaintiff's appeal make it unnecessary for us to discuss and decide the points presented in support of the defendant's appeal from the same judgment which, by stipulation, comes here upon the same record.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

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40 Cal. App. 260

MARIN MUNICIPAL WATER DIST. v. NORTH COAST WATER CO. (Civ. 2847.)

(District Court of Appeal, First District, Division 1, California. March 13, 1919. Rehearing Denied by Supreme Court May 12, 1919.)

1. COVENANTS 🔑8 — IMPLIED COVENANT AGAINST INCUMBRANCES—PROCEEDINGS IN INVITUM.

Where municipal water district having condemned certain land secured possession of land through an order of court by a proceeding in invitum under Code Civ. Proc. § 1254, there was no implied covenant, as in a voluntary conveyance by grant, against incumbrances or liens.

2. EMINENT DOMAIN 🔑165 — PAYMENT — LIENS—RECOVERY FROM OWNER.

Code Civ. Proc. § 1248, providing that, upon condemnation of land incumbered by a mortgage or other lien securing indebtedness not due at time of entry of judgment, the amount of indebtedness may, at plaintiff's option, be deducted from the judgment, does not give plaintiff the right to recover such indebtedness after payment of judgment in full and neglect to retain amount of indebtedness.

3. EMINENT DOMAIN 🔑165—CONDEMNATION OF LAND SUBJECT TO TAX LIEN—RECOVERY FROM FORMER OWNER.

Municipal water district, having secured possession of property it had condemned by order of court in a proceeding in invitum under Code Civ. Proc. § 1254, cannot recover from owner taxes due and constituting lien upon land, but not delinquent, at time of transfer of land, notwithstanding Civ. Code, § 1712; owner being under no obligation to remove lien of taxes at time of transfer.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by the Marin Municipal Water District against the North Coast Water Company. Judgment for defendant after demurrer to complaint was sustained without leave to amend, and plaintiff appeals. Affirmed.

George H. Harlan, of San Rafael, for appellant.

Chas. S. Wheeler and John F. Bowie, both of San Francisco (Nathan Moran, of San Francisco, of counsel), for respondent.

RICHARDS, J. In this action the plaintiff sought to recover from the defendant the sum of $2,224.57, which it had paid as county and municipal taxes upon certain real property situated in the county of Marin. The complaint set forth certain facts in an attempt to show that it was the duty of the defendant to have paid these taxes, and that, it not having done so, the plaintiff, in order to free its property from the lien thereof, was compelled to and did pay them. A general demurrer to the complaint was sustained without leave to amend, and the plaintiff appeals from the judgment thereupon entered.

It appears from the complaint that the plaintiff is a municipal water district. As such it brought an action to condemn certain lands of the defendant. It had theretofore procured a valuation of said lands to be made by the railroad commission, which fixed such valuation at the sum of $289,100. The action was tried on February 14, 1916, and resulted in a judgment, entered on March 21st following, that the plaintiff take said lands upon paying the said sum of $289,100, from which judgment the defendant took an appeal.

On or about the first Monday of March of the same year the real property was assessed by the county assessor, and a part thereof by the town assessor of Mill Valley, for taxation purposes, and in the following September county and municipal taxes were duly levied (being the taxes giving rise to the present controversy), and became a lien upon the real property referred to as of the first Monday in March, 1916. These taxes became due on October 23d of that year.

On October 24, 1916, the plaintiff, upon notice theretofore given, procured from the superior court, under the provisions of section 1254 of the Code of Civil Procedure, an order placing it in possession of the property upon payment of the amount previously found to be its value, and a few days thereafter, to wit, on November 1st, it paid to the defendant this amount and entered into possession of the real property. At the time of the transfer neither the county nor municipal taxes had been paid, and several weeks later became delinquent, and the property was sold therefor. Thereafter the plaintiff redeemed it, and demanded of the defendant that it reimburse to it the amount so paid out, which the defendant refused to do.

[1] The facts as above narrated disclose that at the time the plaintiff took over the real property the taxes, although due and a lien thereon, were not delinquent. There had been no default on the part of the defendant. Its property being taken from it by a proceeding in invitum, there was no implied covenant, as in a voluntary conveyance by grant, against incumbrances or liens. Nor are we pointed to any provision of law placing upon defendant any obligation to the plaintiff to remove from the property about to be taken from it any lien existing thereon. The plaintiff claims that such obligation arises from the terms of section 1248 of the Code of Civil Procedure. That section reads as follows:

> "When the property sought to be taken is incumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid."

[2] We do not so construe the section. It gives to the person taking property by proceedings in eminent domain the right to retain from the sum of money to be paid for it the amount necessary to discharge any lien existing thereon, but his neglect to adopt this course would not give rise, in the absence of some other provision of law creating it, to a right of action to recover it when once paid. The right given by this section seems to be one the extent of which is measured by the mode prescribed for its exercise. In eminent domain proceedings the only obligation resting upon the defendant is to prove his damages. A case in which this question arose is Gray v. Case, 51 N. J. Eq. 426, 26 Atl. 805. There the condemnor failed to provide against a lien both at the trial and after the award was paid into court. The Court of Chancery of New Jersey used this language with regard to the situation thereby created:

> "But, the company failing to give the requisite notice, it still had the right to have equitable distribution of the award among those interested. For this purpose it was entitled to the aid of the court. Platt v. Bright, 29 N. J. Eq. 128; Id., 31 N. J. Eq. 81. This, too, was neglected by the company. Parties who fail to avail themselves of the rights and safeguards which the law offers them cannot complain when such failure results in their disadvantage."

Plaintiff also claims in support of its right to recover that the case comes within the provisions of section 1712 of the Civil Code, reading:

> "One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides."

Obviously this section is entirely foreign to the matter in hand.

[3] We are of the opinion that the facts set out in the complaint fail to show any obligation on the part of the defendant to have removed the lien of the taxes at the time of the transfer of the land to the plaintiff; and that, there being no such covenant or duty, there could be no liability created either by the fact that the defendant did not pay such taxes, or that the plaintiff did pay the same.

It follows that the trial court correctly held that the complaint stated no cause of action.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

40 Cal. App. 292

GUARANTY TRUST & SAVINGS BANK v. MARSH et al. (Civ. 2790.)

(District Court of Appeal, Second District, Division 1, California. March 14, 1919.)

LANDLORD AND TENANT ⚷208(2)—ASSIGNMENT OF LEASE—RENT—RECOGNITION OF ASSIGNEES BY LESSOR.

Lessor, by serving the statutory three days' notice upon lessee's assignees in possession of premises, to pay the rent then due or surrender possession, recognized assignees as tenants.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Guaranty Trust & Savings Bank, against Albert L. Marsh, E. Rabin, and others. Judgment for plaintiff, and last-named defendant appeals. Affirmed.

Henry M. Willis, of Los Angeles, for appellant.

Call & Call and Anderson & Anderson, all of Los Angeles, for respondent.

CONREY, P. J. Action in unlawful detainer. A trial was had of the issues between plaintiff and appellant, the other defendants having suffered default. At the time of the trial appellant surrendered the leased premises to the plaintiff. Judgment was entered against appellant for the rent for the time covered by his occupancy, from which judgment defendant Rabin has appealed.

Appellant contends that the judgment against him should be reversed for the reason that there was no finding that the relation of landlord and tenant existed between the plaintiff and appellant, and that there was no evidence in the record to support the finding that appellant entered the premises on May 20, 1918, under an assignment of the lease theretofore executed by the plaintiff to Marsh and Bracken. The complaint alleged and it is admitted that the record proves that on the 28th day of January, 1918, the plaintiff executed to Albert L. Marsh and Bertram Bracken a three-year lease of the premises described in the complaint. The lessees went into possession on the 10th day of February following the date of the lease. The complaint alleged that appellant and two other defendants "claim some interest in said lease or said premises under the said lessees, and are in possession of the said premises, or a part thereof, under the said lessees." This allegation was not denied. That it probably could not have been successfully denied is indicated by the uncontradicted testimony of the witness Harrington that appellant, at a time while he was in possession of the premises, declared that he held such possession under an assignment of the Marsh and Bracken lease.

There is no merit in appellant's further contention that the relation of landlord and tenant did not exist between him and the plaintiff, the reasons alleged by him being that the plaintiff never consented in writing to an assignment of the lease, and never accepted him as a tenant, and never received rent from him. Those portions of the lease which have been printed with the briefs do not show any contract that an assignment of the lease must be approved in writing by the lessor. If there had been such stipulation, it must have existed for the benefit of the lessor and not for the protection of the lessee under such circumstances as here appear. That the plaintiff did recognize appellant's tenancy prior to the commencement of this action is shown by the fact that plaintiff served upon appellant, together with other persons, the statutory three days' notice to pay the rent then due or surrender possession.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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40 Cal. App. 264

REHNERT v. BEAM. (Civ. 2628.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1919.)

CONTRACTS ⚷172 — PRIMARY OBLIGATION TO REPAY MONEY—ALTERNATIVE PERFORMANCE.

Contract whereby defendant agreed to repay plaintiff's assignor the sum of $5,000 previously advanced for use in perfecting certain inventions, or, instead, to deliver 4,500 shares of the stock of a corporation to be formed, *held* to obligate defendant primarily to repay $5,000, subject to the proviso that he might relieve himself from payment by delivering stock on or before specified date.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Louise E. Rehnert against P. E. Beam. From judgment for defendant, and from an order denying her motion for new trial, plaintiff appeals. Judgment and order reversed.

Gibson & Woolner, of Oakland, and Davis, Kemp & Post, of Los Angeles, for appellant.

E. R. Young and Stanley Visel, both of Los Angeles, for respondent.

CONREY, P. J. Action to recover money alleged to be due on a written contract. Judgment was entered in favor of the defendant. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

It is conceded by counsel on both sides that the only point involved in the case turns upon the construction of the contract. The stipulations of the contract are as follows:

> "Whereas, said second party agreed to advance to said first party the sum of ten thousand ($10,000.00) dollars to be used in perfecting certain inventions and the construction of certain machines, and in consideration therefor the said first party agreed to deliver to said second party a part of the capital stock of a corporation thereafter to be formed; and
>
> "Whereas, said second party has advanced to said first party the sum of forty-five hundred ($4,500.00) dollars, and no more:
>
> "Now, therefore, it is hereby agreed, that said first party shall repay to said party of the second part the said sum of forty-five hundred ($4,500.00) dollars and five hundred ($500.00) dollars for the use thereof, on or before the 1st day of April, 1914, or in lieu thereof, shall deliver to said second party forty-five hundred (4,500) shares of the capital stock of the Refrigeration Plants Mfg. Co., hereafter to be formed, par value of stock to be ten ($10.00) dollars per share, by said first party, as agreed. In the event that said first party pays to said second party the said forty-five hundred ($4,500.00) dollars and said five hundred ($500.00) dollars on or before April 1, 1914, then said first party shall be relieved from any obligation to deliver to said second party any of the capital stock of said Refrigeration Plants Mfg. Co. and said second party shall not be entitled to any stock in said company.
>
> "In witness whereof, the parties hereto have hereunto set their hands and seals, this 20th day of August, 1913."

The contract was in form between the defendant and one R. E. Starkweather. Starkweather afterwards assigned the contract to the plaintiff. In entering into said agreement Starkweather was in fact acting for and on behalf of the plaintiff and as her agent, and any money to be paid under the agreement or any stock to be delivered was at all times the money and property of the plaintiff. The court below held that by virtue of said contract the defendant did not agree to pay the sum of $5,000 on or before April 1, 1914, or at any other time, but held, on the contrary, that the obligation was to deliver 4,500 shares of stock, subject merely to defendant's option to relieve himself from the delivery of the stock by paying $5,000 on or before the 1st day of April, 1914. Appellant claims that the principal obligation was to pay the sum of $5,000, subject to the proviso that the defendant might relieve himself from such payment by delivering 4,500 shares of stock on or before said 1st day of April. The true meaning of the contract, in our opinion, is according to the latter contention. If the terms of the contract had been that the defendant agreed, on or before the date named, to deliver 4,500 shares of the capital stock or in lieu thereof, within that time, to pay the sum of $4,500, then, upon failure of the defendant to do either of those things within the time limited, the action very properly would have been for recovery of the stock or damages for the breach of that agreement; and in that event the damages would not necessarily have been limited by the sum specified in the agreement, but that specification would have applied only as the definition of the amount which defendant would have the option to pay on or before the 1st day of April. But in the contract, as written, the primary agreement is to pay the money. As within the time limited the defendant did not pay that money or exercise his option to deliver stock in lieu thereof, it seems very plain that the plaintiff is entitled to recover the amount demanded.

The judgment and order are reversed.

We concur: SHAW, J.; JAMES, J.

40 Cal. App. 309

JENSEN v. ALLEN et al. (Civ. 2616.)

(District Court of Appeal, Second District, Division 1, California. March 17, 1919.)

1. INJUNCTION 🔑236—BONDS TO DISSOLVE INJUNCTION—CONSTRUCTION.

Bond executed by yacht purchasers, who had been enjoined from removing yacht, pending determination of action to enforce lien against it, in which action judgment had been rendered for plaintiff, from which appeal had been taken, conditioned that purchasers pay sums of money found to be lien under "final judgment and decree of said Supreme Court in said action of J. v. D. No. 14311," or return yacht to jurisdiction within 30 days after notice of "judgment of said Supreme Court in said action," construed to remain in force only until determination of appeal then pending, and not to continue during retrial following reversal upon such appeal.

2. INJUNCTION 🔑238—BOND—DISCHARGE—ATTACHMENT.

Bond, executed by purchasers of yacht, who had been enjoined from removing it during pendency of action to enforce a lien against it, was discharged by causing attachment to be levied and by taking possession of yacht under writ.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by Lawrence Jensen against Carroll Allen and another. Judgment for plaintiff, and defendants appeal. Reversed.

Wilbur Bassett and Allen & Weyl, all of Los Angeles, for appellants.

Patterson Sprigg, of San Diego, and Davis, Kemp & Post, of Los Angeles, for respondent.

JAMES, J. Defendants appeal from a judgment entered in the trial court in favor of plaintiff. The action was to recover upon an undertaking or bond alleged to have been given to secure payment of any judgment which plaintiff might obtain in an action brought by him against one Dorr, which action was pending at the time of the execution of the undertaking. In the action referred to plaintiff sought to recover, on his own behalf and as assignee of other claimants, for labor and material furnished in the construction of the yacht "Yankee Girl." The total amount there prayed for was about $4,000. Judgment was asked to enforce the claim as a lien against the yacht. An answer was filed, but the trial court, responsive to a motion made by the plaintiff in that behalf, held that no material issue was raised by reason of the denials contained in the answer, and entered judgment in favor of the plaintiff on the pleadings. Defendant Dorr appealed to the Supreme Court. In the meantime Dorr had been declared a bankrupt, and a sale had been made of the "Yankee Girl" by the assignee in bankruptcy, the purchasers at the sale being one Sandoval and the International Fisheries Company. While the appeal in the case referred to was pending, the plaintiff brought an action against the purchasers of the yacht and Allen, the assignee in bankruptcy, in which action an injunction was asked for to restrain the defendants from removing the yacht from San Diego county, Cal., pending the determination of the case of Jensen v. Dorr, the demand in the prayer being that such injunction hold "until the remittitur in said case shall be returned to this honorable court." After the injunction order was made the bond in suit here was given. The bond recited first the substance of the matters concerned in the injunction suit; recited that upon issues joined by the amended complaint and answer a permanent injunction had been made, restraining defendants "from removing or taking from the jurisdiction of said superior court, the vessel, 'Yankee Girl,' engine, boiler, tackle, apparel, and furniture, now in the harbor of San Diego in said San Diego county, until the remittitur in the case of Lawrence Jensen v. Fred Dorr, No. 14311, now pending in the Supreme Court of the state of California, should be returned to said superior court, and until the further order of said superior court"; and further provided:

> "Whereas, said International Fisheries Company and A. Sandoval desire the use of said vessel during said period, and did by their counsel move said superior court on the 23d day of May, 1910, to release said vessel upon the execution of a good and sufficient bond which they agreed to give, conditioned as hereinafter mentioned; and, whereas, the said superior court upon consent of counsel for Lawrence Jensen, granted said motion and fixed said bond at the sum of six thousand ($6,000.00) dollars; now the condition of this obligation is such that the said International Fisheries Company and A. Sandoval shall well and truly pay or cause to be paid to said Lawrence Jensen, or his assigns, all sums of money found to be a lien upon said vessel, 'Yankee Girl,' under and by virtue of the final judgment and decree of said Supreme Court in said action of Jensen v. Dorr, number 14311, and all damages and costs which may be awarded in said judgment, not exceeding the sum of six thousand ($6,000.00) dollars, in favor of said Jensen or his assigns, or will return said vessel in as good condition as it now is within the harbor of said city of San Diego, and within the jurisdiction of said superior court, to be there held subject to the orders of said court, within thirty days after notice of the decision and judgment of said Supreme Court in said action of Jensen v. Dorr, number 14311, aforesaid. That should the Supreme Court reverse said judgment and hold that the same constitutes no lien on said vessel 'Yankee Girl,' or that no lien exists by virtue of said judgment, then and in that event this obligation to be void, otherwise to remain in full force, effect and virtue."

The judgment in the appeal referred to was by the Supreme Court reversed as having been improperly made, because, as the Supreme Court held, the answer as filed by the defendant Dorr therein was sufficient to raise issues and place the plaintiff upon trial of his case. See Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553. The case was returned to the superior court for trial, was there tried, and judgment again entered for the plaintiff, determining that the indebtedness alleged by him existed, and that he was entitled to enforce a lien therefor against the yacht. An appeal was taken from this judgment, and the judgment was affirmed by this court. Jensen v. Dorr, 23 Cal. App. 701, 139 Pac. 659. Petition for rehearing in the Supreme Court was later denied. This action to recover upon the undertaking hereinbefore referred to was then commenced.

Defendants contend that the judgment should be reversed because: First, the obligation of the bond was fully discharged when the Supreme Court reversed the first judgment in the case reported in 159 California Reports, before cited; second, assuming that the position just stated is not correctly taken, the defendants became released because the plaintiff, after the decision of the Supreme Court, took possession of the yacht under writ of attachment. The latter point is presented under the claim of error of the trial court in refusing to admit a stipulation and testimony showing that such attachment was in fact levied. We think that the appellants are right as to both contentions.

[1] Referring to the first point made, our opinion is that the obligation of the bond was definitely conditioned to remain in force only until the appeal pending at the time the bond was executed should be determined by the Supreme Court, and that, as the bond recites:

> "Should the Supreme Court reverse said judgment and hold that the same constitutes no lien on said vessel 'Yankee Girl,' or that no lien exists by virtue of said judgment, then and in that event this obligation to be void."

The obligation was not to answer for the payment of any judgment that might be rendered in the case upon a retrial. We think that this construction is plainly to be drawn from the terms of the undertaking, and that it is indicated by the express language used. When the Supreme Court reversed the judgment on the first appeal there was no obligation left for the bond sureties to respond to. Assuming that they were required, after that judgment was rendered on that appeal, to tender the boat in the harbor of San Diego, the record shows that they offered to prove at the trial that they served written notice upon plaintiff's attorney, making such tender, but the trial court refused to allow the testimony to be given. We think that no such notice was required to be given. If such was a prerequisite to the discharge of the obligation, then the court committed error in refusing to allow the proof to be made. If we are correct in thus construing the obligations imposed upon the makers of the bond, the appeal is effectually disposed of, for the second point made assumes that the obligation continued until a final judgment was rendered in the case of Jensen v. Dorr on appeal after the trial in the superior court. Defendants offered to prove that, about two months after the decision of the Supreme Court in Jensen v. Dorr, a writ of attachment was issued in that case and levied upon the yacht at the instance of the plaintiff. Counsel for the plaintiff stipulated that such was the fact, but objected to the offer on general grounds, which objection was sustained.

[2] Assuming that the bond was in force at the time this attachment was levied, we think that the act of the plaintiff in taking possession of the boat under attachment was an act inconsistent with the terms of the undertaking and of such a nature as to result in the discharge of the obligation of the bond. This bond was given after the permanent injunction had been made, and was one which was wholly without the authority of the trial judge to require, and amounted in effect only to a contract made out of court upon the execution of which the plaintiff in the injunction suit agreed that the defendants might be relieved from the effect of the injunction. There was no appeal in the injunction case; hence the bond was in no wise a bond to stay the execution of the writ. Upon the part of the plaintiff, Jensen, there was an agreement necessarily implied that if the bond were given, the possession of the boat should remain with the defendants in the injunction suit. By causing the attachment to be levied and by taking possession of the boat under such writ, the plaintiff, Jensen, breached the condition on his part to be performed, and the obligation of the bond became at an end. Assuming, then, that the obligation of the bond was a continuing one and was for the purpose of securing any final judgment that might be rendered in Jensen v. Dorr, then we think that the trial judge was plainly in error in refusing to allow the defendants to show that plaintiff effectually waived any benefits he might have had under that instrument, by proceeding to have the boat attached.

There are some other points made by the defendants as to alleged errors committed by the trial judge, but as the points discussed appear to be finally determinative of this appeal and of this action, we think it unnecessary to give particular attention to that argument.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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40 Cal. App. 246

CALIFORNIA LAND SECURITY CO. v. RITCHIE et al. (Civ. 1940.)

(District Court of Appeal, Third District, California. March 13, 1919.)

1. Brokers 🔑14 — Land Brokers — Agreement—Sale of Interest.

A contract between landowners and a broker authorizing the latter "to sell all of his interest" gives authority to sell only such interest as such owner may have in the premises, and not any particular estate or fee simple.

2. Brokers 🔑63(1)—Sale of Land—Refusal to Accept Purchaser.

Where property is sold by a broker to a purchaser able, ready, and willing to take and pay for the property, and the terms are unsatisfactory to the intending vendor, the latter should object on that ground, and not refuse absolutely to sell, and, where he fails to so object, he is liable to the broker for commissions upon refusing to accept the purchaser.

3. Appeal and Error 🔑1011(1)—Finding of Trial Court Upon Conflicting Evidence—Conclusiveness.

A finding based on conflicting evidence will not be disturbed on appeal.

4. BROKERS 🔑49(3)—LAND BROKERS—CONTRACT—CASH PAYMENT—CHECKS.

Vendors under contract with broker for sale of land, terms "one-half down and the balance in five equal annual payments," cannot be required to accept payment by check, and they need not bind themselves to convey until this objection is removed by the offer at the time of a different method of payment, reasonable in character and satisfactory to them.

5. BROKERS 🔑49(2)—RIGHT TO COMMISSION—VENDOR'S REJECTION OF CONTRACT INCAPABLE OF SPECIFIC PERFORMANCE.

Under contract to sell vendor's land "one-half down and the balance in five equal annual payments," a broker is not entitled to a commission upon vendor's refusal to sign a sale contract under which purchaser could refuse to complete the purchase by forfeiture of $100 for noncompliance; such being an option contract and incapable of specific performance.

6. BROKERS 🔑49(2)—RIGHT TO COMMISSION—PURCHASER ABLE, READY, AND WILLING—OPTION CONTRACT.

To entitle a broker to agreed commissions, he must produce a purchaser able, willing, and ready to purchase, and he is not entitled to commission for producing such a proposed purchaser who reserved to himself the right of election either to complete or arbitrarily refuse to complete purchase, even though a perfect title be shown.

7. BROKERS 🔑46—CONTRACT—CONSTRUCTION—EXCLUSIVE AGENCY.

An agreement, making a broker the sole agent for sale of defendant's interests in the premises for the period of 30 days, construed as permitting defendant to dispose of her interest by sale without liability for commissions.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by the California Land Security Company against Don Ritchie and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

Carleton C. Case, of Stockton, for respondents.

HART, J. Plaintiff brought the action to recover $6,227.50 as commissions for having found a purchaser for certain lands of defendants. From a judgment in favor of defendants for costs, plaintiff prosecutes this appeal.

The action is based, first, upon what is termed by the parties and what we shall herein call a "brokerage contract," which reads as follows:

"Oakland, Cal., Mar. 1st, 1916.

"Calif. Land Security Co., San Francisco, Cal.—Gentlemen: You are authorized to sell all our interest in the Ritchie ranch in Stanislaus Co., Calif., at the price of seventy dollars per acre for the front land containing 1,350 acres and forty dollars per acre for the river land containing 284 acres.

"Terms to be one-half down and the balance in five equal annual payments at six per cent. interest.

"In case a sale is made you are to receive five dollars per acre so far as our interest appears in said purchase price.

"This agreement can be canceled by giving thirty days' notice in writing and to be exclusive for thirty days or until notice is given to C. B. Hubbard or to Calif. Land Security Co., of San Francisco.

"Yours truly, Don Ritchie.
"Mrs. Josie M. Ritchie.
"Mrs. Belle Lightner."

On the 16th day of March, 1916, plaintiff presented to the defendants Don Ritchie and Mrs. Josie M. Ritchie a document of which the following is a copy:

"This agreement, made and entered into this 13th day of March, 1916, by and between F. H. Arnsburger, the party of the first part, and Josie M. Ritchie, Don Ritchie and Belle Lightner, the parties of the second part, witnesseth:

"That the party of the first part agrees to purchase from the parties of the second part, and the parties of the second part agree to sell to the party of the first part all their right, title, estate and interest in and to that certain tract of real estate situated in the county of Stanislaus, state of California, and particularly bounded and described as follows, to wit: (Describing land known as the 'J. M. Ritchie ranch.')

"It is understood that 80 acres of said tract of land belongs to Josie M. Ritchie in severalty and the rest of said land the second parties own in common, each owning an undivided one-fourth interest therein.

"The party of the first part agrees to pay for said land at the rate of $70.00 per acre for the front land, being the southwesterly portion of said land and comprising 1,350 acres and at the rate of $40.00 per acre for the river land comprising 284 acres; and the party of the first agrees to pay to the parties of the second part on the sale the sums set opposite the respective names, to wit:

"Josie M. Ritchie, the sum of $30,665.00.
"Don Ritchie, the sum of $25,065.00.
"Belle Lightner, the sum of $25,065.00.

"And agrees to pay said purchase price as follows: One-half in cash at the time of delivery of deed, and the balance to be evidenced by a note secured by a mortgage payable in five equal annual payments with interest at the rate of six per cent. per annum. * * *

"It is also understood and agreed that a mortgage in form substantially like that ordinarily in use by the Stockton Savings & Loan Society will, subject to the terms hereof, be used. Taxes shall be pro-rated as of the time of delivery of deed.

"It is understood that the party of the first part shall have a reasonable time to examine the title to said land and if the title is imperfect and cannot be perfected within sixty days after written notice to C. B. Hubbard of the defect, the deposit may be returned and the parties of the second part agree to convey their said interest in said premises as above defined, to the party of the first part with a valid title free and clear of incumbrances.

"It is understood and agreed that the sum of $100.00 has been paid by the party of the first part to C. B. Hubbard, the agent of the parties of the second part, as a deposit upon said land, and the party of the first part shall pay the balance of one-half of the purchase price above mentioned to the parties of the second part after he shall have had a reasonable time to examine the title to said land, and if the title to said land is a valid title and free and clear of incumbrances and the party of the first part refuses to complete and carry out this contract, then in that case the money paid to C. B. Hubbard shall be forfeited to and belong to the parties of the second part as liquidated damages, and this contract shall thereupon become null and void.

"In witness whereof the parties hereto have hereunto and in duplicate set their hands and seals the day and year first above written.

"F. H. Arnsburger. [Seal.]"

Then followed the certificate of a notary public that said Arnsburger had acknowledged and executed said instrument before him.

The court found that the foregoing agreement was signed by Arnsburger; that it was presented to the defendants the Ritchies to be signed, together with the offer of a check for $100; that the Ritchies refused to sign it and declined to accept said check; that the said agreement was never presented to the defendant Lightner for her signature; that plaintiff never thereafter made any other or further request or demand upon the defendants to sign said instrument; that, prior to the 15th day of March, 1916, and before said Arnsburger signed said agreement of purchase and sale, the defendant Lightner, without the assistance of the plaintiff, found a purchaser and thereupon sold and conveyed all her interest in the land described in the brokerage contract with the plaintiff, and that said sale was not made to defraud or deprive plaintiff of its commissions; that 80 acres of said ranch was owned in severalty by Josie M. Ritchie, and that the balance, consisting of 1,554 acres, was owned, an undivided one-fourth by Josie M. Ritchie, an undivided one-fourth by Belle Lightner, and an undivided one-fourth by John Raggio and Edward F. Harris; that when said Arnsburger executed said contract he did not know that the said Raggio and Harris owned an undivided one-fourth of the 1,554 acres or that they or either of them were owners of or interested in said land or any part thereof; that the plaintiff never found or presented to the defendants, or any of them, a purchaser or prospective purchaser ready, able, and willing to purchase the property described in said brokerage contract, in accordance with the terms of said contract, or to purchase the interest of the defendants in and to said land upon the terms expressed in said brokerage contract; that said Arnsburger was not, on the 19th day of March, 1916, or at the time he signed said contract of sale, or at any time while said brokerage contract was in effect, ready or willing to purchase the interest of the defendants in and to the said land, and that plaintiff did not perform the terms and conditions of said brokerage contract by it to be performed, "and did not perform the services required of it by the terms and conditions of said brokerage contract"; that the defendants never refused or declined to carry out the terms of the brokerage contract, "but at all times, when the same was in force, stated that they were willing and ready to perform the terms and conditions of said contract on their part to be performed."

The general objection raised by the appellant to the result reached by the court below is that the findings that the plaintiff did not produce before the respondents a purchaser able, ready, and willing to purchase the lands described in the brokerage contract, and that the respondents "were, at all times, when the same was in force, willing and ready to perform the terms and conditions of said contract on their part to be performed," are not supported by the evidence.

The specific points made by the respondents in support of the judgment are: (1) That there is a material variance or difference between the agreement of the plaintiff and the proposed agreement of sale signed by Arnsburger and submitted by the appellant to the respondents for their approval and signatures, particularly in that, while the brokerage agreement authorized the appellant to sell such interest only as respondents have in the land, the proposed agreement of purchase signed by Arnsburger called for the sale to him by the respondents of the land itself—a distinction quite important in almost all transactions involving agreements to convey real property. (2) That the so-called agreement of purchase signed by Arnsburger was not an agreement of sale and purchase, but a mere option to purchase.

The learned trial judge, on deciding the case, filed a written opinion in which he held that the objection first above stated to the agreement proposed and submitted by the appellant to the respondents for the latter's approval is well taken; that in his opinion the contract between the appellant and the respondents went no further than to authorize the former to negotiate the sale of the interest only of the respondents in the land, while the proposed agreement of purchase provided for a sale of the land itself; and that the respondents were therefore justified in refusing to sign the latter agreement as not conforming in a vital particular to the appellant's authority to negotiate the sale. Upon this theory, the court held and decided that the appellant did not bring to the respondents a purchaser able, willing, and ready to purchase their interest in the land upon the terms and conditions specified in its authorization to sell, and that, consequently, it was entitled to no compensation for any services it had performed or trouble and expense to which it had gone to procure the agreement signed by Arnsburger.

[1] The Arnsburger agreement, it will be observed, contains the following paragraph:

> "It is understood that the party of the first part shall have a reasonable time to examine the title to said land, and, if the title is imperfect and cannot be perfected within sixty days after written notice to C. B. Hubbard of the defect, the deposit may be returned, and the parties of the second part agree to convey their said interest in said premises as above defined, to the party of the first part, with a valid title, free and clear of any incumbrances."

It is undoubtedly true that this language appears to go beyond the scope of the written authorization vested in the appellant to sell the land. As seen, the latter instrument authorized the appellant to find a purchaser of such interest only as the respondents have in the land. It nowhere authorized him to find a purchaser of the land itself, as appears to be the proposition involved in the purported agreement of sale and purchase. As is pointed out in the opinion of the learned trial judge, the cases seem to be quite uniform upon the proposition that where one party agrees to convey, and the other party agrees to purchase, all the former's right, title, and interest in and to his real estate, such contract merely means the sale and purchase of such interest as the first party has in the premises, and not any particular estate or fee-simple. See Ward v. Foley, 141 Fed. 364, 366, 72 C. C. A. 140; Henderson v. Beatty, 124 Iowa, 163, 99 N. W. 716; Reynolds v. Shaver, 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36; Van Rensselaer v. Kearney et al., 11 How. 297, 13 L. Ed. 703.

[2] It is contended by the appellant, however, that it was the duty of the respondents to point out specifically, at the time the Arnsburger agreement was presented to them for their approval and signatures, any objections they had to that instrument or any of its covenants; that they failed to do so or, at any rate, did not object to it on the ground that, in its scope, it transcended the terms of the brokerage agreement between them and the appellant; and that having so failed to state such objections, it is now too late to object to any purpose. This is the most serious problem presented in connection with the point we are now considering, assuming, of course, as we shall at all times assume for the purpose of considering said point, that the Arnsburger agreement involved a contract of sale and purchase. It has been held, upon the soundest of reason, where a broker has negotiated a sale of real property to a purchaser able, ready, and willing to take and pay for the property, and any of the terms of the contract as to payment, abstract or deed are unsatisfactory to the intending vendor, the latter should object to them on that ground and not refuse absolutely to sell; and that, where he fails to make such objection under such circumstances, he will be held liable to the broker negotiating the sale for his commissions if he refuses to accept the purchaser. Smith v. Keeler, 151 Ill. 518, 38 N. E. 250; Fenn v. Ware, 100 Ga. 563, 28 S. E. 238; Donley v. Porter, 119 Iowa, 542, 93 N. W. 574; Blood v. Shannon, 29 Cal. 393; Fiske v. Soule, 87 Cal. 313, 25 Pac. 430.

[3] Don Ritchie testified that he did not like the language of the contract. He could not or at least did not, give any particular reason for his objection to the instrument itself. He did testify, though, that he said to the appellant, when the latter presented the instrument to him and his mother for their signatures, that he did not know Arnsburger or know anything of him, and that he would prefer meeting that gentleman personally before he and his mother entered into a binding agreement of any sort, or language to this effect. His reasons for desiring personally to meet and know something of the proposed purchaser before going further with the deal, he said, were that the plaintiff had had previous options on or agreements to sell the same property, and had telegraphed or telephoned him at Bakersfield to go to Stockton and meet persons who had agreed to buy the property, and that in each of such instances the efforts of the plaintiff to drive a bargain with such parties had failed. He therefore wanted to know with certainty from some investigation of his own that Arnsburger was not only willing to buy their interest, but able and ready to do so. He further testified that he refused to accept the check for $100 tendered by the plaintiff to him and his mother as "earnest money" or a penalty for failure to complete the deal because of his objection to that method of the payment of that sum for the purpose stated, adding that he had lost confidence in the plaintiff or its representatives. This story of what occurred on the occasion of the submission of the Arnsburger agreement to the respondents was flatly contradicted by the witness Hubbard, president and general manager of the plaintiff, who conducted the transaction on behalf of plaintiff; but, the court having accepted it as true we are required to consider the proposition to which it relates accordingly.

[4] As to the first ground of objection, we seriously question its validity. The sec-

ond ground, though, possesses some force. Indeed, we think it was sufficient to justify the respondents in refusing to sign the instrument and, unless removed within a reasonable time, to decline absolutely to sell the property to Arnsburger. The terms specified in said instrument, as to payment, were "one-half down and the balance in five equal annual payments," etc. This meant a payment in cash down, and, though a payment by check may be a "cash payment," the vendor cannot be required to accept that mode of payment under such an agreement. If he objects to it, the objection is good, and he need not bind himself to convey until the objection is removed by the offer at the time of a different method of payment, reasonable in character and satisfactory to him. It appears from the evidence—in fact, it was admitted by Hubbard—that this objection was not removed or overcome, the check having been returned by Hubbard to Arnsburger within a few days after the time that the Ritchies refused to sign the purported agreement of sale and no other offer of such payment made.

[5] The foregoing discussion has been, as seen, upon the assumption that the instrument submitted to the Ritchies by the appellant for their signatures was an enforceable contract to sell and purchase. But the question arises upon a consideration of the following covenant in said agreement whether it is such an agreement or a mere option to purchase the property:

> "It is understood and agreed that the sum of $100.00 has been paid by the party of the first part to C. B. Hubbard, the agent of the parties of the second part, as a deposit upon said land, and the party of the first part shall pay the balance of one-half of the purchase price above mentioned to the parties of the second part after he shall have had a reasonable time to examine the title to said land, and if the title to said land is a valid title and free and clear of incumbrances and the party of the first part refuses to complete and carry out this contract, then in that case the money paid to C. B. Hubbard shall be forfeited to and belong to the parties of the second part as liquidated damages, and thereupon this contract shall become null and void."

The test determinative of the question whether the said agreement, containing as it does the foregoing covenant, is an agreement to purchase and sell the property described therein or a mere option to purchase the same, is: Is said agreement capable of specific enforcement?

There are two classes of contracts for the conveyance of lands, in which penalties are annexed for the breach of the covenants thereof, and in one of which classes specific performance will be decreed and in the other denied, viz.:

(1) Where the contract contains a stipulation for the payment of sums of money, called "penalties" or "liquidated damages," the sole purpose of which stipulation is to secure the performance of the contract or the acts specified therein to be performed. Thus, in Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210, which was an action to reform a contract for the sale of real property and for the specific performance of the same when reformed in the particular prayed for in the bill, the contract contained a covenant or stipulation that "if either party * * * fails to keep or perform the covenants hereinabove specified, said party so defaulting shall forfeit to the other the sum of $1,000, said sum being the agreed liquidated damages," and the Illinois Supreme Court held that said stipulation for liquidated damages was intended "merely as a security for the performance of the contract and that there is nothing in the terms of the contract to justify the conclusion that either party has the right to perform the contract, or in lieu thereof, to pay the sum of $1,000.00." The court concluded:

> "As the contract, therefore, is not alternative in its nature, a court of equity is not ousted of its jurisdiction to decree a specific performance by reason of the condition contained in the contract in reference to the forfeiture of $1,000 as agreed liquidated damages."

(2) Where there is inserted in the contract a covenant or stipulation that the party who is to perform the contract may at his election do one of two things—that is, where the stipulation is that the proposed purchaser may either consummate the purchase or, in default thereof, pay to the seller a certain specified sum as liquidated damages for the breach or the failure to purchase—in which case the agreement is to be construed as a mere option whose terms are incapable of specific enforcement.

The distinction thus noted is considered and stated by the Supreme Court of Texas as follows in Redwine v. Hudman, 104 Tex. 21, 133 S. W. 426:

> "The question always is: What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or is it that one or two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court enforcing the performance of the very act, and thus carrying into execution the intention of the parties. If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election, to compel the performance of the other alternative."

See, also, Fry on Specific Performance, § 115; 36 Cyc. 571, 572.

While the proposed agreement here does not directly or in so many words provide that the proposed buyer may refuse to carry out and complete the contract, the language of the instrument necessarily implies as much, and thus would as clearly and effectually vest that right in the proposed purchaser as if it were directly expressed. If signed by the Ritchies, it would give to the buyer the choice of two alternatives, namely: Either to purchase the property on the terms stated or refuse to complete the purchase and so forfeit to the sellers the sum of $100 fixed in the contract as the damages for such noncompliance. This construction necessarily follows from the provision that the proposed vendee might refuse to purchase the property, notwithstanding that the title to the same was found to be valid or merchantable, the provision for liquidated damages in the sum of $100 to be forfeited to the sellers in the event of the refusal by the proposed purchaser to carry out his part of the contract, and the provision that upon the happening of the contingencies named "this contract shall become null and void." No other language was necessary to be added to that covenant of the agreement to make it any clearer than it is that the intention of Arnsburger as therein expressed was to reserve to himself the right of election to buy or not to buy the property in any event, in case the instrument had been signed by the Ritchies.

Clearly, therefore, the instrument was one of those contracts looking to the sale and purchase of real property which are incapable of specific enforcement. It would be, if signed by the Ritchies, wanting in that mutuality between the parties which must be shown to exist in such contracts before their specific performance by the parties thereto can be decreed. Indeed, if, upon the happening of the contingencies named, the "contract shall become null and void," how could the instrument be specifically enforced after the happening of those contingencies? Obviously, if the contingencies happened which would render the agreement "null and void," there could then be no agreement to enforce.

It would seem unnecessary to cite authorities to support the above proposition, but agreements similar to the one here have been considered by courts of other jurisdictions and held not to be subject to specific performance. Some of the cases it will do no harm to refer to herein.

In Crum v. Slade & Bassett (Tex. Civ. App.) 154 S. W. 351, which was an action to recover commissions for the sale of real property, the agreement provided for the payment to the seller of the sum of $2,000, "as part of the cash payment, to be forfeited to the seller in the event the buyer upon approval of the title to said lands, after being furnished abstracts and deeds, as aforesaid, fails or refuses to perform his part of this contract. * * * In the event the buyer forfeits the $2,000 paid and the contract is thereby *at an end* [italics ours], that said sum is to be divided" between the seller and the brokers negotiating the sale in certain specified proportions. The Court of Civil Appeals of Texas held that the language quoted, particularly that which we have put in italics, clearly indicated an intention to vest the purchaser with the right either to carry out the agreement or refuse to do so at the expense of the forfeiture of the cash money paid down on the execution of the agreement by the seller, and accordingly ruled that the agreement amounted to no more than an option, incapable of specific enforcement.

Similarly, it was held by the same court, in Simpson v. Eardley (Tex. Civ. App.) 137 S. W. 378 (in which a writ of error was denied by the Supreme Court of Texas), as to an agreement procured by a broker for the sale of certain real estate, which provided, inter alia, that—

> "Should said title be approved by the attorneys for the parties of the second part, and they fail or refuse to comply with the terms of this contract, then said sum of $1,000 earnest money [the contract providing that that sum should be paid down by the purchaser on the execution thereof by the seller], shall be forfeited to the party of the first part and treated as liquidated damages."

The court in that case said:

> "It will be seen that by said contract Bell and Robinson did not agree to become purchasers of the land; that is to say, they did not agree to buy the land, because they expressly reserved the right not * * * to take it and let the $1,000 go to defendant as a forfeit or liquidated damages. Eardley could not, upon that contract, have enforced specific performance; consequently it was not a contract of sale, binding as such on Bell and Robinson in any view, but, at their election, it was a sale or an option according to how they saw fit to treat it. * * * It is clear that defendant, in case of an arbitrary refusal on the part of Bell and Robinson to take the land, was cut off from any right to insist on performance by them, and had to take the $1,000 or nothing."

In Rankin v. Grist et al., 61 Tex. Civ. App. 484, 129 S. W. 1147, and Moss & Raley v. Wren, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847, agreements of like import were held to confer upon the proposed purchaser the right to elect between consummating the purchase and the refusal to purchase, with resultant forfeiture of money to be paid down on the execution of the agreements by the proposed sellers. In both said cases it was held that the agreements could not be specifically enforced.

[6] It is, of course, very clear from the foregoing views and conclusion that the plaintiff did not procure in Arnsburger a purchaser of the land mentioned in the agreement able, willing, and ready to pur-

chase upon the terms specified in the brokerage agreement or at all, and therefore is not entitled to the compensation provided in its agreement for its services in negotiating the sale of the property. Of course, as appellant declares, it is to be conceded to be a well-settled proposition that, where a broker, when employed merely to negotiate a sale of real estate, "has found a purchaser able, ready, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and does not depend upon the final acceptance by the purchaser of a conveyance of the property sold," nor is it contingent upon the consummation of the sale. Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105. And it is equally true that where the broker procures a party able to purchase the property upon the vendor's terms and is willing and ready to do so, no act of the vendor whereby the sale fails of consummation can have the effect of depriving the broker of his commissions. Even the failure of the vendor to present a good or merchantable title to the property cannot have that effect, unless there be in the brokerage contract a covenant so providing. But the broker, to be entitled to the agreed commissions, must produce a purchaser able, willing, and ready to purchase; and where, as here, he produces a proposed purchaser, who reserves to himself the right of election either to purchase or arbitrarily refuse to do so, or to refuse to purchase, even though a perfect title be shown, then the broker has not produced a purchaser ready and willing to purchase, even though he has the ability to do so. It follows that the plaintiff has not made out a case entitling it to recover as against the Ritchies.

[7] As to the defendant Lightner, it appears that she had disposed of her interest in the land described in the agreements, and that the Arnsburger agreement was never presented to her by the plaintiff or any other person for her signature. That she had the right to sell her interest, notwithstanding the brokerage contract with the plaintiff pending the life of said contract, is not a debatable proposition when we examine the said agreement. It will be observed that, while the agreement vested in the plaintiff an exclusive agency and so made it the sole agent for the sale of the interest of the defendants in the premises for the period of 30 days, it did not confer upon the plaintiff the exclusive right to sell said interest. As the learned trial judge declared in his opinion:

> "Under such conditions, the defendants, collectively or individually, might, pending the period of the agency and before the broker had secured a purchaser or a valid agreement from a proposed purchaser willing and able to make the purchase according to the authorization to sell previously executed, sell or make sale without becoming liable for commissions."

The proposition as thus stated is sustained by many cases, notable among which are Dreyfus v. Richardson, 20 Cal. App. 800, 130 Pac. 161, and Snook v. Page, 29 Cal. App. 246, 155 Pac. 107.

It results that, under the circumstances as disclosed here as to the defendant Lightner, she could in no event be held liable to the plaintiff for commissions for procuring a purchaser of her interest.

Agreeably to the views herein set forth, the judgment appealed from is affirmed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

40 Cal. App. 298

OGRAM v. WELCHOFF et al. (Civ. 2832.)

(District Court of Appeal, First District, Division 1, California. March 17, 1919.)

1. MECHANICS' LIENS 🔑142 — SUFFICIENCY OF STATEMENT—TERMS—CONSTRUCTION OF STATUTE.

Code Civ. Proc. § 1187, requiring claim of mechanic's lien under section 1183 to state "the work agreed to be done," does not apply where claim is for labor performed by carpenter, by whom there was no specific work agreed to be done; such requirement being confined to contractors.

2. MECHANICS' LIENS 🔑135 — LIEN STATEMENT — SUFFICIENCY — CONSTRUCTION OF STATUTES—DESIGNATION OF CLAIMANT.

Carpenter's mechanic's lien claim, under Code Civ. Proc. § 1187, stating lien to be for labor performed on building, is sufficient without designating lien as that of a carpenter, the lien under section 1183 being given to persons entitled thereto for furnishing labor contributing to erection of building, and not as followers of a particular trade or calling, notwithstanding enumeration of various classes of persons in such statute.

3. MECHANICS' LIENS 🔑5—CONSTRUCTION OF STATUTE.

Under Code Civ. Proc. § 4, and in view of section 1203, the sections of the Code embracing the mechanics' lien law, being remedial in character, should be liberally construed.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Frank H. Ogram against C. Welchoff and others. Judgment for defendants, and plaintiff appeals. Reversed.

J. C. Thomas, of Oakland, Keyes & Horne, and W. L. Newby, of Oakland, for appellant.

Carl F. Wood, of Oakland, for respondents.

RICHARDS, J. This was an action to foreclose a mechanic's lien. Judgment went for defendants upon the ground that the lien filed by the plaintiff was void because it did not contain "a statement of the work agreed to be done by plaintiff." Plaintiff appeals, the record on appeal consisting of the judgment roll alone.

The sole question presented is whether or not the claim of lien substantially complied with the section of the Code of Civil Procedure prescribing what it should contain.

Section 1183, Code of Civil Procedure, provides that certain classes of persons therein enumerated shall have a lien upon the property upon which they have bestowed labor, or in the construction of which they have furnished materials, and it is not disputed that the plaintiff comes within one of such enumerated classes.

Section 1187 of said Code provides that every person claiming such lien must file a "claim of lien containing a statement of his demand * * * with the name of the owner or reputed owner, if known, also the name of the person by whom he was employed, or to whom he furnished materials, with a statement of the price, if any, agreed upon for the same and when payable, and of the work agreed to be done, * * *" etc.

The claim of lien filed by the plaintiff, so far as it bears upon the question to be considered, states:

> "Notice is hereby given that Frank Ogram * * * as laborer, claims a mechanic's lien upon the premises hereinafter described for labor performed by him. * * * That Fletcher & Newby and P. A. Newby are the names of the contractors who * * * entered into a contract with said Frank H. Ogram, claimant herein, under and by which said labor was performed, and the following is a statement of the terms, time given and conditions of said contract, to wit: He was to be paid for his services at the rate of $3.50 per day. * * * That said contract has been fully performed on the part of said Frank H. Ogram, claimant, * * * and the total amount of the claim of said Frank H. Ogram for labor by him furnished as aforesaid is $101.50. * * *"

It appears from the complaint, and the court so found, that the plaintiff's employment upon the building in connection with which the lien was filed was as a carpenter, and that his labor upon said building was that of a carpenter. As already pointed out, the court also found that the plaintiff did not include in his claim a statement of the "work agreed to be done," and for this reason held the claim of lien to be invalid. The learned judge of the trial court evidently construed the statute as requiring this even in the case of an artisan, such as a carpenter, who is employed at a daily wage for the purpose of plying his trade as directed from day to day and from hour to hour. It is apparent, we think, that a claimant of this class, employed at daily wages to work at his trade under the direction of his employer, cannot include in the statement of his claim "the work agreed to be done," if in fact no such agreement has been made. At most he could state the general character of the work he expected to be called upon to do, and in support of the judgment the respondents argue that this the plaintiff should have done.

[1] In construing this requirement of the section it must be borne in mind that the section is prescribing the contents of the claim of lien of quite different classes of persons, and it is not likely—indeed quite the contrary—that the requirements laid down for the lien of a contractor or subcontractor would be literally applicable to the claim of lien to be filed by a mechanic or laborer. In the case of a contractor he evidently is able to state the "work agreed to be done," for his contract of necessity specifies it, and we are of the opinion that a correct construction of this requirement would confine it to such cases.

And it would not follow that because a person was not able to state the "work agreed to be done," for the very good reason that no specific work had been agreed upon, he must in lieu thereof state the general character of the work that he was employed to do.

[2] We may notice in passing a secondary contention of respondents, that the mechanic's lien law establishes different classes of claimants, and that a person must claim his lien within his class, e. g., the plaintiff having furnished labor as a carpenter should have claimed his lien as a carpenter. We think it sufficient to say in answer to this contention that the enumeration of various classes of persons in section 1183, Code of Civil Procedure, is in no sense a classification of them for the purpose of providing a lien for each class. It is simply an attempted enumeration of those callings whose members furnish the requisite labor in the construction of buildings, and the lien is the same in the case of all persons entitled, and is given to them, not as followers of a particular trade or calling, but as persons having furnished labor contributing to the erection of the building. If we followed this contention of the respondents to its logical conclusion, the plaintiff, being a carpenter would have no lien at all, for we do not find the trade of carpenter included by name in the enumeration.

[3] The sections of the Code embracing the mechanic's lien law, being remedial in character, should be liberally construed. Code Civ. Proc. § 4; Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081. Some of the earlier constructions of these sections, although purporting to follow the rule of

construction laid down in section 4, Code of Civil Procedure, were still somewhat technical, and the Legislature showed its disapproval of the method followed by adding to the law on the subject section 1203, which directs that certain kinds of mistakes in claims of lien which theretofore had been held sufficient to invalidate them should not be given that effect, thus emphasizing the legislative intent that the greatest liberality consistent with the attainment of the object of the sections should be exercised in their construction. We are not therefore called upon to hold that because a claimant, from the nature of his employment, is unable to specify the "work agreed to be done," he must, in lieu thereof, state the general character of the work he was employed to do. It seems to be conceded that the object of requiring certain details to be set forth in the lien is to enable the owner of the property against which the lien is filed to investigate the correctness of the demand. In the present case, the owner of the property, being apprised by the claim of lien that the claimant had performed labor for a certain number of days at a specified daily rate of compensation under the employment of certain named persons, he was just as well able to investigate the correctness of the claim as if he had been further informed that the particular work done was that of a carpenter.

Our conclusion is that as the record discloses that there was no specific work agreed to be done by the plaintiff, the requirement of section 1187, Code of Civil Procedure, that it should be stated in the lien has no application to this case, and, the findings of the court being in plaintiff's favor on the remaining issues the court erred in holding that the plaintiff's claim of lien was null and void. The judgment is therefore reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 266

WHITING-MEAD COMMERCIAL CO. et al. v. RICHARDS et al. (Civ. 2071.)

(District Court of Appeal, Second District, Division 2, California. March 13, 1919.)

Appeal and Error ⚷757(1)—Absence of Record and of Designation of Parts of Transcript—Consideration of Brief.

Where appellant by the alternative method and on the clerk's transcript alone neither prints any of the record in the brief, nor designates in any way the parts of the transcript upon which the alleged statement of facts is based, the appellate court will not consider the brief.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Whiting-Mead Commercial Company and others against Nellie D. Richards and others. From a judgment for defendants, plaintiffs, with the exception of one, appeal. Affirmed.

Charles B. McCoy, of San Diego, for appellants.

Binnard & Macomber, of San Diego, for respondents.

THOMAS, J. This is an appeal by all the above-named plaintiffs, except G. S. Umpleby, who has dismissed the appeal so far as his interests are concerned, from an amended judgment entered on February 9, 1916, in which the trial court found that the interest of Nellie D. Richards in certain land was not subject to certain liens, etc.

The appeal is by the alternative method, and on the clerk's transcript alone.

The exact condition of the record here is, as was said in the case of Welk v. Sorenson et al., 178 Pac. 498:

> "Appellant neither prints any of the record in the brief nor designates in any way the parts of the transcript upon which the alleged 'Statement of Facts' is based. We will not therefore consider the brief."

By virtue of the rule followed in that case this court will not consider the briefs here.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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40 Cal. App. 348

CUNEO v. GIANNINI et al. (Civ. 2614.)

(District Court of Appeal, First District, Division 1, California. March 19, 1919. Rehearing Denied by Supreme Court May 15, 1919.)

1. Corporations ⚷308(3) — Construction of Manager's Contract—Compensation—"Net Profits."

Where a corporation whose main profits consisted in buying, selling, exchanging, and generally handling real estate and personal properties and securities, and investing, enhancing, and turning over its capital, agreed to pay its manager, as compensation for services, annually "a sum of money * * * equivalent to 25 per cent. of the net profits," the "net profits" included the appreciation in value of the corporation's assets during the year.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Net Profits.]

2. CORPORATIONS 🔑308(3) — CONTRACT FOR COMPENSATION OF MANAGER — INTERPRETATION BY PARTIES.

In construing compensation contract between corporation and its manager, the meaning must be determined, in some measure at least, by the interpretation placed upon it by the parties themselves during nearly ten years of conduct of the business of the corporation by the manager.

3. CORPORATIONS 🔑314(2)—BOARD OF DIRECTORS—VALIDITY OF ACTS—SETTLEMENT WITH HUSBAND OF DIRECTOR.

Settlement of corporation with its manager by board of directors was not affected by fact that manager's wife was one of the directors, since the mere fact that manager was her husband, and that the amount of his claim, if allowed and paid, would increase community funds, would not create such an interest in the wife as would disqualify her from acting as a director.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Frank J. Cuneo against A. P. Giannini and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Purcell Rowe and Carl E. Day, both of San Francisco, for appellant.

Morrison, Dunne & Brobeck, Peter F. Dunne, and Fred L. Dreher, all of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants. The action was one instituted by the plaintiff on behalf of himself as a stockholder of one of the defendants, J. Cuneo (a corporation), and on behalf of other stockholders thereof, to recover from the defendant A. P. Giannini for the corporation the sum of $37,883.34, alleged to have been illegally paid to said defendant Giannini by the directors of said corporation.

The facts of the case are substantially uncontroverted, and are briefly as follows: For many years J. Cuneo had been engaged in business in San Francisco and adjacent counties as a dealer in and trader of real estate and other kinds of property, with his offices in that city. In the year 1903 he caused to be formed the J. Cuneo Company, a family corporation, as a more convenient instrumentality for the conduct of his business and the consolidation and handling of his properties. The corporation when thus formed took over his business and continued it. Shortly after the formation of the corporation Cuneo died, leaving a widow and nine children, of whom three were minors. One of the elder daughters was at the time married to the defendant A. P. Giannini, and the latter, largely by reason of the meager business experience of the other members of the family, was intrusted with the management of the corporate affairs. A contract was entered into on October 14, 1903, between the J. Cuneo Company on the one hand and said A. P. Giannini on the other, with relation to the terms, conditions, and extent of the latter's management of the business affairs and properties of the former during a period of ten years, the portion of which contract essential to this case being that in relation to the compensation to be received by said Giannini, which reads as follows:

> "That said corporation, the party of the second part, shall pay to said party of the first part for his services as said manager a sum of money in gold coin of the United States equivalent to 25% of the net profits of said corporation, an accounting by said manager to be made at the expiration of each year during the life of this agreement and payment to be made at the time of said accounting."

In pursuance of said contract said A. P. Giannini assumed and entered upon the management of said corporation, and continued therein for a period of almost ten years, during which time the corporation continued to be engaged along the lines of the former business of itself and its organizer in buying, selling, trading, and dealing in real estate, bank stocks, and other forms of property. From time to time during those years the corporation, acting through its officers, but with the knowledge and approval of the members of the family constituting its stockholders, took account of the transactions and properties of the corporation and of the increase in values of its various kinds of property, and these were carried into a loss and gain account upon the books of the corporation, which was understood to represent the profits from time to time accruing from and in its business.

In reckoning these estimated profits the properties of the corporation were dealt with in kind, and their increase in value or the increase in value of other properties for which they were exchanged, either directly or through their sale, and the investment of their proceeds in other properties, were treated as profits, and it is testified to by Mr. Giannini and other members of the family without substantial contradiction that it was the general understanding of all concerned that Mr. Giannini was, under his agreement, to be credited with 25 per cent. of these increased valuations as shown by these occasional appraisements and loss and gain accounts, and the evidence shows that from time to time he received such credits on the books of the corporation.

In the early part of the year 1913 it was decided at a meeting of the directors of the corporation to go into virtual liquidation of its affairs and to effect a distribution of its assets among its several stockholders in proportion to their respective holdings of stock therein, such distribution to be based upon an appraisement and valuation of the properties of the corporation presently to be made. Pursuant to this understanding on January 28, 1913, at a meeting of the stockholders of the corporation, all being present, such appraisement and valuation was made and agreed to, and, so far as appears from the record, was entirely fair and satisfactory to all concerned. These appraisements and valuations showed that the values of the properties of the corporation which were thus to be liquidated and distributed had largely increased during the term of Mr. Giannini's services as manager of the affairs of the corporation, which enhanced valuations represented profits in kind though not in money. In the course of this proposed liquidation of the properties and affairs of the corporation the question of the interest and share of Mr. Giannini under the terms of his agreement naturally arose, and it was disposed of at a meeting of the directors held on March 11, 1913, at which a majority of such directors were present, and at which the matter of Mr. Giannini's compensation under his said agreement was considered, and the amount thereof fixed at the sum of $36,994.24 as the balance due him thereunder, and it was then further decided and directed that the note of the corporation should be executed and delivered to him for said sum in full settlement for his said services. Such note was thereupon executed and was received by him, and was subsequently paid. It is this transaction which is assailed by the plaintiff in this action, and which the trial court by its judgment herein sustained.

The main and in fact the only substantial question presented upon this appeal is that of the construction of the term "net profits" as the same appears in the clause of the agreement between the corporation and Mr. Giannini above set forth. It is the contention of the appellant that this phrase has a well-defined meaning, in which meaning it must be held to have been used by the parties to this agreement, and which meaning could not be changed or altered by oral evidence; that according to such meaning "net profits" constitute the difference between receipts and expenditures, and hence can only be represented in money; that net profits must always be actual as distinguished from estimated profits, and hence that the settlement had by the directors of this corporation with the respondent Giannini, having been based upon the estimated increases in valuation of the properties of the corporation in kind, is in contravention of the agreement, and cannot therefore be upheld.

We are not prepared to give our concurrence to this contention on the part of the appellant herein. The terms "profits" and "net profits" depend in our judgment for their meaning upon the nature of the business and properties with respect to which they are employed. The leading case upon the subject of profits in kind is the case of the Spanish Prospecting Company, 1 Ch. (1911) 92, 20 Am. Cases, 677. The Spanish Prospecting Company had purchased from Punchard, Fleming & Vivian certain mining properties in Spain, and had engaged the services of the vendors in the management of said properties, agreeing to pay each of the members of the firm so retained a certain salary, which, however, they were not to be entitled to draw except only from the profits, if any, arising from the business of the company. In the course of said business the company acquired certain shares in another company called the Spanish Minerals Development Company, Ltd., which later went into liquidation and distributed its assets among its shareholders. By virtue of this distribution the Spanish Prospecting Company received certain shares, and also certain debentures of another corporation named the Esperanza Copper & Sulphur Company. These debentures were held in kind until such time as the Spanish Prospecting Company went into voluntary liquidation, when the question arose as to whether these were to be regarded as "profits" from which the aforesaid salaries could be paid. In an extended and luminous discussion of the subject, Lord Justice Fletcher-Moulton says:

> "The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context, which differ in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates, usually separated by the interval of a year. The fundamental meaning is the amount of gain made during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets, in calculating profits, must be valued and not merely enumerated."

The rule announced in this case has been followed by numerous later decisions on both sides of the Atlantic, notably in the case of Stein v. Strathmore Worsted Mills Co., 221 Mass. 86, 108 N. E. 1029, wherein it was held by the Supreme Court of Massachusetts that, under a contract whereby a plaintiff became the defendant company's selling agent at an annual salary and also a percentage on net profits, the term "net profits" meant the difference between a sum made up at the end of the year of the receipts of the business and of the value of the stock, materials, machinery, real estate, and plant on hand, as compared with a sum embracing all similar items as of the beginning of the year. The following cases also recognize and apply the same rule for the estimation of the net profits of business adventures of the character of that in which the J. Cuneo Company was chiefly engaged during the period of the plaintiff's connection with it in the capacity of its manager. Meserve v. Andrews, 106 Mass. 419; Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1036; Mayer v. Nethersole, 71 App. Div. 383, 75 N. Y. Supp. 990.

[1] The instant case, in fact, furnishes a yet stronger reason for the application of the rule than that supplied by some of the foregoing cases, since the corporation of which the plaintiff herein was manager was essentially a trading corporation, making its main profits in the buying, selling, exchanging, and generally handling both real estate and personal properties and securities, investing, enhancing, and turning over its capital through the process of dealing in the main in property in kind. When the agreement between the parties is looked to it will be seen that this fact was apparently in the minds of those who framed it, since it is therein provided that the sum which the plaintiff is to be paid for his services is "a sum of money in gold coin of the United States equivalent to 25% of the net profits of the corporation." The use of the word "equivalent" in this connection would seem to quite clearly indicate that the net profits of the corporation were not to be altogether comprehended in terms of a money residue as a result of the business of the year.

[2] In addition to these considerations we are of the opinion that the meaning to be given the term "net profits" as employed by the parties to this contract, if the same be doubtful, must be determined in some measure at least by the interpretation which the parties themselves placed upon it during the nearly ten years of the conduct of the business of the corporation by the plaintiff under this contract. The evidence, we think, shows clearly that upon several occasions, and particularly with respect to certain specific properties, the amount to which the plaintiff was entitled and which he actually received was determined by a comparison of the values of the assets of the corporation in kind at different periods of time. These valuations and the assignment to the plaintiff of his one-fourth interest in the said assets and properties, based thereon, were, we think, made fairly and openly, and with the knowledge and acquiescence of the various members of the Cuneo family interested therein, and, this being so, we think it sufficiently appears that the parties themselves have placed upon this agreement the very interpretation in practical effect which the foregoing authorities would indicate to be the proper one as a matter of law.

[3] The further contention of the appellant to the effect that the action of the directors of the corporation in fixing the sum to which the respondent Giannini was entitled, and in directing the issuance of the corporation note therefor which was subsequently paid, must be held void for the reason that such action was taken at a meeting attended by a bare majority of the said board, one of whose members making up such majority was the wife of said respondent, we think to be possessed of no merit. The said meeting was regularly called and held, so far as the record discloses. The wife of Mr. Giannini was also one of the shareholders in this family corporation, whose interests as such would be adversely affected by the action of the board in the allowance of his claim. She was not directly or beneficially interested, in a financial sense, in the result of the action of said board in the allowance of said claim. The mere fact that the claimant was her husband, and that the amount of his claim if allowed and paid would work an accretion of the community funds of the spouses, would not, in our opinion, create such an interest in the wife as would disqualify her from acting as a member of the board of directors of the corporation. None of the cases cited by the appellant goes so far, and we are satisfied that to uphold the view of the appellant in this regard, in the absence of any showing of fraud would be to create an altogether too narrow limitation upon the powers of boards of directors or trustees of family corporations in which very frequently like dual relations and interests exist. In the instant case there is no showing of any kind tending in the slightest degree to disclose any sort of misleading, or overreaching, or concealment, or advantage, or fraud of any kind on the part of the respondent in respect to any of the transactions in the course of his management of the properties and affairs of the family corporation, and the fact that this action was begun and has been prosecuted by a minority stockholder after a refusal on the part of the directors to reconsider their action, or to themselves institute the same, would serve to indicate that the majority of the stockholders do not wish the action of the directors in the premises overturned.

The foregoing being our view of the law and the facts of this case, it follows that the judgment herein should be affirmed. It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

40 Cal. App. 345

SCARPA v. SCARPA. (Civ. 2833.)

(District Court of Appeal, First District, Division 1, California. March 19, 1919. Rehearing Denied April 17, 1919; Denied by Supreme Court May 15, 1919.)

1. DIVORCE 🔑286 — PROPERTY OF PARTIES — ACTION OF RECEIVER—RIGHT TO COMPLAIN.

A divorced husband to whose wife certain of his property has been assigned and receiver appointed to sell other property as community property is not injured by the receiver's action in selling certain property not belonging to either spouse, but to a stranger to the divorce action.

2. DIVORCE 🔑267—PROPERTY OF PARTIES—FEE OF ATTORNEY FOR RECEIVER—AUTHORITY OF COURT.

The court which granted divorce to a wife had authority to make an order for payment of counsel fees to the attorney of the receiver appointed to make sale of the property awarded the wife.

3. APPEAL AND ERROR 🔑705 — QUESTIONS REVIEWABLE—ABSENCE OF EVIDENCE.

Where appellant from order settling the account of the receiver in his wife's divorce suit as to certain items fails to bring up the evidence concerning them, the appellate court cannot review the action of the trial court thereon.

4. APPEAL AND ERROR 🔑1024(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Where the action of the court concerning certain items of the account of the receiver in a wife's divorce suit was taken on a conflict of evidence as to such items, the conclusion of the trial court may not be reviewed on the husband's appeal from order settling the receiver's account.

5. DIVORCE 🔑255—PROPERTY OF PARTIES—STATUS AS SEPARATE PROPERTY — RES ADJUDICATA.

Where, in a wife's divorce action, it was determined that items of property awarded her and subsequently sold by a receiver were community property, after six months had elapsed after such determination by interlocutory decree the status of the property was res adjudicata, and not open to further attack by the husband by objection to the receiver's account, since an interlocutory decree becomes final as to disposition of property after expiration of the six months from its entry within which appeal may be taken.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action for divorce by Caroline L. Scarpa against Joseph Scarpa, wherein decree for plaintiff appointed William P. Wright receiver to take charge and make sale of the separate property assigned plaintiff. From an order settling the receiver's final account, defendant appeals. Affirmed.

Jos. Scarpa and Geo. D. Collins, Jr., of San Francisco, for appellant.

Louis Oneal, of San Jose, for respondent.

KERRIGAN, J. This is an appeal from an order settling the final account of a receiver. The proceeding springs from an action for divorce instituted by the plaintiff, Caroline L. Scarpa, against the defendant, Joseph Scarpa, in which the trial court on November 1, 1916, granted the plaintiff an interlocutory decree of divorce upon the ground of adultery, and in that decree the court directed that the homestead of the parties, together with certain belongings found to be the separate property of the plaintiff, be assigned absolutely to her, and that the community property of the parties be assigned three-fourths to the plaintiff and one-fourth to the defendant. In the decree William P. Wright was appointed receiver to take charge and make the sale of the property. He qualified and entered upon the discharge of his duties, and on October 17, 1917, he filed his report and account. Exceptions were filed thereto, and after notice and hearing the account was settled on November 5, 1917. The appeal is from this decree of settlement.

[1] Defendant objects to the action of the receiver in selling two cows, claiming that they were neither community property nor separate property of either spouse, but belonged to a stranger to the action. There is evidence in the record which sustains the finding of the court implied from its approval of the sale that these animals were legitimately the subject of the receiver's action. On the other hand, if the defendant's contention as to their ownership be correct, it is apparent that he is not injured by the action of the receiver to which he objects.

[2] Defendant also takes exception to the amount of the fee allowed to the receiver's attorney. The court, of course, had authority to make an order for the payment in question, and we find nothing in the record that tends to show an abuse of the court's discretion in this respect.

[3] It appears that several of the items of the account here objected to had been the subject of a separate hearing in the course of the action, but however that may be, the appellant as to these items has failed to bring up the evidence concerning them, which prevents this court from reviewing the action of the trial court thereon.

[4] The remaining objections may be divided into two groups. As to one of them it must be held that the action of the court concerning the items complained of was taken upon a conflict of evidence. As to these items, therefore, the conclusion of the trial court may not be reviewed here.

[5] The other group of objections is based upon the contention that the items of property sold were not community property. The answer to this is that the matter was determined adversely to appellant's position

upon the trial of the divorce action, and, as more than six months had elapsed after such determination by the interlocutory decree before the objections to the account were filed, the status of this property was res adjudicata, and thus not open to further attack. In a proceeding in divorce the court has jurisdiction to adjudge the character of any property claimed to be community property, and, having done so in an action between these parties, the question upon the settlement of this account was no longer open. Huneke v. Huneke, 12 Cal. App. 203, 107 Pac. 131; Allen v. Allen, 159 Cal. 197, 113 Pac. 160. An interlocutory decree becomes final as to all dispositions of property made therein after the expiration of six months from the entry thereof, within which an appeal may be taken therefrom. Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Huneke v. Huneke, supra; Allen v. Allen, supra.

The order is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

40 Cal. App. 96

RUPERD v. HUNTER et al. (Civ. 2450, L. A. 5268.)

(District Court of Appeal, Second District, Division 1, California. Feb. 26, 1919. On Rehearing in Supreme Court in Bank, April 28, 1919.)

On Rehearing in Supreme Court.

JUDGMENT ⚷251(1)—CONFORMITY TO PLEADINGS AND ISSUES.

In an action for money had and received, where the answer admitted the receipt of the money and set up affirmative matters in defense, the judgment based upon findings adverse to the defendant as to the affirmative matters is a judgment upon a cause of action set forth in the complaint, and not upon one which appears for the first time in the answer.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Catherine R. Ruperd against Joseph C. Hunter and Anna S. Hunter. From an adverse judgment, the first-named defendant appeals. Affirmed in the District Court of Appeal, and rehearing denied in the Supreme Court.

George W. Perkins, of Los Angeles, and C. F. Holland, for appellant.

Alfred H. McAdoo and Duke Stone, both of Los Angeles, for respondent.

CONREY, P. J. The defendant Joseph C. Hunter appeals from the judgment. The complaint is in three counts, but for the purpose of considering the contentions made by appellant it will be sufficient to refer to the first cause of action, together with the answer thereto and the findings of the court. The complaint alleges that on or about August 10, 1912, the defendants, in consideration of the sum of $2,000 received by them and in evidence of said indebtedness, executed their 30-day note to the plaintiff for the sum of $2,000; that, after crediting payments made, there remained due and unpaid the sum of $1,907.42. The answer of appellant denied the excution of the note, but admitted that on August 10, 1912, he received from plaintiff the sum of $2,000. The answer then alleged as follows:

> "Alleges: That for more than seven years last past, defendant Joseph C. Hunter has acted as business agent and advisor for this plaintiff, and that during all of said seven years defendant Joseph C. Hunter has attended to the investing and loaning of plaintiff's money. That said sum of $2,000 was received by defendant Joseph C. Hunter from this plaintiff for the purpose of investing said sum of $2,000 for the benefit of this plaintiff. That said sum of $2,000 was so invested by defendant Joseph C. Hunter at the special instance and request of this plaintiff. That said sum of $2,000 was to be returned to plaintiff at such times and in such manner as said investments should allow or mature."

The answer further alleged that this defendant has advanced to plaintiff the sum of $1,568.03 for and on account of said sum of $2,000.

The findings of the court are silent upon the subject of the execution of the note or the nonpayment thereof. The court did find, however, that—

> "On or about August 10, 1912, the defendant Joseph C. Hunter received of plaintiff the sum of two thousand ($2,000.00) dollars under an express agreement between plaintiff and said defendants for the purpose of investing the same for the benefit of the plaintiff, and it was agreed between plaintiff and said defendant that said sum of $2,000 was to be invested at two (2%) per cent. a month and said defendant should pay the plaintiff one (1%) per cent. a month while said money was so retained by him; and it was further agreed between plaintiff and said defendant that said sum was to be returned to plaintiff on thirty (30) days' notice from plaintiff to said defendant. And the court finds that the plaintiff demanded the return of said moneys and an accounting thereof more than thirty days before bringing this action; but that the said defendant has never rendered to the plaintiff an accounting for said moneys and has refused to return said moneys to the plaintiff, except the sum of one hundred fifty ($150.00) dollars."

The court further found that the defendant has never repudiated said trust agreement and the statute of limitations had not begun to run prior to filing this action; that it is not true that the defendant Joseph C. Hunter has advanced to plaintiff the sum of $1,568.03

on account of said sum of $2,000; and in truth and in fact said defendant has only advanced on said $2,000 the sum of $150 and the sum of $338.97, the latter items being advanced from time to time as interest payments. Based on the foregoing findings, the court awarded judgment to plaintiff against the defendant Joseph C. Hunter in the sum of $2,000, with interest thereon at the rate of 1 per cent. a month from August 10, 1912, until date of judgment, less credits allowed in accordance with the findings.

The record consists of the judgment roll and a bill of exceptions. The bill of exceptions contains a notice of intention to move for a new trial, with a statement showing that the motion for new trial was duly presented and the motion denied. The grounds of the motion for new trial included a statement "that said decision is against law." The bill of exceptions does not contain any of the evidence received, or any of the rulings of the court thereon.

Appellant contends that the decision was against law, in this, that the court failed to make findings of fact upon the issues presented by the complaint, "but instead has found in favor of plaintiff on an entirely different cause of action than that presented by the pleadings, while the findings are silent as to the real issues of the case." The facts appear to be, however, as we may infer from the findings, that the case was tried upon the affirmative issues tendered by the answer, which showed that the defendant had received the sum of $2,000 from the plaintiff in trust for stated purposes, but alleged that nearly $1,600 thereof had been returned. Presumably in accordance with the evidence produced at the trial, the court found that a very much smaller sum had been returned, and rendered judgment for the actual balance remaining in defendant's hands. So far as the record shows, it may be that no evidence concerning the execution of the note was received at the trial, and it may be assumed that such note was not executed. If the defendant had rested upon his denial with respect to the note, perhaps that would have been sufficient to dispose of the action in his favor, leaving the plaintiff free to maintain another action upon defendant's indebtedness to her. Since the defendant chose to anticipate such a proceeding by an affirmative statement of facts raising the actual issues of the case, we cannot see that he is in a position to complain of the result at this time. Presumably he permitted the court, without objection on his part, to try and determine the controversy, as seems to have been done. The answer, while denying the execution of the note, asserted that this defendant received the plaintiff's money at the time stated in the complaint, but alleged that it was received for the purpose of investing the same in loans for the benefit of the plaintiff, and that those loans were made. The answer did not deny that all of those loans had been repaid to the defendant. The real question at issue seems to have been with respect to the amount that had been repaid by appellant to plaintiff. On that issue we must assume that the findings of fact are in accordance with the evidence. The conclusion at which we have arrived in this matter is in harmony with the opinion of the Third District Court of Appeal as stated in Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25; and Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90. In each of those cases the Supreme Court denied an application for a rehearing. As was said in the Slaughter Case:

> "It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue."

It has been held directly that where an answer raises an issue not presented by the complaint, and upon which a judgment might be based, such pleadings are a sufficient basis for the judgment. Grangers' Union v. Ashe, 12 Cal. App. 757, 108 Pac. 533. See, also, Abner Doble Co. v. Keystone, etc., Co., 145 Cal. 490, 78 Pac. 1050; Vance v. Anderson, 113 Cal. 532, 45 Pac. 816.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

On Rehearing in Supreme Court.

PER CURIAM. The opinion of the District Court of Appeal may possibly be taken as holding that a judgment for plaintiff may be sustained upon findings adverse to the defendant upon affirmative allegations of the answer, although the cause of action to which such allegations and findings are responsive is not one set up in the complaint. If this is the construction to be put on the opinion, we are not willing to concur without further consideration. But, in fact, this question is not involved. The complaint as amended is in reality one for money had and received. The answer admitted the receipt of the money and set up affirmative matters in defense, and to these last-mentioned matters the findings are responsive. The judgment upon these findings is therefore a judgment upon a cause of action set forth in the complaint and not upon one which appears for the first time in the answer. A hearing in this court is, therefore, denied.

OLNEY, SHAW, MELVIN, LAWLOR, WILBUR, and LENNON, JJ., concur.

ANGELLOTTI, C. J., concurs in the order denying a hearing.

40 Cal. App. 217

SMITH v. HERNAN et ux. (Civ. 2661.)

(District Court of Appeal, First District, Division 1, California. March 8, 1919. Rehearing Denied April 7, 1919.)

1. BILLS AND NOTES ⚿139(3) — HUSBAND AND WIFE ⚿171(3)—CONSIDERATION—EXTENSION OF TIME—MORTGAGE-NOTE.

Where time in which to pay original indebtedness contracted by husband and secured by mortgage on property subsequently deeded by him to his wife was extended from time to time, there was a sufficient consideration to support husband's promise upon new note and mortgage given by the wife contemporaneously with the execution of the note on property conveyed to her.

2. HUSBAND AND WIFE ⚿171(10)—MORTGAGE ON SEPARATE PROPERTY OF WIFE—LIABILITY AS SURETY.

Where husband conveyed to his wife property mortgaged to secure his indebtedness, and thereafter gave new note for remaining part of indebtedness, and he and the wife executed a mortgage on the property to secure the note, the wife's status was that of surety for the husband.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Alice Smith against M. H. Hernan and Lillie B. Hernan. From the decree rendered, defendant last named appeals. Affirmed.

J. Early Craig, of San Francisco, for appellant.

Gerald C. Halsey and C. Harold Caulfield, both of San Francisco, for respondent.

WASTE, P. J. This is an appeal by the defendant Lillie B. Hernan from a decree foreclosing a mortgage. The original indebtedness was contracted by defendant M. H. Hernan, and secured by a mortgage of community property executed by him alone. Subsequently said Hernan deeded the property to Lillie B. Hernan, who was and is his wife. The indebtedness, being extended from time to time, was reduced to $1,175, and defendant M. H. Hernan executed to plaintiff his promissory note for that amount, to secure which both defendants executed and delivered to plaintiff a mortgage of the same property described in the original mortgage and in the deed from M. H. Hernan to his wife, and then separately owned by her.

The note was not paid when it became due and this action was instituted, resulting in the decree complained of by appellant.

Appellant attacks the finding of the court that the "mortgage was made, executed and delivered by defendants M. H. Hernan and Lillie B. Hernan, his wife, to plaintiff on the 5th day of December, 1913, at the time of the execution and delivery of the promissory note" (executed by plaintiff M. H. Hernan alone) "described in plaintiff's complaint, and as part of the same transaction, and for the purpose of securing the payment of said promissory note according to the terms thereof." This finding was made in response to the issues squarely presented by the pleadings, particularly the denials and affirmative allegations of appellant's answer, and is strictly in accord with the testimony of all the witnesses for both plaintiff and defendants. It will therefore not be disturbed.

[1, 2] The original indebtedness and the various extensions of time granted defendant in which to pay the same furnished a valuable consideration to defendant M. H. Hernan for the note and mortgage. Humboldt Savings & Loan Society v. Dowd, 137 Cal. 408, 412, 70 Pac. 274; Whelan v. Swain, 132 Cal. 389, 391, 64 Pac. 560. As the consideration was sufficient to support the promise of the husband upon the new note it was sufficient to support the mortgage given by the wife contemporaneously with the execution of the note. The debt not being her own, and the property being her separate property, she stands as surety for the husband for the payment of the debt. McDonald v. Randall, 139 Cal. 246, 72 Pac. 997; Burkle v. Levy, 70 Cal. 250, 11 Pac. 643; Rohrbacker v. Aitken, 145 Cal. 489, 78 Pac. 1054; Farmers' & Merchants' Bank v. De Shorb, 137 Cal. 693, 70 Pac. 771.

On the trial of the case, counsel for plaintiff and the court were of the opinion that the mortgage provided for and by its terms secured the expense of a search of title prior to foreclosure proceedings. There is no such provision in the mortgage.

The court below is directed to modify the judgment by deducting therefrom the item of $25 allowed for search of title, and as so modified the judgment will stand affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

40 Cal. App. 302

H. & W. PIERCE, Inc., v. SANTA BARBARA COUNTY. (Civ. 2866.)

(District Court of Appeal, Second District, Division 2, California. March 17, 1919.)

1. TAXATION 🔑489—INCREASE OF ASSESSMENT—BOARD OF EQUALIZATION—RECORD.

Upon proceedings by board of equalization to increase assessor's valuation of property, there being no requirement as to taking down the evidence at the hearing or of bill of exceptions to rulings of the board, a court will determine the board's action by inspection of the record, in absence of fraud or abuse of power.

2. TAXATION 🔑490 — HEARING BEFORE BOARD OF EQUALIZATION—ORDER OF BOARD —CONCLUSIVENESS.

Order of board of equalization, increasing assessor's valuation of property, reciting that evidence was taken at the hearing, is conclusive as to the sufficiency of the evidence to support the increase in valuation.

3. TAXATION 🔑490—BOARD OF EQUALIZATION—INCREASE OF VALUATION.

Order of board of equalization, increasing assessor's valuation of property, is conclusive as to jurisdictional facts, unless the contrary appears from the record.

4. TAXATION 🔑494(1) — VALUATION — REVIEW BY COURTS—IRREGULARITIES.

Equity will not inquire into irregularities nor reverse questions of valuation, unless the valuation is so grossly excessive as to be inconsistent with an exercise of honest judgment, or so unequal and discriminating as to violate the fundamental law of the land.

5. TAXATION 🔑537—RECOVERY OF TAX PAID —VOID ASSESSMENT—MORAL OBLIGATION.

In proceedings to recover taxes paid under protest under Pol. Code, § 3819, tax will not be revoked on account of some technical defect rendering assessment void, where there is a moral obligation to pay the tax.

6. TAXATION 🔑814(1) — ACTION TO SET ASIDE TAX DEED—INVALIDITY OF ASSESSMENT—MORAL OBLIGATION TO PAY TAX.

In proceedings to set aside tax deed, tax will not be revoked because of technical defect invalidating assessment, where there is a moral obligation to pay the tax.

7. TAXATION 🔑348 — VALUATION — STOCK RANCH.

In valuing land used as stock ranch, all the capabilities or uses to which the land is adopted should be considered, and not merely rental being received for use of land as stock ranch.

8. TAXATION 🔑469—VALUATION—BOARD OF EQUALIZATION — INCREASING ASSESSOR'S VALUATION.

Board of equalization's order, increasing assessor's valuation, is not void because of board's refusal to restrict itself in valuing property to the consideration of rental received for land; such refusal, if error, being committed in the exercise of the jurisdiction of the board to hear and determine matter before it.

9. TAXATION 🔑490—BOARD OF EQUALIZATION—CONCLUSIVENESS OF ORDER.

In view of Pol. Code, § 3672 et seq., where it appears that evidence was taken by board of equalization at hearing at which it increased an assessor's valuation, the decision of the board raising the assessment is, in absence of fraud, valid and conclusive on the courts.

10. TAXATION 🔑488—BOARD OF EQUALIZATION—INCREASE OF ASSESSOR'S VALUATION—SUFFICIENCY OF ORDER.

Board of equalization's order, raising the assessment on parcels of real estate to certain sum, after notice to owner under Pol. Code, § 3673, without designating in figures the exact amount of increase for each parcel, is sufficient, in view of Civ. Code, § 3538; the amount of increase of each parcel being simply a matter of calculation.

11. TAXATION 🔑428 — ASSESSMENT ROLL—DOLLAR MARKS—PUNCTUATION.

Omission of dollar marks and punctuation in their proper places on the assessment roll was not misleading to taxpayer, where it had knowledge of the exact amount, as evidenced by proceedings under Pol. Code, § 3819, in which it asked for the exact amount which it claims was paid in excess to that which it contends should have been paid.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by H. & W. Pierce, Incorporated, against the County of Santa Barbara. From judgment and an order, plaintiff appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, and R. B. Canfield, of Santa Barbara, for appellant.

U. S. Webb, Atty. Gen. (T. R. Finley, Dist. Atty., of Santa Maria, and E. W. Squier, of Santa Barbara), for respondent.

THOMAS, J. This action is brought by plaintiff to recover taxes paid under protest as provided by section 3819, Political Code. It is contended by plaintiff, the appellant here, and admitted by respondent in its brief (although this contention was denied in the trial court) that this action being brought under said section plaintiff was required to present no claim or demand for taxes so paid to the board of supervisors, and that the ruling of the trial court in sustaining plaintiff's demurrer to this affirmative defense, numbered "Third" in the answer, was proper. In view, therefore, of this condition of the record, appellant's first point may be deemed disposed of. As to this disposition, however, of that point, as between the parties themselves, we express no opinion favorable or adverse thereto.

It is urged by appellant that "a board of equalization cannot change an assessor's valuation of property for purposes of taxation without evidence authorizing them to do so." This is conceded by respondent; but in that concession respondent insists that, "after hearing evidence bearing upon the matter, said board has such jurisdiction."

Nothing in the complaint here appears from which fraud or abuse of discretion may be imputed to either the assessor or the board of equalization.

It is contended by appellant that "there was no evidence before the board in this case authorizing the increase ordered," and that "there was not sufficient evidence before the board here to authorize the increase ordered." In this we are unable to agree with appellant. There is no merit in this contention. The record discloses that the minutes of the board of supervisors bearing on this matter show on their face that on July 25, 1912, when the matter of raising the assessment came on to be heard, "the following witnesses were sworn and examined: I. W. Stewart, Thos. Nuckolls, John Roupp, and Clio L. Lloyd, county assessor." Indeed, from the conclusive character of the board's order, it is clear that evidence was introduced before the board which, if believed by them—as it obviously was—was sufficient to justify the making of and to support the order. Farmers' & Merchants' Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312.

[1] We know of no provision, and none has been called to our attention for taking down the evidence at a hearing, such as the one under discussion here, before a board of equalization, or providing for a bill of exceptions to the rulings of such board. Hence it must be held that the questions here presented must be determined by an inspection of the record itself, in the absence of fraud or malicious abuse of power (Farmers' & Merchants' Bank v. Board of Equalization, supra); and in such case "the board of equalization * * * is the sole judge of questions of fact and of values of property." La Grange, etc., Min. Co. v. Carter, 142 Cal. 560, 565, 76 Pac. 241, 243.

[2] We are clear that the record discloses beyond controversy that evidence was taken at the said hearing before the board of equalization in support of the raise, and the fact, recited in the order, that evidence was taken, forecloses discussion as to the sufficiency of the evidence. Teague v. Board of Trustees, 156 Cal. 351, 104 Pac. 581; People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205; People v. Town of Loyalton, 147 Cal. 774, 82 Pac. 620; Central Pacific R. R. Co. v. Placer County, 46 Cal. 667; Pittsburg, etc., Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

Complaint is made that "the court erred in refusing to hear proof of the further evidence produced before the board after the evidence of the rental value of the land had been shown to have been given." Appellant then argues that—

> "The court can never tell in advance what may be the effect of further evidence, and should try a case through to the end without stopping the trial on the ground that it has heard enough. Such a course of procedure condemns the litigant before he has been fully heard. All relevant evidence should be received, unless unreasonably cumulative."

[3] Obviously, this is a self-evident truth. Before we can condemn the trial judge in the case at bar, however, of such conduct, and without questioning in the remotest degree the honesty or integrity of counsel for appellant, may we be pardoned if we suggest that he has cited us to no evidence in the record here supporting such criticism; and indeed, we know of no law, and none has been cited to us, that authorizes us to do so on the argument of counsel in his brief on appeal. If the introduction of testimony before the board be jurisdictional, then the order of the board is conclusive as to the jurisdictional facts, unless the contrary appears by the record (Humboldt County v. Dinsmore, 75 Cal. 604, 17 Pac. 710); and this is the rule which prevails both in cases of certiorari and appeal (Hagenmeyer v. Mendocino County, 82 Cal. 214, 23 Pac. 14).

The last ground for reversal urged by appellant is that "the correctness of the board's order, independent of the evidence upon which it was based, is immaterial." We are of the opinion that this difficulty is more apparent than real. It is urged that until the board, acting within its powers, has changed an assessor's valuation, that valuation is presumptively the correct valuation, and is final, and the real owner is entitled to "rest securely upon" it as a settled valuation, and in support of this contention cite People v. Reynolds, 28 Cal. 108. As we view the case at bar, that case is not in point.

[4] It must be remembered that "equity will not inquire into irregularities, nor reverse questions of valuation, unless the valuation is so grossly excessive as to be inconsistent with an exercise of honest judgment, or is so unequal and discriminating as to violate the fundamental law of the land." 27 Am. & Eng. Enc. of Law, 724; 37 Cyc. 1111 et seq. In the case at bar, as we have already seen, there was no claim made by appellant in his complaint, nor is there any evidence in the case, that either the assessor or the board of supervisors, sitting as a board of equalization, were guilty of fraud or abuse of discretion. A careful reading of the record in this case—and assuming, without so holding, that we can in this proceeding review the evidence taken before the board—discloses, we think, without contradiction, that the value of the ranch referred to in this proceeding was at

least that assessed by the board, and that the tax was no greater than that imposed upon property of similar character located in that vicinity.

[5, 6] In actions, such as the present one, to recover taxes, as well as in actions to enjoin or set aside tax deeds, the law is that when there is a moral obligation to pay the tax it cannot be revoked on account of some technical defect rendering the assessment void. Steele v. San Luis Obispo, 152 Cal. 785, 93 Pac. 1020; Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; Esterbrook v. O'Brien, 98 Cal. 671, 33 Pac. 765.

[7, 8] The testimony of the witnesses, together with other evidence introduced before the board, shows clearly that at that hearing it was contended, in behalf of appellant that the value of the property should be determined by the rental it was producing as a "stock proposition." The board refused to be so restricted. They recognized this fact as an element which might assist in arriving at its real value in money, but took into consideration, in fixing the valuation, the value of the ranch for any purposes to which it appeared to be adapted. We do not think it necessary to cite authorities to support the view of the board, the correctness of which is so obvious. But if it was erroneous, it was an error committed in the exercise of the jurisdiction of the board to hear and determine the matter before it, and such error does not render the order void. In arriving at the value of the land, *all* its capabilities, or the uses to which it is adapted should be taken into consideration. Muller v. Ry. Co., 83 Cal. 240, 23 Pac. 265; Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; San Diego Land Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

[9] The powers and duties of county boards of equalization are prescribed by section 3672 et seq., Political Code. No appeal from its decisions, or other method of having its decisions reviewed by a court of law, is provided by statute. While it appears in the case at bar that evidence was in fact taken by the board, the decision of the board thereon raising the assessment is, in the absence of fraud, valid and conclusive, and its judgments are not subject to the supervision of the courts. 37 Cyc. 1111; 27 Am. & Eng. Enc. of Law, 720; Keokuk, etc., Bridge Co. v. People, 185 Ill. 276, 56 N. E. 1049; Board, etc., v. Bullard, 77 Kan. 349, 94 Pac. 129, 16 L. R. A. (N. S.) 807; Doty Lumber, etc., Co. v. Lewis County, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912B, 870; Stanley v. Supervisors, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000.

The record discloses that the property in question was assessed to plaintiff for purposes of taxation by said county and state, and on the assessment of said county "each of said parcels of real property" was so assessed, and that the aggregate amount assessed against such parcels of real property by the county assessor, as aforesaid, is the sum of $88,210. That thereafter, on July 18, 1912, the board of equalization did serve a notice upon plaintiff, requiring it to show cause, if any it had, why said assessment should not be raised from said sum last stated to the sum of $175,000; that said notice complied with the rule of said board in such matters made and provided and which said rule was promulgated and adopted in compliance with section 3673 of the Political Code; that evidence was taken, and after consideration of the same, and upon reconvening after an adjournment from morning until the afternoon session on the same day, the following record appears: "On motion, duly seconded, it is ordered that said assessment be, and the same is hereby, raised from $88,210 to $175,000"—all the supervisors voting in the affirmative. As already intimated, no fraud being alleged or proven, this is conclusive. Los Angeles Gas, etc., Co. v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384.

[10] Appellant contends, in effect, that the statute requires the board to designate *in figures* the exact amount of increase for each parcel. This is not the case. From what has just been said, manifestly all was done that the law requires, nothing being left but simply a calculation—a simple problem in arithmetic. The board may designate the percentage or proportion to be figured out by the ministerial officer. The maxim "That is certain which can be made certain" is applicable here. Section 3538, Civ. Code.

By the specific terms of section 3819, supra, it is provided that—

> "If it shall be adjudged that the assessment, or any part thereof referred to in the protest, *was void on the ground specified in the protest* (the italics are ours), judgment shall be entered," etc.

[11] The grounds specified in the protest were: First. "Nowhere on the face of said assessment roll is there any dollar mark, or other mark, sign, word, abbreviation, or explanation to indicate what is meant by the figures in the columns on said assessment roll, which are designed to show the value of the property or the amount of the taxes levied against said property." The answer to this objection is that, while the presence of the dollar mark before the figures, and the insertion of punctuation marks in the proper places, would probably have been the proper practice, still appellant evidently has not been misled by that omission, as is evidenced by the fact that it went to court and asked for the exact amount which it claims was paid in excess to that which it contends should have been paid. The second ground

specified in the protest is "that the board did not hear evidence upon which the order raising the assessment could be based." Third. "That the board raised said assessment because it considered that 'it was necessary to derive more revenue for county purposes, and preferred to raise the amount of the assessment of the said property rather than to raise the tax rate.'" Fourth. "Because the further purpose of the board was to compel appellant to subdivide said property," etc. And fifth. "Because it did not increase 'the assessment of each parcel of land separately,' but determined and ordered that the assessment of all the property mentioned in said schedule should be raised to the sum of $175,000." The court held that appellant had failed to produce evidence in support of these grounds, and found against it on those points. The evidence here fully supports that finding.

After an examination of the entire cause, including the evidence taken before the board of equalization, as disclosed by the record here—which we were under no legal, equitable, or moral obligation to do—we fail to find therein any improper admission or rejection of testimony, or any error as to the matter of procedure which has resulted in the miscarriage of justice, or because of which the appellant herein has been denied any substantial right.

The judgment and order appealed from are, and each of them is, hereby affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

40 Cal. App. 242

Ex parte JOHNSTON. (Cr. 654.)

(District Court of Appeal, Second District, Division 1, California. March 12, 1919.)

1. HEALTH 🔑20—POLICE POWER—REGULATIONS.

The adoption of measures for the protection of the public health is a valid exercise of the police power of the state, as to which the Legislature is necessarily vested with large discretion, not only in determining what are contagious and infectious diseases, but also in adopting means for preventing their spread, as by imposing on health department of city the duty to take measures to prevent the spread of disease afflicting any person.

2. HABEAS CORPUS 🔑25(1)—QUARANTINE OF DISEASED PERSON—ILLEGALITY OF ORIGINAL ARREST.

A woman with gonococcus infection, declared, by Pol. Code, § 2979a, as amended by St. 1917, p. 171, to be contagious and infectious, who was originally taken into custody without warrant, but submitted to examination, is not entitled to habeas corpus to release her from quarantine in a hospital, where the health commissioner confined her for treatment, despite any possible maladministration of the law or any illegality in the original arrest.

3. EVIDENCE 🔑14—JUDICIAL NOTICE—COMMUNICABILITY OF DISEASE.

The court may not take judicial notice that gonococcus infection is not communicable except by actual contact.

4. HEALTH 🔑24—QUARANTINE REGULATIONS—JUDICIAL ESTABLISHMENT OF INFECTION.

One infected with a contagious disease, declared to be such by Pol. Code, § 2979a, as amended by St. 1917, p. 171, may be subjected to quarantine regulations by the health commissioner of a city, without its first being judicially established by some proceeding in court that he or she is so infected.

In the matter of the application of Grace Johnston for a writ of habeas corpus. Petitioner remanded to custody.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for petitioner.

Erwin W. Widney, City Prosecutor, and W. K. Crawford, Deputy City Prosecutor, both of Los Angeles, for respondent.

Kemper B. Campbell, of Los Angeles, amicus curiæ.

SHAW, J. Upon petitioner's application therefor, the Supreme Court issued a writ of habeas corpus made returnable to this court after its denial of a similar petition.

It appears from the return to the writ and oral evidence of Dr. Bettin, who is connected with the city health department of Los Angeles, that petitioner was, on November 12, 17, and 22, 1918, with her consent, examined and found to be afflicted with gonococcus infection, and thereupon, by order of the health commissioner of the city, confined in a hospital for treatment, which, with the view of effecting a cure, was administered until December 5, 1918, at which time, upon application for a writ of habeas corpus, she was, by the superior court, released on bail, at the hearing of which, on February 8, 1919, she was remanded to custody and returned to the hospital, since which time she has steadfastly refused to accept any treatment or submit to any examination. There was no showing or claim that she received treatment while absent from the hospital; nor, indeed, any evidence whatsoever offered in support of the contention that she was not now and had never been so afflicted. The testimony of Dr. Bettin is that, without treatment, the disease would continue its course, and that at the present time, in her opinion, petitioner is still afflicted with said infection.

[1] The adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the Legisla-

ture is necessarily vested with large discretion, not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof. Black's Const. Law, § 108; Holden v. Hardy, 169 U. S. 392, 18 Sup. Ct. 383, 42 L. Ed. 780; State v. Somerville, 67 Wash. 638, 122 Pac. 324; State Bd. of Health v. Bd. of Trustees, 13 Cal. App. 514, 110 Pac. 137. The Legislature, in its discretion having determined the character of the disease in question, has imposed upon the health department of the city the duty, when having knowledge that one is afflicted therewith, of taking the necessary measures to prevent its spread.

[2] In the absence of any showing to the contrary, we must, upon the evidence before us, assume that petitioner was, when subjected to quarantine regulations, and is now, afflicted with and suffering from gonococcus infection, which, by section 2979a, Political Code (Stats. 1917, p. 171), is, with leprosy, smallpox, typhus fever, and a number of other diseases, declared to be contagious and infectious. The sole question thus presented is the right of proper authorities to isolate and place her in quarantine. By the section of the Code just cited it is made the duty of the health officer, knowing of the existence of any such contagious or infectious disease, to take such measures as may be necessary to prevent the spread thereof. The isolation of one afflicted with a contagious or infectious disease is a reasonable and proper, indeed the usual, measure taken to prevent the increase and spread thereof.

It appears that petitioner was originally taken into custody without a warrant, and, basing his argument upon such arbitrary action, counsel draws a lurid picture of what might result from maladministration of the law by those charged wih the duty of enforcing it. The fact that the authority so delegated may, in a given case, be abused, is no legal reason for denying the power to quarantine summarily in a case where grounds therefor concededly exist. Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; Brown v. State, 59 Wash. 195, 109 Pac. 802. Possible maladministration of the law is no concern of petitioner, unless such administration thereof is shown to have affected her. Nor can her arrest without a warrant, after which, and while being illegally held, an examination was made with her consent which disclosed the existence of the infection, avail her in this proceeding. Assuming the action of the police officer arbitrary and unjustified, she is not restrained of her liberty by reason thereof, but on account of a disease with which she was subsequently found to be afflicted, and in the ascertainment of which fact there appears to have been no arbitrary or unlawful action taken.

[3] There is no merit in the contention that the infection with which petitioner is afflicted is noncommunicable except by actual contact, which contact in such cases must be predicated upon the assumption that an offense cognizable by law will be committed. Assuming that grounds exist for petitioner's contention, no evidence tending to establish such fact has been presented, and it is not a matter as to which the court may take judicial notice.

[4] Counsel cites no authorities in support of the contention that one afflicted with a contagious disease cannot be subjected to quarantine regulations until it is first judicially established by some proceeding in court that he is so afflicted. Manifestly to uphold such contention would render laws for the protection of the public health nugatory. State v. Superior Court (Wash.) 174 Pac. 973, where the matter is fully considered. The writ no doubt was granted upon the argument that petitioner was not and never had been afflicted with the infection, which if true would entitle her to be discharged from custody. The return and evidence taken at the hearing conclusively establish the fact to the contrary.

In our opinion, the return and evidence taken at the hearing show a legal cause for the detention of petitioner, and she is remanded to custody.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 267

DORRIS v. McKAMY et al. (Civ. 2870.)

(District Court of Appeal, Second District, Division 2, California. March 13, 1919.)

1. Appeal and Error 🔑2 — Appeal from Order Denying New Trial—Dismissal—Amendment of Code.

Notice of appeal from order denying motion for new trial having been filed after Code Civ. Proc. § 963, had been amended in 1915 (St. 1915, p. 209), the attempted appeal must be dismissed.

2. Officers 🔑74—Removal—Judicial Proceedings — Accusation by Private Citizen.

An accusation by a private citizen against an official, under Pen. Code, § 772, is an accusation of a public offense, neglect of the official's duties or misfeasance in office, the proceeding being criminal and in its nature a prosecution for crime, the penalty wherefore is removal from office and a fine of $500 going to the informer.

3. Municipal Corporations 🔑183(3)—City Marshal—Removal Proceedings by Private Citizen—Verified Accusation.

If the verified accusation against a city marshal, made by a private citizen under Pen.

Code, § 772, wholly failed to state a case sufficient to constitute an offense under the criminal law of the state, the court was without jurisdiction to oust the marshal from office, and judgment for $500 in favor of the informer was a nullity, and subject to collateral attack in the informer's suit to set aside the marshal's conveyance as fraudulent to him.

4. Municipal Corporations 🔑183(3)—Neglect of Marshal to Prosecute—Removal.

Accusation by private citizen against a city marshal, pursuant to Pen. Code, § 772, charging the marshal with having failed, refused, and neglected to cause the arrest or prosecution of prostitutes in the city, etc., *held* not to state facts constituting any offense known to the criminal law of the state; the offenses committed by the women whom the marshal failed to arrest having been misdemeanors only under sections 315, 316, and 318.

5. Municipal Corporations 🔑183(3)—City Marshal — Removal — Failure to Make Arrest.

Where it is sought to remove a city marshal from office at the instance of a private citizen, pursuant to Pen. Code, § 772, on the ground that he has refused or neglected to perform the duties of his office, in that he has refused or neglected to arrest for a crime amounting to a misdemeanor only some person whom it was his duty to arrest, no warrant having been issued, the person who it is claimed should have been arrested must have committed or attempted a misdemeanor, and have done so in the officer's presence; Pen. Code, § 836, giving a peace officer authority to arrest for misdemeanor without warrant only when the offense is committed in his presence.

6. Municipal Corporations 🔑183(3)—City Marshal—Removal—Failure in Official Duty—"Permit."

In an accusation by private citizen against city marshal, pursuant to Pen. Code, § 772, to remove him from office, an allegation that the marshal "permitted" prostitutes to occupy certain buildings amounted to no more than an allegation that having received no warrant issued on a complaint, and not having seen committed in his presence any acts sufficient to constitute any of the offenses denounced by the Penal Code, the marshal made no arrest; "permit" involving no intent, but implying mere passivity and abstinence from preventative action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Permit.]

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Suit by W. C. Dorris against James McKamy and Frances Keester. From judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Reversed.

Matthew S. Platz, of Bakersfield, for appellants.

Alfred Siemon, of Bakersfield, for respondent.

FINLAYSON, P. J. This is a creditor's suit to set aside a conveyance, executed by defendant McKamy to defendant Keester, alleged to have been made with intent to hinder and delay plaintiff in collecting a judgment for $500 that had been given and made in his favor against McKamy in a proceeding under section 772 of the Penal Code to oust the latter from his office of city marshal of the city of Bakersfield—a proceeding wherein plaintiff here was the informer. From a judgment in favor of plaintiff adjudging that the conveyance to Keester was fraudulent and void and setting it aside, and likewise from an order denying their motion for a new trial, defendants have appealed.

[1] Notice of appeal from the order denying the motion for a new trial having been filed after section 963 of the Code of Civil Procedure had been amended in 1915 (St. 1915, p. 209), the attempted appeal therefrom must be dismissed.

Respondent's right to the relief he here seeks depends upon whether he is a judgment creditor of McKamy, the grantor in the conveyance sought to be set aside. Whether he is such a creditor, or even a general creditor of McKamy, depends upon the validity of the judgment in the ouster proceeding, wherein the superior court of Kern county adjudged that McKamy be deprived of his office as city marshal of Bakersfield and that the informer, W. C. Dorris, the respondent here, recover of and from McKamy the sum of $500.

[2] Section 772 of the Penal Code authorizes the superior court to entertain an accusation made under oath by a private citizen against an official within its jurisdiction, charging him with having collected illegal fees or with having refused or neglected to perform the official duties pertaining to his office; and on conviction the court must enter a decree that the accused be deprived of his office, and give judgment for five hundred dollars in favor of the informer. An accusation presented under this section of the Penal Code is an accusation of a public offense, to wit, neglect of official duties, or misfeasance in office. The proceeding is a criminal proceeding, and, in its nature, a prosecution for crime, the penalty wherefore is removal from office and a fine of $500 that goes to the informer. In re Curtis, 108 Cal. 661, 41 Pac. 793; Wheeler v. Donnell, 110 Cal. 655, 43 Pac. 1; People v. McKamy, 168 Cal. 531, 143 Pac. 752.

[3] If the verified accusation against McKamy wholly failed to state a case sufficient to constitute an offense under the criminal law of the state, the court was without jurisdiction in the proceeding to oust him from office, and the judgment for $500 in favor of the respondent here—a sine qua non to his

right to the relief here sought by him—was a nullity.

Courts derive their jurisdiction from the law. In criminal cases their jurisdiction extends to such matters as the law has declared criminal, and none other; and when they undertake to punish for an offense to which no criminality attaches, however reprehensible such offense may be in foro conscientiæ, they act beyond their jurisdiction. In re Corryell, 22 Cal. 178. Hence the rule is that if an indictment, information, or written accusation—the very groundwork of the whole superstructure thereafter to be built thereon—charges or purports to charge acts which do not constitute any crime known to the law, the court is without jurisdiction, and the sentence or judgment is subject to collateral attack, as, for instance, in a habeas corpus proceeding. In re Corryell, supra; Ex parte Harrold, 47 Cal. 129; Ex parte Kearny, 55 Cal. 212; In re Kowalsky, 73 Cal. 121, 14 Pac. 399; Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; Ex parte Goldman, 7 Cal. Unrep. 254, 88 Pac. 819; Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409; In re Worthington, 21 Cal. App. 497, 132 Pac. 82; In re Wilson, 30 Cal. App. 567, 158 Pac. 1050; Siebe v. Superior Court, 114 Cal. 551, 46 Pac. 456; Ferguson v. Superior Court, 26 Cal. App. 554, 147 Pac. 603; Ex parte Neet, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638; Ex parte Show, 4 Okl. Cr. R. 416, 113 Pac. 1062; Ex parte Beall, 28 Okl. 445, 114 Pac. 724; Ex parte Roquemore, 60 Tex. Cr. R. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186. In Siebe v. Superior Court, supra, speaking of an accusation filed under section 772 of the Penal Code, the court said:

> "* * * And, unless the accusation charges the officer with a violation of his official duty in respect to one or other of these particulars, *the court has no jurisdiction in the matter.*" (The italics are ours.)

In Ex parte Harrold, supra, the petitioner for the writ of habeas corpus had been tried and found guilty as alleged in an indictment charging him with "willfully omitting as a public officer to perform a duty enjoined by law upon him." It was charged in the indictment that he had failed to reside at the county seat. It was contended by the Attorney General that this was a "willful omission to perform a duty enjoined by law upon a public officer," within the meaning of section 176 of the Penal Code. It was held that the failure to reside at the county seat was not an "omission to perform any duty enjoined by law upon a public officer," and that therefore the indictment did not charge any offense. Because the facts set forth in the indictment did not constitute any crime known to the law, it was held that the petitioner was entitled to his discharge. In Ferguson v. Superior Court, supra, it was held that, if an accusation under section 772 of the Penal Code does not state facts sufficient to constitute a ground for the officer's removal, the court is without jurisdiction to entertain the proceeding, and the officer is entitled to a writ of prohibition restraining the trial court from proceeding further in the matter. The rule is clearly and concisely stated by the Montana Supreme Court as follows:

> "If an information states facts which do not constitute any crime known to the law, or undertakes to state such an offense, but the facts stated do not constitute the offense, and no addition to them, however full and complete, can supply what is essential, then the court is without jurisdiction to put the complainant on trial. In such case the judgment cannot be corrected. It is simply void." In re Farrell, 36 Mont. 254, 92 Pac. 785.

In Ex parte Ruef, 150 Cal. 665, 89 Pac. 605, the court, recognizing a distinction between proceedings in courts of inferior as distinguished from courts of general jurisdiction, held that, where the criminal proceeding is one pending in a court of general jurisdiction and the indictment or information purports or attempts to state an offense of a kind of which the court has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on a collateral attack. As we understand this statement of the rule, it amounts practically to this: If it can be deduced from the accusation that the prosecutor intended to charge an act or an omission which is a crime known to the law, the court has jurisdiction and habeas corpus will not lie, however defectively the act or omission be described. But if the act or omission charged or attempted to be charged as an offense is not a crime known to the law, then the court is without jurisdiction, and its judgment a nullity. We think the only conclusion that is consistent with the weight of authority and the decisions of our own Supreme Court is that, if the accusation filed against McKamy states facts which do not constitute any crime known to the law of this state, the court was without jurisdiction, and its judgment void.

[4] Did the accusation state facts that constitute any offense known to the criminal law of this state? We think not. It did not differ in any material respect from that held to be insufficient in Ferguson v. Superior Court, supra.

The written accusation presented to the superior court for McKamy's removal from office alleges that, at the times therein mentioned, he was the city marshal of Bakersfield; that in that city there was at that time a large number of women living in houses of prostitution or cribs, maintaining or keeping said places as disorderly houses or houses of ill fame; that such houses had been resorted to by divers and sundry persons for the purposes of prostitution; and that such women kept such places as houses of ill fame for the purposes of prostitution. Then follows, in paragraph 3, a description of the houses or cribs, and the allegation that "such places have been erected, maintained, leased and let" for the purposes of prostitution and lewdness, and that "the occupancy and living in said houses" by said women "has been open and notorious," and that the women in said places "dress and conduct themselves in a vile and indecent manner, as follows: That said women and girls will leave said cribs and solicit, entice and invite those passing thereby to visit them therein for the purposes of prostitution and lewdness." Then follows paragraph 4, which is as follows:

> "That during all of the times above mentioned, said defendant James McKamy has had knowledge of the fact that said women were doing the things and performing the acts as in the paragraph last hereinbefore alleged [i. e., the third paragraph], and that he has failed, refused, and neglected, and still fails, refuses, and neglects, to cause the arrest or prosecution of the said women, or any of them, for said acts, but permits them to occupy the said cribs as hereinabove alleged, without molestation or force against them."

Nowhere in the accusation is it alleged, nor is it even claimed, that any warrant was ever delivered to McKamy for the arrest of any of the persons referred to in the accusation. The offenses which the accusation attempts to allege were committed by the women whom McKamy failed to arrest were misdemeanors only. Pen. Code, §§ 315, 316, and 318.

In Ferguson v. Superior Court, supra, it is held that "where the only specific charges of neglect on the part of the petitioner to perform his official duty * * * are, first, his failure 'to cause the prosecution or the arrest of any persons letting said cribs for the purpose of prostitution,' and, second, his failure to cause the prosecution or arrest of 'any of the persons residing therein,' the accusation fails to state facts sufficient to constitute a ground for" the officer's removal. It was held in that case that the accusation was insufficient to give the court jurisdiction to remove the officer, even though it alleged that he had knowledge of all the facts respecting such letting of the cribs and residence therein; and that, while the Code provides that in prosecutions for keeping a house of prostitution, common repute may be received as independent evidence of the character of the house and the women resorting to it, the failure of a peace officer to act upon such common repute in arresting the keeper or the inmates thereof does not constitute a neglect of official duty, although it might excuse such action if he did arrest them.

[6] Where, as in the accusation in question here, it is sought to remove a peace officer from his office upon the ground that he "has refused or neglected to perform the official duties pertaining to his office," in that he has refused or neglected to arrest, for a crime amounting to a misdemeanor only, some person whom, it is claimed, it was his duty to arrest—no warrant for such arrest having been issued—two things are essential: (1) That the person who it is claimed should have been arrested committed or attempted to commit a misdemeanor; and (2) that the misdemeanor was committed or attempted to be committed in the officer's presence. A peace officer has authority to make an arrest for a misdemeanor only when he is armed with a warrant or the crime is committed in his presence. Pen. Code, § 836.

The accusation against McKamy fails to allege, not only that any warrant had been delivered to him, but that any of the women had committed, in his presence, any act sufficient to constitute any offense denounced by any Penal Code section to which our attention has been called. The charge in the accusation is that McKamy "has had knowledge of the fact that said women were doing the things and performing the acts as in the paragraph last hereinbefore alleged," i. e., paragraph 3. The only acts that paragraph 3 alleges were committed by the women are: (1) Occupying and living in said houses of prostitution openly and notoriously; and (2) dressing and conducting themselves "in a vile and indecent manner, as follows: That said women and girls will leave said cribs and solicit, entice and invite those passing thereby to visit them therein for the purposes of prostitution and lewdness." It is not alleged that the women "willfully" lived in or occupied the houses, though the language of section 315 of the Penal Code is that "every person who * * * willfully resides in such a house, is guilty of a misdemeanor." As to the alleged soliciting and enticing, it is not alleged that any unmarried female was enticed (the crime denounced by section 266 of the Penal Code); nor that, by reason of such soliciting, enticing, or inviting, any person was "prevailed upon" to visit the room of any of the lewd women (the offense denounced by section 318 of the Penal Code). Our attention has not been called to any other Code section making it an offense to solicit, entice, or invite.

An analysis of the language of the accusation whereby it was sought to deprive McKamy of his office discloses that the alleged neglect of official duty with which he was charged was not stated so strongly as in the similar case against Ferguson—the petitioner for the writ in Ferguson v. Superior Court, supra. For the reasons set forth in that case, with which we agree, we hold that the accusation against McKamy did not state facts sufficient to give the court jurisdiction to punish him by depriving him of his office and adjudging that he pay a fine of $500 to the informer, the plaintiff in this action.

[6] Respondent seeks to differentiate the accusation here in question from that presented against Ferguson by arguing that the accusation against McKamy alleges that he "permits" the women "to occupy said cribs as hereinbefore alleged." The word "permit" is a word of considerable elasticity; it lacks clear-cut and precise definiteness. As defined by Webster and others, "permit" implies no affirmative act. It involves no intent. It is mere passivity, abstaining from preventative action. In re Thomas (D. C.) 103 Fed. 272, 274. An allegation that McKamy "permits" the women to occupy the cribs amounts to no more than that having received no warrant issued upon a complaint sworn to by some person moved thereto by a proper sense of civic duty, and not having seen, "committed in his presence," any acts sufficient to constitute any of the offenses denounced by the Penal Code, he made no arrests.

While in the light of the facts alleged in the accusation, McKamy's failure to swear to a complaint, as any private citizen might have done, indicates a lack of appreciation of the duties that devolve upon every decent citizen having knowledge of facts sufficient to justify the honest belief that misdemeanors have been committed, nevertheless, as was said in the Ferguson Case:

> "We cannot subscribe to the proposition that the failure of an officer, without process, to make an arrest under such circumstances, or to swear to a complaint and cause the prosecution of the offenders, constitutes a misdemeanor, to wit, neglect of official duties, for which he may be removed from office. Under such circumstances, to subject him to a prosecution under the provisions of section 772 of the Penal Code, at the relation of one seeking to recover the $500 penalty provided therein, would not only impose unnecessary and intolerable burdens, but strip him of all discretion in the making of arrests for misdemeanors, and require him at his peril to make arrests of vagrants, prostitutes, and inmates of houses of prostitution upon common repute or information."

The accusation here in question is not simply a case where the document has been inartificially drawn, or a case where it intimates the existence of facts necessary to the Constitution of the offense denounced by section 772 of the Penal Code, or even an attempted statement, insufficient, but indicating a purpose to declare on the essential facts. There is here a total failure to allege any offense for which McKamy may be punished by removal from office; and that the court was without jurisdiction and the judgment a nullity is the only conclusion that accords with such cases as Ex parte Harrold, supra, Siebe v. Superior Court, supra, and Ferguson v. Superior Court, supra. Tested by the rulings in those cases, the accusation was not merely defective, or technically insufficient, not merely demurrable or subject to a motion to quash, but, in the language of Ex parte Show, supra, it was "elementally and fundamentally defective in substance, so that it charges a crime in no manner or form and by no intendment."

For these reasons we hold that respondent never was a creditor of McKamy.

Other points are made, but what has been said is sufficient to dispose of the appeal.

The appeal from the order denying the motion for a new trial is dismissed.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

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40 Cal. App. 240

NIXON v. RAMSEY. (Civ. 2826.)

(District Court of Appeal, First District, Division 1, California. March 12, 1919.)

1. Limitation of Actions ⟹148(3) — Action on Note—Acknowledgment of Obligation.

Maker's letter to holder of notes, stating, "It is impossible right at the Present time—For me to Pay any Part of the above amount—I hope to be able Some time Soon to hole thing up—I am not making any Promises—I hope to be able to Pay the hole thing up Some day," written after action on notes was barred by limitations was not an acknowledgment sufficient to take the case out of the operation of the statute of limitations. Code Civ. Proc. § 339, subd. 1.

2. Limitation of Actions ⟹150(1)—Running of Statute—"Acknowledgment."

An acknowledgment to take the case out of the operation of the statute of limitations must be a distinct, unqualified, unconditional recognition of the obligation for which the person making such admission is liable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acknowledgment.]

Appeal from Superior Court, Mendocino County; J. A. White, Judge.

Action by Kate I. Nixon against Elsie H. Ramsey, etc. Judgment for defendant, and plaintiff appeals. Affirmed.

Ira S. Lillick, of San Francisco, for appellant.

Preston & Preston, of Ukiah, for respondent.

WASTE, P. J. This is an appeal by plaintiff from a judgment made and entered after demurrer to the complaint sustained without leave to amend.

The action was brought by the plaintiff to recover judgment against defendant, as executrix of the last will and testament of H. Ramsey, deceased, on three promissory notes made, executed, and delivered by said H. Ramsey, during his lifetime, to the First National Bank of Winnemucca, Nev., and by said bank indorsed, signed, and delivered to the plaintiff herein.

The notes were dated, respectively, November 20, 1909, December 31, 1909, and July 10, 1912, and, being executed out of the state of California, were barred by the statute of limitations when the complaint was filed, September 6, 1916. Section 339, Code of Civil Procedure, subd. 1, as said section provided prior to the amendment of 1917 (St. 1917, p. 299).

On or about the 10th day of December, 1914, plaintiff, by and through her duly authorized agent, one M. D. Fairchild, demanded of said H. Ramsey payment of said notes. The demand was in writing and was as follows:

> "The Nixon National Bank, Reno, Nev.
> "Dec. 10, 1914.
>
> "Mr. H. Ramsey, Piedmont, Cal.—Dear Sir: In handling various matters of the estate of Geo. S. Nixon, deceased, I find that there are three notes signed by you, as follows:
>
> "December 31, 1909, $10,400.00, November 20, 1909, $825.00, and July 10, 1912, for $2,250.00, making a total of $13,475.00 principal with considerable unpaid interest. As the affairs of the estate are about ready for a final distribution, it has occurred to me that perhaps we can come to some arrangement, whereby it will be of mutual benefit to all concerned, relative to the settlement of these notes.
>
> "I would be very glad to hear from you at an early date and oblige.
>
> "Yours truly, M. D. Fairchild."

Thereafter, and on the 14th day of January, 1913, the said H. Ramsey, in writing, and upon the face of the aforesaid written demand, and below it, subscribed, signed, and delivered to plaintiff herein, by and through said M. D. Fairchild, the said agent of said plaintiff, an acknowledgment of said promissory note, which said acknowledgment was in the following words and figures, viz.:

> "Jan. 14th, 1915.
>
> "It is impossible right at the Present time—For me to Pay any Part of the above amount—I hope to be able Some time Soon to hole thing up—I am not making any Promises—I hope to be able to Pay the hole thing up *Some day*)
> "H. Ramsey."

The sole question presented on this appeal is: Is the document pleaded by the plaintiff an acknowledgment of a debt, within the contemplation of section 360 of the Code of Civil Procedure, sufficient to take the case out of the operation of the statute of limitations?

[1, 2] Under the well-established rule in this state we are of the opinion that it is not. An acknowledgment sufficient to take the case out of the operation of the statute must be a distinct, unqualified, unconditional recognition of the obligation for which the person making such admission is liable. Snyder v. Dederichs, 179 Pac. 535; Powell v. Petch, 166 Cal. 329, 136 Pac. 55, and the cases cited.

The writing indorsed by Ramsey on the letter to Fairchild, the agent, falls far short of containing an admission or a new contract which would take the indebtedness out of the statute of limitations. It was written after the bar of the statute had attached, and must be viewed in the light of that fact. Southern Pacific Co. v. Prosser, 122 Cal. 415, 52 Pac. 836, 55 Pac. 145. Tested by the rule announced in the cases above cited and many others in this state, it is clear that there is nothing contained in the letter from Ramsey to Fairchild which can be construed as an unconditional promise on the part of Ramsey to pay the outlawed debt. Snyder v. Dederichs, supra. The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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40 Cal. App. 294

FLINN et al. v. ZERBE et al. (Civ. 2823.)

(District Court of Appeal, First District, Division 1, California. March 15, 1919.)

MUNICIPAL CORPORATIONS ⚷519(1)—STREET IMPROVEMENT—ORDINANCE AND CHARTER —"ASSESSMENT."

Under Charter of City and County of San Francisco, c. 2, art. 6, § 33, giving power to assess cost of such work, the board of supervisors had authority to enact Ordinance No. 2439, N. S., providing that the contractor performing street work thereunder should have a lien upon the property benefited by the improvement for its cost, though an "assessment" is defined as an official estimate of sums which are basis of apportionment of tax.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assessment.]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by James J. Flinn and T. E. Treacy against Charles Zerbe and others. From judgment for plaintiffs, defendants appeal. Affirmed.

H. M. Anthony, of San Francisco, for appellants.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for respondents.

RICHARDS, J. Plaintiffs brought this action to foreclose the lien of a street assessment upon certain lands of the defendants. It appeared upon the face of the complaint that the proceedings for the improvement of the street and the assessment of the lands of the defendants therefor were taken under the provisions of Ordinance No. 2439, N. S., of the city and county of San Francisco. The defendants demurred to the complaint. Their demurrer being overruled, they elected to stand upon it, and accordingly declined to answer, whereupon judgment was entered against them as prayed, decreeing a sale of the premises in satisfaction of the lien of the assessment.

In support of their appeal the defendants make but one contention, namely, that the board of supervisors of the city and county of San Francisco had no authority to enact, as they did, in Ordinance No. 2439, N. S., that the contractor performing street work thereunder should have a lien upon the property benefited by the improvement for the cost thereof.

This contention is based upon the appellants' construction of section 33, article 6, chapter 2, of the municipal charter, which, so far as the question is concerned, provides as follows:

> "The methods of procedure in this article provided for the improvement of streets * * * and for the assessment of the expense thereof * * * upon private property shall not be deemed exclusive, but the board of supervisors * * * may by ordinance substitute therefor any method of procedure in any general law of the state of California * * * providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property; or the board may * * * adopt an ordinance * * * providing a method of procedure for such improvement and assessment. * * *"

The ordinance under which the present work was done was adopted under the authority of the last part of this provision of the charter, and the point of the appellants' contention is that this authority to enact a method of procedure for the improvement of streets and of the assessment for the cost thereof does not give to the municipal governing body the power to provide that the assessment shall be a lien upon the property assessed.

We think this contention unsound, both upon reason and authority. It has been uniformly held in this state that no personal liability can be constitutionally imposed upon a property owner for street improvement under a public contract, but that the cost thereof may be imposed as a lien or charge upon the specific property benefited (Taylor v. Palmer, 31 Cal. 249; Williams v. Rowell, 145 Cal. 261, 78 Pac. 725; Railway Co. v. Reclamation District, 173 Cal. 93, 159 Pac. 430), and the power given to the board of supervisors to enact a method of assessment evidently contemplates an assessment of property rather than of the property owner. It will be noticed that by the section of the charter quoted the alternative is given to the board of supervisors either to adopt by ordinance any existing method of street improvement and assessment provided by the general law, or the method already provided in the charter of the city and county, or to enact a new one. Under the methods provided by the general law of the state and by the charter, an assessment for street improvement is made a lien upon the specific property benefited, and it is apparent that, if the board of supervisors by ordinance had adopted any of those methods, such method would have been in force in the municipality not by virtue of its being a state law, but because of its enactment by ordinance. From which it follows that there is no legislative intent to be discerned in section 33, article 6, chapter 2, of the charter, to exclude from the grant of power to the board of supervisors the ability to provide for a lien upon property in street improvement matters. The particular language employed in this section also leads to the same conclusion. It refers to the assessment provided for in general laws of the state and by the existing municipal charter (all of which are assessments upon property enforceable by sale thereof), and then says that the board of supervisors may by ordinance provide for "such" assessment; i. e., the kind of assessment just mentioned in the section.

The appellants' principal argument in support of their contention is based upon the definition of the word "assessment." They cite Cooley on Taxation (page 258) to the effect that—

> "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists of two processes, listing persons properly to be taxed, and of estimating the sums which are to be the guide of an apportionment of the tax between them."

With this and similar definitions as a basis, they readily demonstrate by the citation of authority that the power to assess does not include the power to impose a lien. But here the assessment is not imposed upon the person, but upon the property, which necessarily includes a power to collect the assessment by a sale of the property, and whether we speak of the method of enforcing the assessment as the foreclosure of a lien upon the property, or a sale of the property for the collection of the amount assessed, is immaterial; they evidently being the same thing.

Turning to authority, we find that the power conferred by this section of the charter to enact a method of assessment has been construed by our Supreme Court as meaning as assessment carrying a lien upon the property assessed. In Mardis v. McCarthy, 162 Cal. 94, 101, 121 Pac. 389, an ordinance in all respects similar to the ordinance which we are here considering (that is, as to the imposing of liens) was under consideration, except that it provided for the boring of tunnels, instead of grading, paving, sewering, curbing, and sidewalking streets. The tunnel ordinance provided for the imposing of the burden of the cost of the work upon private property (that is, imposing a lien), and was authorized by the same section 33, chapter 2, article 6, of the charter, as authorized the street improvement ordinance which we are now considering. In that case the delegation of the authority to the board of supervisors to adopt such ordinance was upheld, and the method of procedure provided in the ordinance for the assessment and collection of the cost of the improvement from the adjoining lands by lien was held to be within the scope of the charter authority.

In the case of Hayne v. City and County, etc., 174 Cal. 185, 162 Pac. 625, the Supreme Court was considering the same ordinance as in the case just cited, passed, as we have seen, under the same authority as the one here construed. The objection that is now made was there advanced to that ordinance, and was held not to be a valid objection.

We conclude, therefore, that the court did not err in overruling the defendants' demurrer to the complaint.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 314

RICHEY v. BUTLER et al. (Civ. 1953.)

(District Court of Appeal, Third District, California. March 18, 1919.)

1. MORTGAGES 🔑464—FORECLOSURE—PRIMA FACIE CASE—EVIDENCE.

In action to foreclose mortgage securing payment of note, the introduction in evidence of note and mortgage sued upon and written assignments showing plaintiff to be owner thereof is sufficient to justify findings sufficient to support decree ordering foreclosure.

2. EVIDENCE 🔑594—WEIGHT—UNCONTRADICTED EVIDENCE.

Trial court is not legally bound to accept all testimony adduced before it at its face value or as conclusive merely because there is no testimony offered and received in contradiction of it.

3. WITNESSES 🔑315—CREDIBILITY—MANNER OF TESTIFYING.

The manner in which witness testifies often operates as effectually in the impeachment of the verity of his testimony as would affirmative contradiction.

4. APPEAL AND ERROR 🔑1008(1)—REVIEW—FINDINGS.

Since trial court has witnesses before it, its conclusions upon questions of fact are rarely reviewable, and only so when questions of fact are of such a character from the nature of the evidence as to resolve them into questions of law.

5. EVIDENCE 🔑589—FRAUD—EXISTENCE OF INCUMBRANCE—SUFFICIENCY OF EVIDENCE.

In action to foreclose mortgage executed by purchaser to vendor where defense was that vendor represented land to be free from incumbrances when in fact there was mortgage thereon, and only testimony offered in support of such defense was that given by defendant himself, *held* that court, in refusing to accept defendant's story, did not commit abuse of sound judicial discretion.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by George D. Richey against James A. Butler, John H. Davidson, Joseph T. Roffy, Gabriel Hughes, Reclamation District 1000, and M. D. Butler, as administrator of the estate of James A. Butler, deceased, substituted as the representative of James A. Butler, deceased. From decree rendered, last-named defendant appeals. Affirmed.

Paul F. Fratessa, of San Francisco, and Edward I. Butler, of San Rafael, for appellant.

Arthur C. Huston, of Woodland, and Thomas B. Leeper, of Sacramento, for respondent.

HART, J. The action was brought to foreclose a mortgage on 80 acres of land in Sacramento county, which was given to secure the payment of a promissory note for $1,500, executed by James A. Butler and payable to the order of Joseph Roffy, which note and mortgage, at the commencement of the action, were alleged to be the property of the plaintiff.

A decree was entered, ordering foreclosure of said mortgage, the sale of the mortgaged property, and the payment to plaintiff of $1,500 and interest from the proceeds of the sale. It was also decreed that said sale should be subject to an assessment lien of defendant reclamation district 1000, and that plaintiff take nothing as against said reclamation district.

The appeal is by M. D. Butler, administrator, from the judgment. A reversal is urged upon the sole ground that the findings and the judgment are not supported by the evidence.

The note and mortgage in question were dated March 3, 1908, and the mortgage was acknowledged by James A. Butler on the 16th day of the same month. James A. Butler died February 22, 1913, and M. D. Butler was duly appointed administrator of his estate and substituted in the action, and will hereinafter be called the defendant.

It appeared that on October 26, 1907, said Roffy had executed a mortgage in favor of George L. Woodford, but at the date of the trial belonging to James H. Davidson, to secure the sum of $1,500, said mortgage covering 160 acres of land, of which the 80 acres in question were a part. It was alleged in the answer "that the said Roffy, with the intent to deceive and defraud said James A. Butler, falsely, fraudulently, and knowingly represented to said James A. Butler that said land was then free and clear from any and all liens and incumbrances," and that James A. Butler did not discover said incumbrance until in the month of April, 1908, at which time he demanded of Roffy the cancellation of the Butler note and mortgage, which was by Roffy refused. Before the trial, plaintiff dismissed the action as to defendant Davidson, who had commenced an action to foreclose his mortgage. As to this, the court found that nothing was due on the Davidson mortgage, "and said mortgage constitutes no lien or incumbrance upon said land, and the existence of said mortgage constitutes no fraud or deceit upon the mortgagor in said action, and said defendant Butler was not damaged, and suffered no damage by reason of said alleged mortgage."

[1] The plaintiff, having introduced in evidence the note and the mortgage sued upon, and certain written assignments showing that he was the owner thereof, and thereupon rested his case, a showing was then made to justify findings sufficient to support the decree. The single question remaining, then, is: Is the evidence presented by the defendant and addressed to the special defense set up in the answer and based upon the ground of fraud such that this court may justly declare that the trial court, in repudiating or disregarding it, abused its discretion or transcended the province (peculiarly that of trial courts) of passing upon questions of the credibility of the witnesses and the weight of the evidence?

The only testimony offered by the defendant and received by the court in support of the special defense was that given by the defendant himself. He testified that he met Joseph T. Roffy in San Rafael at the time the mortgage was executed by his brother to him; that his brother, since deceased, Mr. Roffy, and the witness were present; that he met his brother and Mr. Roffy at their request; that they wanted him to look at some papers which they were about to execute. He continued:

> "They told me that Mr. Roffy was the owner of some land up in Sacramento county, and that he was about to trade the land for an automobile that my brother then owned. The automobile was valued by both Roffy and my brother at $1,500. The land was valued by both Roffy and my brother at $3,000. They agreed to make the trade—the automobile for the land, with a mortgage back of the $1,500 on the balance due on the purchase price. They both asked me to look over the papers, which I did. I then informed them both that the transaction was not carried on in a business way; that they should have an abstract of title—search of the title made. Mr. Roffy informed my brother at that time that such a thing would be a needless expense; that he had just had the title searched himself; had the abstract at his place; that he would produce that abstract and would transfer it to my brother, * * * and assured my brother that the land was clear and free of any kind of incumbrance or lien, the title was perfect. * * * My brother said he knew Mr. Roffy for some time; that he was a teacher in the University of California; that he had every faith in him; that it would be a whole lot of red tape and a needless expense to have any search made; that he was perfectly willing to take the statement of Mr. Roffy that the land was free and clear from any incumbrance."

The witness said that so far as he knew his brother never saw an abstract; that about three months later he and his brother visited an attorney who was representing Roffy, and that his brother said he wanted his automobile back, and would reconvey the property to Roffy as soon as the note and mortgage were delivered up and canceled. Shortly after that, witness and his brother saw Roffy in San Francisco. He said:

> "My brother demanded from Mr. Roffy that he deliver back the automobile to him. Mr. Roffy made promises of freeing the land from the incumbrance which was upon it. My brother became a little impatient, and told Mr. Roffy that he was tired of waiting; that he had been stalling for two or three months, and that he had lost faith in him; that he would wait no longer. * * * I prepared a complaint at that time setting up the fraud, and asked for an injunction to prevent Roffy from transferring the automobile or further using it or damaging it, and also praying that the note and mortgage be delivered up and canceled. Before that complaint had been verified by my brother or before it had been filed, my brother informed me that Mr. Roffy had disposed of the automobile, and that he was unable to locate it."

Thereupon, he testified, his brother swore to a complaint charging Roffy with obtaining money under false pretenses, and a warrant issued for his arrest, but Roffy had gone to Chicago and the warrant was not served.

It will be noted that it does not clearly appear from the witness' testimony that the deceased never at any time, prior to the consummation of the sale saw and examined the abstract of title to the land which Roffy said that he had, and which he further said he would produce and deliver to the deceased. But, be that as it may, it is, of course, manifest that the court rejected the defendant's testimony, and we can perceive no reason arising from the record before us for declaring, as a matter of law, that the refusal of the court to accept that testimony involved error or an abuse of judicial discretion. Indeed, as we view the proposition, it would be entirely in excess of the just power of a reviewing court to hold that it was the legal duty of the trial court to have accepted as verity the testimony of the defendant, and upon it predicated a finding that the transaction resulting in the sale of the land to the deceased by Roffy was characterized by such fraud and deception as would, in equity, vitiate such a transaction.

[2-4] A trial court is not legally bound to accept all testimony adduced before it at its face value or as conclusive, merely because there is no testimony offered and received in contradiction of it. The manner in which a witness may testify often operates as effectually in the impeachment of the verity of his testimony as would affirmative contradiction thereof by other testimony. The trial court has the witnesses before it, and is thus in a position to determine, with at least approximate accuracy, whether a witness' testimony is or is not worthy of that degree of credence necessary to impress it with persuasive or any probative force. The tests available to trial judges and juries for determining questions of fact are obviously not available to reviewing tribunals, and therefore when a trial court or jury reach a conclusion upon the facts, such conclusion is rarely reviewable, and only so when the questions of fact are of such a character from the nature of the evidence as to resolve them into questions of law.

[5] In the present case, the trial court acted clearly within its province in refusing to accept the defendant's story and, as suggested, the situation here is not such as to warrant us in saying that thus it committed error or an abuse of sound judicial discretion.

But the trial court was not required to determine the question whether there was fraud in the transaction on the part of Roffy sufficient to render it nugatory and void by a consideration alone of the defendant's testimony. The plaintiff in rebuttal, introduced in evidence a number of letters passing between the plaintiff and James A. Butler long after the sale and conveyance of the land to the latter and the mortgage by him given to Roffy on said land to secure payment of his (Butler's) promissory note to Roffy for the purchase price. The contents of the deceased's letters, which formed a part of the correspondence referred to, the trial court could well have considered as rather contradictory to, than confirmatory of, the testimony of M. D. Butler. The subjoined is the important part of said correspondence:

On January 30, 1909, said Butler wrote to plaintiff, saying, among other things:

> "I am going to try and settle up with Geo. Woodford regarding the Sacramento land some time, this week, and would like to communicate with you when I do."

To this letter, plaintiff replied on February 4, 1909, as follows:

> "Not having heard from you in answer to my two previous letters, I was about ready to start foreclosure on the $1,500 mortgage, signed by you, which I hold against the land near Sacramento. You say you are going to settle up with Woodford this week. Woodford's mortgage is not due for nearly a year yet, while my mortgage was due on Jan. 1st. If you do not care to pay my mortgage and want to get released from the note, I am willing to release you, providing you give me a quitclaim deed to your 80 acres, so that I can clear up the title. If you want to pay the mortgage off and keep the land, and have not all of the cash at this time, I will be willing to accept part of it and wait a short time for the balance. I am willing to do anything that is fair, but something must be done right away. * * *"

On February 9, 1909, Butler answered, saying that he had not received the two letters mentioned by plaintiff, and proceeding:

> "I was over to see Mr. Woodford to-day and told him that I was willing to settle with him or you. But that I would like to hear from you first which I think is proper. You say his mortgage will not be due for some time. Now your mortgage is overdue and perhaps it would be better to settle with you and you can settle the difference. I now have a check for $1,000 and will pay Mr. Woodford or you providing things can be arranged. I will be able to pay the balance in a month or so. * * *"

Plaintiff replied on February 19, 1909, stating that he had nothing to do with Woodford's mortgage; that he would send the note and mortgage to the Wells Fargo Bank, in San Francisco, to be indorsed by the bank upon receipt of $1,000.

On February 24th, Butler wrote:

> "I am going to deposit $1,000 this day with the Wells Fargo Bank here in this city. I will instruct them to send you this amount upon receipt of the release & mortgage. I will pay you the balance in three or four months. Kindly let me know what rate of interest you intend to charge. I am willing to pay anything that is fair and square."

Later, on the same day, he wrote that the Wells Fargo Bank refused to accept the money, as plaintiff had no account with it, but that he had deposited the money with the Anglo-Californian Bank, "and if you send your papers to them they will hold them in escrow until your mortgage is satisfied."

Plaintiff, on March 2, 1909, wrote that he was sending the note and mortgage to the Anglo-Californian Bank. He said:

> "You state that the bank would hold the papers in escrow until the mortgage was all satisfied. This will hardly be necessary, and I would prefer to hold the papers until the balance becomes due. I have drawn an extension agreement, which is signed by myself and acknowledged before a notary public. This I have instructed the bank to deliver to you when you turn over the $1,000 to them for me. * * * You asked me about the rate of interest on the $500. I am willing to let it go without interest now that the matter is being settled."

The extension agreement referred to in the above letter was to the effect that upon payment of $1,000 upon said note and mortgage, payment of the balance of $500 would be extended to July 1, 1909. On July 7, 1909, J. A. Butler wrote plaintiff:

> "Your letter has been received and noted. Let me assure you that I will settle with you in sight of ten days. My money got tied up, otherwise I would have settled before now. Assuring you that I am about to pay you up," etc.

The above letters of the deceased very plainly show that, if he at any time ever believed that Roffy had imposed upon or deceived him as to the title to the land, he must have later satisfied himself that the bargain was all that he could have expected it to be. In none of the letters, it will be noted, did he make any complaint about the transaction or claim that he was induced to enter into and consummate it by any misrepresentations or deception on the part of Roffy. To the contrary, the letters very clearly show that he was anxious to pay his mortgage debt and so retain the land, notwithstanding that he knew, as the letters show, that a prior mortgage to secure an unmatured indebtedness evidenced by a promissory note then subsisted upon the property. It is quite manifest that upon a consideration of said letters the trial court could justly or at least with considerable reason have been inspired with a strong feeling of distrust in the testimony of the witness, Butler.

While thus we have presented and briefly considered some of the considerations upon which the court below might have been led to reach its conclusion, in the face of the testimony of the defendant, that the transaction between Roffy and the deceased was carried on and completed, so far as Roffy's part therein was concerned, honestly and in good faith, and that the purchase of the land by the deceased was not the result of any misrepresentation by the former of the condition of the title, either at the time the transaction was under negotiation or when it was finally completed, it has not, under our view of the record, been absolutely necessary that we should have done so, since, as hitherto declared, there would be, even in the absence of the letters referred to from the record, no justification for the conclusion by this court that the result reached by the court below necessarily involved an arbitrary rejection of the defendant's testimony. In other words, as stated in the beginning, there would be in such case no ground upon which we could justly hold that, by disregarding the testimony of the defendant, the court below was guilty of an abuse of discretion.

In view of the conclusion we have arrived at, as indicated above, it is not necessary to consider other assignments involving attacks upon other findings than those just considered. As stated above, the finding that the note and the mortgage were made and delivered as alleged in the complaint is of itself sufficient to support the judgment, and it therefore becomes wholly immaterial whether the prior mortgage was or was not a subsisting lien upon the land at the time of the transaction between Roffy and the deceased, and the finding that it was not is therefore also immaterial. Nor, in view of our conclusion as to the evidence, is it necessary to determine whether, to entitle the defendant to maintain his defense upon the ground of fraud, it was necessary for him to rescind the contract of sale, it being contended by the respondent that rescission is a prerequisite to a right of action in such a case, and that the same must be kept alive continuously and to the time of the trial, which, it is likewise contended, was shown by the letters above adverted to was not done.

The judgment appealed from is affirmed.

We concur: BUCK, Presiding Judge, pro tem.; BURNETT, J.

40 Cal. App. 208

ROTH v. THOMSON. (Civ. 1850.)

(District Court of Appeal, Third District, California. March 7, 1919.)

1. Brokers 🔑86(4)—Real Estate Transaction—Procuring Cause—Sufficiency of Evidence.

In real estate broker's action for commissons, evidence *held* to support finding that sale of property was not made through any effort of plaintiff broker.

2. Brokers 🔑53—Sale of Real Estate—Procuring Cause.

Where purchasers had been trying to buy property for a period of 11 years, and during such time had been negotiating with owners, broker was not procuring or efficient cause of sale, though he had property listed and had sent purchasers letters describing it among other properties for sale without calling particular attention to it.

3. Brokers 🔑54, 57(1)—Real Estate Transactions—Commission—Sale on Terms Expressed in Employment Contract.

Broker, to be entitled to commission for sale of real estate, must produce purchaser ready, willing, and able to purchase at the price and on the terms specifically expressed in the contract of employment.

4. Brokers 🔑63(1)—Real Estate Transactions—Commission—Change in Terms of Sale by Owner.

Where broker produces purchaser ready, willing, and able to purchase at the price and on the terms specifically expressed in contract of employment, owner cannot by changing terms of sale or price of land affect broker's right to his commission.

5. Brokers 🔑53—Sale of Real Estate—Commissions—Procuring Cause.

Real estate broker is not entitled to commission for sale of land unless his efforts are the procuring or inducing cause of sale.

6. Brokers 🔑46—Brokerage Contract—Sale of Real Estate by Owner.

Where broker wrote owner asking if his land was still for sale and if there had been any change in the price, and the owner replied, naming price and stating broker's commission upon his sale of land, owner had the right to sell the land independently of agreement with broker; such contract not giving broker the exclusive right to sell land nor making him exclusive agent for sale thereof.

7. Brokers 🔑44—Broker's Contract—Termination.

Where contract giving broker right to sell property at certain price for certain commission did not specify duration thereof, owner could terminate contract at any time before broker procured purchaser ready, willing, and able to purchase on the terms stated in his contract.

8. Evidence 🔑317(18)—Hearsay Evidence—Action for Commissions—Procuring Cause of Sale.

In broker's action for commissions for sale of real estate, evidence as to owner's statement after the sale had been effected, and just prior to owner's death, that broker had nothing to do with the sale, was inadmissible, being hearsay.

9. Evidence 🔑271(16)—Self-Serving Declarations—Action for Commissions—Procuring Cause of Sale.

In broker's action for commissions for sale of land, evidence offered by defendants as to statements by owner after consummation of sale, and just previous to owner's death, that broker had nothing to do in effecting sale, was inadmissible, being self-serving declarations.

10. Appeal and Error 🔑931(6)—Review—Presumptions—Incompetent Testimony—Trial by Court.

In trial by court it will be presumed on appeal that court, in reaching its conclusion, disregarded any incompetent testimony which might have found its way into the record.

11. Appeal and Error 🔑1170(7)—Harmless Error—Incompetent Testimony.

In action tried by court, introduction of incompetent testimony was not reversible error under Const. art. 6, § 4½, where the evidence, with incompetent testimony disregarded, was sufficient to support findings.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by E. H. Roth against Mary C. Thomson, as executrix of the last will and testament of Henry T. Thomson, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles Kasch, of Ukiah, and W. G. Poage, for appellant.

Preston & Preston, of Ukiah, for respondent.

HART, J. The action was brought to recover from one Henry T. Thomson a real estate broker's commission alleged to have been earned by plaintiff in procuring customers for the purchase of certain lands of said Thomson. Subsequently to the filing of the complaint, Henry T. Thomson died, his wife, Mary C. Thomson, was duly appointed and qualified as executrix of his will, and plaintiff filed a supplemental complaint making her, as such executrix, the party defendant. The supplemental complaint set up the due presentation to the executrix and the rejection by her of a claim for $968 as commissions for plaintiff's alleged services, and prayed judgment for that amount.

The cause was tried before the court sitting without a jury, and judgment was rendered in favor of defendant. From said judgment plaintiff prosecutes the appeal.

It is agreed by both parties that there are two questions to be decided, namely: Was there a sufficient contract of employment and agreement to pay a commission, signed by Henry T. Thomson? If so, did plaintiff produce a purchaser ready, willing, and able to purchase the property from said Thomson under the terms and conditions of said contract of employment?

The court found: That on the 26th day of February, 1917, Henry T. Thomson was the owner of about 1,940 acres of land in Mendocino county and of a large amount of personal property, consisting of cattle, horses, and hogs; that on or about said date said Thomson, without the aid or assistance of plaintiff, found purchasers for said ranch and personal property in the persons of C. E. Firebaugh and J. W. Firebaugh; that C. E. Firebaugh entered into a contract with said Thomson, agreeing to purchase said property for $23,500 payable as follows: $1,000 on the execution of said agreement; $8,000 upon the execution and delivery of a good and sufficient warranty deed conveying the lands of said Thomson and a bill of sale for the personal property; the balance of $14,500 to be represented by a promissory note payable on or before six years from date of delivery of deed, with 6 per cent. interest per annum, secured by mortgage upon the property transferred; that said Firebaughs thereafter completed the purchase of said ranch from deceased; that plaintiff did not procure said purchasers for said property nor did he act as agent for deceased in the sale thereof; that he did not bring the parties together and did not induce the said Firebaughs to enter into said contract; that he rendered no valuable or other service to deceased in procuring said purchasers and is not entitled to any commission.

The contract of employment relied upon by plaintiff consists of a number of letters passing between him and Henry T. Thomson, plaintiff residing at Willits, and said Thomson at Covelo, in Mendocino county. The first letter, written by plaintiff, was dated August 19, 1915, in which it was stated:

> "I am writing to find out if your ranch is still in the market. * * * I had a gentleman in my office who wants a good stock ranch. * * * I told him about your ranch, and he promised to go up and see it within the next two weeks. His name is V. A. Spragia, so if he comes and you do business you will do the right thing by me. Would be pleased to hear from you as to any changes in price or otherwise."

Thomson replied to this letter on the next day August 20th, as follows:

> "My ranch is on the market for $26,000.00. 1,840 acres of land and all of the stock. * * * Your commission will be 5% on the land. Will not pay any commission on sale of stock."

On August 23d plaintiff wrote asking Thomson to segregate the land and the stock, giving the price on each. On August 25th Thomson wrote that the price of the land was $10 per acre, and that the stock was not for sale if he did not get a buyer for the land. On April 17, 1916, Thomson again wrote plaintiff, giving an itemized list of the live stock, farming implements, etc., and the value of each, and stated:

> "I will take $26,000.00 for this property. Pay you 5 per cent com. on sale of land. $15,000.00, balance $11,000.00 at 6%."

[1] We are satisfied that the finding that the sale of the Thomson ranch to the Firebaughs was not effected through any effort of the plaintiff derives sufficient support from the evidence; hence it will not be necessary to consider whether the plaintiff's purported authority to negotiate the sale of the ranch measured up to the requirements of our statute of frauds, or, to be more definite, comes fairly within the provisions of section 1624, subd. 6, of the Civil Code. See, also, C. C. P. § 1973, subd. 6.

The facts, as briefly as they may well be stated, are these: In 1906 J. W. Firebaugh met Mr. and Mrs. Thomson on the Thomson ranch and purchased from them a number of horses, and there were then some negotiations between the parties regarding the purchase of the ranch by Firebaugh. In 1911 the Firebaugh brothers again met the Thomsons at their ranch, remained there three days, and attempted to buy the property, but could not come to an agreement. The Firebaughs lived in Fallon, Nev., and, after returning to their home, a number of letters passed between them and Thomson, none of which appear in the record, relative to the purchase of the ranch and stock. Mrs. Thomson testified that the correspondence with the Firebaugh brothers relative to the proposed purchase of the ranch thereafter continued intermittently for a period of two years, and ceased either in the year 1913 or 1914. Asked if she at that time had given up selling the place to them, she replied: "Well, I should say so."

After the receipt of the letter from Thomson dated August 25, 1915, heretofore referred to, plaintiff went to the Thomson ranch and secured five or six photographs of the place, in one of which Mrs. Thomson appeared. He placed an "ad" in one of the San Francisco daily papers, advertising different properties for sale. J. W. Firebaugh saw this ad, and on December 18, 1915, wrote plaintiff, requesting him to send a list of properties he had for sale in Mendocino county, which plaintiff did. Firebaugh replied, requesting detailed information as to certain properties which plaintiff furnished him. On December 31, 1915, Firebaugh wrote plaintiff asking for further information, and stated:

> "The place you speak of at Covelo answers the description of a place I looked at once; east

of Round Valley on the road to the Sacramento Valley, owned at that time by a Mr. Thompson."

Plaintiff sent the photographs he had of the Thomson ranch to Firebaugh, who recognized the place and also Mrs. Thomson in one of the pictures.

In 1916 the Firebaughs again visited the Thomson ranch, and in February, 1917, they purchased the property. J. W. Firebaugh testified that when going to the ranch at this time they did not stop to see plaintiff, and said that he had never met him prior to the consummation of the sale. It does not, in fact, appear that the Firebaughs ever communicated with or heard from the plaintiff after January 20, 1916.

Testifying as to the circumstance of the appearance of the Firebaughs at the ranch in the summer of 1916, Mrs. Thomson said that they (the Firebaughs) were at that time "passing through the country" on a camping tour and stopped at a "Ranger's Station," where a Mr. John Bauer was stationed. The Firebaughs remained in that locality for seven days, during which time they renewed negotiations with the Thomsons for the purchase of the ranch. They rode over the ranch and examined it and the stock carefully, being accompanied on one occasion by Mr. Thomson himself, and on others by some one sent out by Thomson. She testified that they at that time almost came to an agreement for the sale of the ranch and stock to the Firebaughs, but the latter were not satisfied with the price asked for the properties. Without then consummating the purchase, the Firebaughs proceeded to Covelo, and thence to Napa. The Thomsons had asked $24,000 for the ranch, the equipments and the stock thereon, and gave the Firebaughs ten days within which to decide whether they would take the properties at that sum. Later the Firebaughs addressed to the Thomsons a letter in which they offered them $21,000 for the properties. Mrs. Thomson said that immediately on reading that letter she destroyed it. The next time the Thomsons heard from the Firebaughs relative to the purchase of the ranch was in February, 1917, when the Mr. Bauer above mentioned, having received a letter from the Firebaughs requesting him to see the Thomsons and ascertain from them the lowest price they would take for the properties, went to the home of the Thomsons and read to them the letter. The Thomsons told Bauer that they still wanted and would require $24,000 for the ranch and stock, etc. A few days thereafter J. W. Firebaugh visited the Thomsons and said he desired to look over the stock on the ranch, to see how they had "wintered and count them up and see what we had." Mr. Thomson sent a man with said Firebaugh over the ranch to look over and take an account of the number of head of the different kinds of stock owned by the Thomsons and then on the ranch. Again, on this occasion, the said Firebaugh was told by the Thomsons that they demanded and wanted $24,000 for the ranch as it then stood and the stock. Firebaugh said he would give them an answer within a few days. On the 17th day of February, 1917, the said J. W. Firebaugh sent a telegram to Mr. Thomson, dated at Napa, in which he offered to give Thomson $23,500 for the properties, "providing the Forest Service will give us the same range now allowed you. If that suits you, meet me at Ukiah." (Here it may be explained that the forest service of the United States had rented a large tract of government range land adjacent to that of the Thomsons to the latter at a nominal rental.) After considering this proposition, the Thomsons concluded to accept it, and thereupon telegraphed the Firebaughs to meet them at Ukiah on February 22, 1917. The Firebaughs and the Thomsons met at Ukiah on February 25, 1917, and then and there immediately entered into negotiations which, as stated above, culminated in the sale of the properties to the Firebaughs.

It is not at all doubtful that, from the foregoing evidential facts, the trial court could justly have specifically found, as impliedly in general language it did find, that the Firebaughs, for a period of approximately 11 years, dating from the year 1906—long before the latter had ever had any communication with the plaintiff regarding the ranch—had been trying to purchase that particular property; that their minds were and had been for many years particularly fixed upon buying the Thomson ranch; that, after having attempted, but failed, a number of times to consummate a deal with the Thomsons, the advertisement of the plaintiff in one of the San Francisco newspapers, setting forth that he had for sale several different tracts of land in Mendocino county, came under their observation, and that, being desirous of securing good stock land in Mendocino county, they communicated with the plaintiff for the purpose of securing from him further particulars or more definite information than the advertisement disclosed of the properties he had for sale; that, upon receiving a reply to their letter from plaintiff, the Firebaughs found that the Thomson ranch, which they had for many years been endeavoring to buy, was among the properties which the former referred to in his advertisement; that, without further communication or dealings with the plaintiff, the Firebaughs, about a year subsequently, again went to the Thomson ranch and again opened up negotiations with the Thomsons themselves for the purchase of the ranch, and finally made a deal with them and bought their ranch at a price several thousand dollars below that which they authorized the plaintiff to sell it for in the letter to him of August 19, 1915.

[2] It is to our minds perfectly clear that from such findings, which, as before stated, were impliedly made by the court in this case, the conclusion is irresistible that the plaintiff's efforts were not the procuring or efficient cause of the sale of the ranch to the Firebaughs. It was not as the result of his efforts that the minds of the vendors and vendees were brought together upon the proposition. He did not even put the Firebaughs "on the track" of the property; for they themselves had for a long time previously to any communication with the plaintiff been "on the track" of the property, and for a corresponding period of time had perseveringly endeavored to purchase it at a price agreeable to their own conception or estimate of what it was worth. There is no evidence that the plaintiff ever informed the Thomsons that he had in the Firebaughs prospective buyers of their ranch, and Mrs. Thomson testified that, when the negotiations directly resulting in the sale were pending, they asked J. W. Firebaugh, who at that time was conducting the negotiations on behalf of himself and brother, whether there was any real estate agent or broker concerned in the transaction in any way, and he replied in the negative. In a word, the plaintiff did not produce the Firebaughs before the Thomsons as a purchaser ready, able, and willing to buy the ranch upon the terms and at the price fixed by the Thomsons in their letter to the plaintiff purporting to authorize him to sell the property. As far as the evidence shows the plaintiff had gone in an effort to sell the property to the Firebaughs was in writing the latter letters describing among other properties they had for sale in Mendocino county, the ranch of the Thomsons. He, indeed, did not direct the attention of the Firebaughs particularly to said ranch until after the latter had, in a letter addressed to him, inquired whether the tract referred to in a letter to the Firebaughs from him as "stock ranch 1840A" was the Thomson ranch. In reply to that inquiry he gave the Firebaughs in a letter some particulars as to the character of said ranch; but he thereafter did absolutely nothing to bring about the sale. This sale, as seen, was effected only after considerable negotiations between the Firebaughs and Thomson and after the latter had reduced the price in a small amount.

[3-5] The rule is that, to entitle a broker to a commission for the sale of real estate which he has been given by the owner authority to sell, he must produce before the owner a purchaser ready, willing, and able to purchase at the price and on the terms specifically expressed in the contract of employment. While a change made by the owner, when consummating the sale, in the price of the land or the terms of the sale from those specified in the broker's contract, cannot of itself affect or impair in any way the right of the broker to his commission, the latter cannot claim a commission unless his efforts are the procuring or inducing cause of the sale. This proposition is explained with singular lucidity in Smith v. Preiss, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820, as follows:

> "In order for the broker to recover, the evidence must show that his efforts were the procuring cause, and not merely one in a chain of causes. * * * The expression 'procuring and inducing cause,' as used in the books, refers to the cause originating a series of events that without break in their continuity result in the accomplishment of the prime object of the employment of the agent."

The books are full of cases expounding and applying the rules governing in cases of this character, and it is sufficient merely to cite a few which are particularly applicable to the facts of the case now in hand, viz.: Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642; Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Cone v. Keil, 18 Cal. App. 675, 124 Pac. 548; Dreyfus v. Richardson, 20 Cal. App. 800, 130 Pac. 161; Brown v. Mason, 155 Cal. 155, 159, 99 Pac. 867.

[6, 7] Of course, it will not be contended that the Thomsons did not have the right to sell the property independently of any arrangements or agreement they had with the plaintiff. The brokerage agreement in this case, assuming that it is legally sufficient as such in all respects, cannot be construed as vesting in the plaintiff the exclusive right to sell the property. Indeed, it does not even go so far as to make him the exclusive agent for that purpose, nor does it specify any time during which his authority to sell should exist. Conceding it to be sufficient to have authorized him to sell the property, it is so phrased that the Thomsons were at liberty to terminate it at any time before he procured a purchaser able, willing, and ready to purchase on the terms stated therein. But, however this may be, it is clear, as stated, that the Thomsons had the right to sell the ranch without the assistance or intervention of the plaintiff, and that the finding that they did so is, as above declared, well supported.

The only other point urged for a reversal involves certain rulings whereby certain witnesses were permitted, over objection by the plaintiff, to testify that, in conversations with Henry T. Thomson, just prior to his death and shortly after the sale was effected and after the plaintiff had started this action, the said Thomson declared that the plaintiff had had nothing to do with the sale of the ranch. It is claimed that this testimony was highly prejudicial to the substantial rights of the plaintiff.

[8-11] The testimony is clearly hearsay and self-serving, and the objection to it should have been sustained. We are not prepared, though, to say that it resulted, or could, under the circumstances of the case, have resulted, in substantial or, indeed, any damage to the plaintiff's rights in the trial of the case. The cause was tried by the court, and it is to be assumed that the court, in reaching its conclusion, disregarded any incompetent testimony which might have found its way into the record. But beyond this consideration there is, as has been shown, other testimony in the record which of itself is amply sufficient to support the decision. Indeed (we do not hesitate to say), the objectionable evidence referred to may be and could have been by the trial court utterly disregarded, and still, the verity of the other evidence having been established by its acceptance by the trial court, no other decision than that crystallized in the findings, so far as is concerned the issue as to whether it was directly or otherwise through plaintiff's efforts that the ranch was sold to the Firebaughs, could justly have been warranted. We therefore conclude that the error complained of cannot be held to have resulted in a miscarriage of justice. Const. art. 6, § 4½.

The judgment is affirmed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

40 Cal. App. 322

SCHUTZER v. TAYLOR. (Civ. 2857.)

(District Court of Appeal, First District, Division 1, California. March 18, 1919.)

1. Gifts ⟹29—Corporate Stock—Retention of Possession.

Where testator was fraudulently induced to contribute to the support of E. and was fraudulently led to believe that unless he made some provision for her after his death she would be in want, and caused certificate of stock in question to be issued in the name of E., with the understanding that the title and possession thereof were to remain in him until his death, when it was to become the property of E., and the certificate of stock was delivered to the testator and remained in his possession until he died, and E. predeceased testator, there was no valid gift.

2. Appeal and Error ⟹1040(7)—Harmless Error—Pleadings.

A defendant cannot complain that the courts sustained a demurrer to a certain defense, where the matter was fully covered and put in issue by the allegations of the complaint and another defense pleaded and the court made a finding thereon.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Josephine O. Schutzer against Edward F. Taylor, executor of the last will and testament of Michael C. Taylor, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. W. Kitts, of San Francisco, for appellant.

R. L. Husted, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment in an action for damages for the conversion of personal property, and is taken on the judgment roll alone.

The defendant in an amended answer alleged two distinct matters of defense. To the second of those defenses the trial court sustained a general demurrer, and it is upon the action of the court in this and one other matter that the defendant bases his appeal.

In the so-called second matter of defense the defendant alleges that Michael C. Taylor, his testator, was fraudulently induced to contribute to the support of Emma Onken during his lifetime; and was also fraudulently led to believe that unless he made some provision for her after his death she would be in want of the common necessaries of life; that accordingly he caused a certificate for 16 shares of the capital stock of the Spring Valley Water Company (which is the property here in dispute) to be issued in the name of Emma Onken, with the understanding that the title and possession thereof were to remain in him until his death, when said shares of stock were to become the property of said Onken; that upon the issuance of said certificate it was delivered to said Taylor; and that it remained in his possession until he died. It is also alleged that Emma Onken died before M. C. Taylor, and that plaintiff herein acquired said shares of stock with notice of all the circumstances herein related, and that hence she has no valid title to the property.

[1, 2] According to these allegations of the second defense, it would appear that no valid gift of the shares of stock was made by Taylor to Onken, and that plaintiff's title is no better than that of Onken, which would constitute a good defense to plaintiff's cause of action. But as it also appears from the record that the matter of plaintiff's title to the property was fully covered and put in issue by the allegations of the complaint and the first defense pleaded, and that the

court made a finding thereon, it follows that the defendant was in no manner prejudiced by the ruling complained of.

We think also that the findings of the court are responsive to the issues made by the pleadings, and that they fully support the judgment.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

40 Cal. App. 290

KNOX v. KEARNEY et al. (Civ. 2654.)

(District Court of Appeal, First District, Division 1, California. March 14, 1919.)

1. Deeds ⟹67, 82—Passing of Title—Delivery—Record—Change of Possession.

As between the parties, where there is a complete delivery of deeds by grantor to grantee without condition or reservation, the title passes to grantee, irrespective of whether deeds are recorded or delivery accompanied by change of possession.

2. Deeds ⟹194(4) — Implied Acceptance —Delivery.

Where deeds are delivered to grantee in person, an acceptance of the conveyance will be implied, in absence of controverting evidence, in view of Code Civ. Proc. § 1963, subd. 28, declaring it to be a disputable presumption, controvertible by evidence, that things have happened according to the ordinary habits of life.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Jennie G. Knox, executrix, etc., substituted in place of David W. McQueen, deceased, as executor of the last will and testament of Jane McQueen, deceased, against William B. Kearney and others. Judgment for defendants, and plaintiff appeals. Affirmed.

T. J. Crowley and Emilio Lastreto, both of San Francisco, for appellant.

Gerald C. Halsey and Harris & Hess, all of San Francisco, for respondents.

KERRIGAN, J. This is an action, brought by the plaintiff as guardian of the person and estate of Jane McQueen, an incompetent person, and continued by said plaintiff upon her decease as executor of her estate, wherein the relief sought was the cancellation of two deeds, alleged to constitute a cloud upon plaintiff's title. Judgment was rendered for defendants. Plaintiff appeals, and brings to this court a record consisting of the judgment roll alone.

The essential facts of the case as shown by the findings are as follows: Jane McQueen, about eight years before her death, being at that time of sound mind, and the owner of the property described in the complaint, executed two deeds thereto, and with the intent to make an absolute gift of the real property therein described to her son, Alfred W. McQueen, delivered them to him. It being the desire of the grantor that the deeds should not be recorded during her lifetime, they were, immediately after their delivery as aforesaid, placed in the possession of the defendant William B. Kearney, with instructions to that effect. Six years after making these deeds Jane McQueen was declared incompetent, and two years later she died, and the plaintiff, who had been the guardian of her person and estate, was appointed executor thereof. Alfred W. McQueen had predeceased her, having died intestate on August 23, 1914, and his widow, the defendant Pauline M. McQueen, was appointed administratrix of his estate. The complaint alleges a demand upon the defendant Kearney for the return of the deeds, and his refusal to accede thereto, but the findings declare that no such demand was made.

In support of the appeal the plaintiff contends that the findings fail to show that there was an acceptance of the conveyance by Alfred W. McQueen; and also that the findings fail to support the judgment for the reason that they do not disclose that the delivery of the deeds was accompanied by a transfer of possession of the property. He also argues in support of the appeal that this court should hold that a deed long unrecorded is invalid, challenging the soundness of the decisions to the contrary, and urges that the rule of those decisions places a premium upon fraud.

In the case at bar the court found that there was a complete delivery of the deeds by the grantor to the grantee without any condition or reservation.

[1] The title thereupon, it is clear, passed to the grantee, and this irrespective of whether the deeds were recorded, or the delivery thereof was accompanied by a change of possession. As between the parties the performance of neither of these things is essential to a valid conveyance; nor is there any violation of law nor infringement of public policy by the grantee failing to place his deed on record, or by the grantor retaining possession of the property. Fisher v. Ludwig, 6 Cal. App. 144, 91 Pac. 658.

[2] As to the point that the findings fail to show that there was an acceptance of the conveyance, we think that, since the findings show that the deeds were delivered to the grantee in person, an acceptance is implied. We see no reason why such a case is not covered by subdivision 28 of section 1963 of the

Code of Civil Procedure, declaring it to be a disputable presumption, controvertible by evidence, that things have happened according to the ordinary habits of life. If we understand human nature as illustrated by the ordinary habits of life, we would not hesitate to affirm that a person to whom is conveyed valuable real property and takes delivery of the deed conveying it usually accepts it. True, it is a disputable presumption, but one requiring evidence to controvert; and in the absence of such evidence the finding of the court of a delivery is sufficient. There might, of course, be a mere manual delivery of a deed, effected by some artifice, from which an acceptance could not be implied, but here the findings present no such case. 13 Cyc. 570; Rousseau v. Bleau, 60 Hun, 259, 14 N. Y. Supp. 712, 716. See, also, DeLevillain v. Evans, 39 Cal. 120; Bensley v. Atwill, 12 Cal. 236; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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40 Cal. App. 229

KELSEY v. SUPERIOR COURT OF SAN DIEGO COUNTY et al. (Civ. 2952.)

(District Court of Appeal, Second District, Division 1, California. March 10, 1919.)

1. PROHIBITION 🔑3(3)—REMEDY ON APPEAL—GRANTING RESTRAINING ORDER.

Alleged error in granting injunctive relief, in that the complaint failed to state facts warranting such relief, cannot be made the basis for prohibition, where the court acted in the exercise of its jurisdiction, but the error must be corrected on appeal.

2. INJUNCTION 🔑150—RESTRAINING ORDER—NECESSITY OF SERVICE OF POINTS AND AUTHORITIES.

Where no points and authorities in support of an application for a restraining order were served upon defendants prior to the hearing on such order, the service of points and authorities for use at the hearing of a prior order, which was vacated, is no compliance with Code Civ. Proc. § 527, requiring such service to be had at least two days before the hearing.

3. INJUNCTION 🔑150 — TEMPORARY RESTRAINING ORDER—GROUNDS FOR CONTINUANCE—ILLNESS OF ATTORNEY.

Where, on account of the illness of an attorney, the hearing on a restraining order issued without notice was continued, there was no compliance with Code Civ. Proc. § 527, requiring a temporary restraining order to be heard within ten days from its date and that the applicant must be ready to proceed when the matter first comes up for hearing.

4. PROHIBITION 🔑10(2) — TEMPORARY INJUNCTIONS—HEARING — JURISDICTION DIVESTED.

Where the trial court continued the hearing on a temporary restraining order beyond the time fixed by statute, it was divested of jurisdiction to take any action on the date fixed other than to dissolve the order issued, and a writ of prohibition to prevent it from taking action on such restraining order will be granted.

Proceedings by Van R. Kelsey against the Superior Court of San Diego County, C. N. Andrews, Judge, for writ of prohibition. Writ granted.

George H. Moore and Raymond E. Hoyt, both of Los Angeles, and Henning & McGee and W. H. Wylie, all of San Diego, for petitioner.

T. B. Cosgrove, City Atty., and M. R. Thorp, both of San Diego, for respondents.

SHAW, J. In response to an alternative writ of prohibition issued by this court in the above-entitled matter, requiring respondent to show cause why it should not be prohibited from proceeding further in a certain action wherein the city of San Diego is plaintiff, and Van R. Kelsey and James Byers, as sheriff of San Diego county, are defendants, an answer to said writ, consisting of a certified copy of the entire record, has been filed in this court.

It appears from the petition upon which the writ was granted:

That on the 26th day of July, 1918, petitioner commenced an action in the superior court of Los Angeles county against James Kennedy, the purpose of which was to recover a money judgment against defendant therein. That at the time and upon the filing of the complaint there was duly issued by the court a writ of attachment in said action, directed to the sheriff of San Diego county, pursuant to which and the instructions given him by plaintiff, he on July 30, 1918, attached certain personal property, consisting of tools, machinery, and other equipment, then in the possession of Kennedy and used by him in constructing what is known as the "Lower Otay dam" in San Diego county, and took the same into his possession and under his control, as appears from the return upon said writ of attachment so made by said sheriff on August 10, 1918, which is as follows:

"I, James C. Byers, sheriff of the county of San Diego, hereby certify that I received the hereunto annexed writ of attachment on the 30th day of July, 1918, with instructions from attorney for within named plaintiff to attach any and all personal property belonging to the defendant, consisting of tools, horses, machinery and other equipment of every kind and description now being used in the construction of the 'Lower Otay dam' at Otay, San Diego county, California. By virtue of the fact that the above-mentioned property was already in my possession under prior attachments, the said property is held on this attachment. Dated this 10th day of August, 1918. James C. Byers, Sheriff, by F. Knefler, Deputy."

And that at all times since the levy of the writ he has had said property in his possession.

That on September 18, 1918, plaintiff in said action recovered a judgment against the defendant therein in the sum of $11,336.12, which was duly docketed on September 19, 1918, and thereafter, to wit, on January 4, 1919, a writ of execution was duly issued thereon, commanding Byers, as sheriff of San Diego county, to make the sums due on the judgment of petitioner out of the property of said Kennedy situated within San Diego county, which execution was placed in the hands of the sheriff, with instructions to levy upon and sell the personal property, tools, machinery, and equipment owned by said Kennedy and located at said Lower Otay dam in San Diego county, in pursuance of which writ and instructions so given, Byers as sheriff levied upon the property and advertised it for sale on January 17, 1919.

That thereafter, on January 15, 1919, the city of San Diego, as plaintiff, commenced an action in the superior court of San Diego county against petitioner and Byers as sheriff, the purpose of which was to enjoin the sheriff from selling the property as advertised under execution, and at the same time plaintiff in said action procured from said court a restraining order and order to show cause commanding petitioner and said Byers to show cause on the 28th day of January, 1919, why an injunction should not be issued forbidding the sale of the property, which order was duly served upon said sheriff, by reason of which fact he refused to make the sale as advertised, or enforce the writ of execution.

That on the day specified in said notice petitioner and Byers as sheriff appeared in response thereto and demurred to said complaint for injunction and filed objections to the issuance thereof, based upon affidavits, all of which were duly served upon the attorney for the plaintiff in said action; whereupon said superior court of San Diego county (as shown by the answer to the petition) vacated said restraining order and ordered the same discharged.

That immediately thereafter, on the same date and upon the same complaint, without amendment thereto or affidavits filed plaintiff in said action procured to be issued out of said court another restraining order against petitioner and Byers, restraining the sheriff from selling the property of Kennedy under and pursuant to the writ of execution so issued, and requiring petitioner and sheriff to show cause on February 3d, before Hon. C. N. Andrews, judge presiding in department 4 of said court, why an injunction should not be granted restraining the sale of said property under said execution, and meanwhile restraining said sale. That after obtaining said last mentioned order, to wit, on January 31, 1919, the plaintiff in said action wherein petitioner and the sheriff were made defendants filed an amendment to its complaint and duly served the same, but at no time did the plaintiff therein, through its attorneys, file or serve upon petitioner or said sheriff, or upon either or any of their attorneys, any points or authorities, as required by section 527 of the Code of Civil Procedure.

That on February 1, 1919, petitioner and said sheriff filed and served their affidavits in response to said order to show cause on February 3, 1919, and notified the attorney for said city of San Diego that petitioner and said sheriff, at the hearing of said order to show cause on February 3d, would rely upon the demurrer theretofore filed and affidavits theretofore filed, in addition to an affidavit served upon said counsel on February 1st. That, pursuant to said order, petitioner and the sheriff appeared before Hon. C. N. Andrews, judge of said superior court, on February 3d, in response to the order to show cause, at which time Deputy City Attorney M. R. Thorp appeared and moved the court to continue the hearing of said matter upon the ground that the city attorney was then engaged in the trial of a case in another department, and that, other than said city attorney and M. R. Thorp so appearing, there was no attorney in the office of the city attorney familiar with the issues of law and fact involved in said hearing; that, while he was then ready and prepared to present his points and authorities in support of the contention of the city in said matter, he was then sick, and by reason of his physical condition, due to illness, was unable to present said matter and to proceed with said hearing. That the court from its observation of the physical condition of said Thorp at the time when he made said motion concluded that he was physically unable to proceed with the hearing and, over the objections of petitioner, who insisted that the hearing proceed, continued the same to February 10th, a time covering a period of more than 10 days after the making of said restraining order and order requiring petitioner to show cause why a temporary injunction should not be granted.

That, notwithstanding the levy of said writ of attachment and the placing of said writ of execution in the hands of the sheriff, he has permitted and is permitting the city of San Diego, through a keeper by him placed in charge thereof, to use said property of Kennedy's so attached and levied upon, continuously, as a result of which it is being worn out and depreciated in value, which wear and tear and depreciation will continue so long as said city is permitted to use the same.

That on February 10th, the day to which said hearing was continued, petitioner and the sheriff appeared in court and objected to the court taking any proceedings in said matter other than to declare and adjudge that said restraining order dated January 28th was ineffectual, and that said order to show cause had by lapse of time become inoperative, which objections were overruled and the further hearing of the matter continued to 2 o'clock on February 10th, at which time, as appears by supplemental petition filed, the said superior court, Hon. C. N. Andrews presiding therein, did grant and cause to be issued a temporary injunction wherein said Byers as sheriff was ordered to desist and refrain from selling the property of Kennedy so levied upon at the Lower Otay dam site, in the county of San Diego, under and in pursuance of the execution issued out of the superior court of Los Angeles county in favor of Van R. Kelsey and against James Kennedy, or in any manner or in any wise interfering with plaintiff's possession and use of said property pending the final determination of the action.

[1] Plaintiff insists, first, that the complaint filed by the city fails to state facts entitling plaintiff to any injunctive relief. This for the reason that at the time when the levy under the writ of attachment was made Kennedy owned and was in possession of the property, and the city, though asserting a lien upon the property by virtue of a clause in a contract existing between it and Kennedy, had in fact no lien thereon or claim thereto recognizable in law. Assuming this contention to be well founded, and also that petitioner has just cause for grievance due to the action of the sheriff in what upon this record appears to be a plain violation of his official duty in permitting the property to be used by the city, the effect of which, owing to such use and resulting deterioration, must necessarily greatly depreciate the value thereof, nevertheless upon such facts it cannot be said respondent, if it erroneously issued the restraining order and temporary injunction, acted in excess of its jurisdiction. It is a court of general jurisdiction having power to entertain the class of proceedings in question. It had before it the parties to the action. The subject-matter of the litigation, which the court was called upon to determine, was plaintiff's right to the relief prayed for upon the facts stated in the complaint.

"Whether the particular facts on which the court proceeds in that regard are or are not sufficient to justify its exercise of jurisdiction is a question of law, the solution of which, either way, cannot impair the court's right to apply its judicial power in the premises according to its view of the law, and of the facts before it." State ex rel. Union Depot R. Co. v. Valliant, 100 Mo. 59, 13 S. W. 398.

Hence, conceding a total absence of facts alleged in the complaint to warrant the action of the court, nevertheless it, in making the orders complained of, acted in the exercise of its jurisdiction, and, if while so doing it erred, such error cannot be made the basis for prohibition, but must, for like error in an ordinary civil action, be corrected on appeal.

[2] Petitioner, conceding the restraining order to have been properly made, next insists that the court upon the proceedings shown to have been taken had no power to make any order other than to dissolve the restraining order. This contention is based upon the provisions of section 527, Code of Civil Procedure, which, among other things, provides that—

"In case a temporary restraining order shall be granted without notice, * * * the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order. * * * When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities as herein required, the court shall dissolve the temporary restraining order."

While points and authorities were served upon defendant in the action brought by the city, prior to the time fixed for the hearing of the restraining order first granted and thereafter vacated, no points and authorities were so served in support of the application made and set for hearing on February 3d. Upon the vacation of the restraining order first granted, the proceeding for temporary injunction terminated. The service of such points and authorities for use at the hearing thereof cannot, as to the order here involved, be deemed a compliance with the provisions of the statute, which in absolute terms requires the applicant for an injunction to serve upon the opposite party, at least two days prior to such hearing, a copy of his points and authorities.

[3] Not only was there a failure of the plaintiff in said action to comply with this provision, but it appears from the application made for a continuance that there was an absence of compliance with the pro-

vision of the statute to the effect that, at the time fixed for the hearing, the applicant for the injunction must be ready to proceed with the hearing. Otherwise, in express and positive terms, the statute provides that "the court shall dissolve the temporary restraining order." The purpose of the statute is plain. In enacting it the Legislature intended, not only that an injunction should not be granted without notice, but that the power of the court to restrain the act sought to be enjoined temporarily should be restricted to the time specified in the statute. The illness of an attorney cannot be deemed ground for continuing a restraining order in effect beyond the time fixed by statute, nor is it an excuse for noncompliance with its terms, any more than such illness would excuse his client for failure to file notice of motion for a new trial within the time specified therefor. In this proceeding it appears that the city attorney knew of his engagements in another department, and knew that his deputy, M. R. Thorp, was ill, although he appeared in court and stated that he had his points and authorities prepared to submit, and further appears the city attorney had two other deputies who might have appeared and represented the city.

[4] The provisions of section 527 provide a complete scheme in a proper case for the obtaining of a writ of injunction, and such scheme must be deemed the measure of the power to be exercised by trial courts in the matter of provisional injunctions. United Railroads v. Superior Court, 170 Cal. 755, 151 Pac. 129, Ann. Cas. 1916E, 199. The effect of the order made was to nullify the terms of the statute, which are so plain and unambiguous that no room exists for interpretation. German Sav., etc., Society v. Aldrich, 5 Cal. App. 215, 89 Pac. 1063.

By its action in continuing the hearing the court was, in our opinion, divested of jurisdiction to take any action on February 10th other than to dissolve the restraining order so issued. It follows from what has been said that the peremptory writ of prohibition should be granted. It is therefore ordered that the respondent refrain and desist from any action or proceeding based upon the restraining order made on February 3, 1919, or the order made on February 11, 1919, granting a temporary writ of injunction, or the enforcement thereof, in that certain cause wherein the city of San Diego is plaintiff and Van R. Kelsey and James C. Byers are defendants, now pending in the superior court of San Diego county, other than to make an order dissolving the restraining order and temporary writ of injunction so granted in said matter.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 228

KELSEY v. BYERS, Sheriff of San Diego County. (Civ. 2953.)

(District Court of Appeal, Second District, Division 1, California. March 10, 1919.)

Application for a peremptory writ of mandate by Van R. Kelsey against James C. Byers, as Sheriff of the County of San Diego, commanding him to execute a writ of execution issued out of the superior court of Los Angeles County against certain personal property and requiring him to sell such personal property. Directed that the writ prayed for issue.

George H. Moore and Raymond E. Hoyt, both of Los Angeles, and Henning & McGee and W. H. Wylie, all of San Diego, for petitioner.
Eugene Daney, of San Diego, for respondent.

SHAW, J. This is an application for a peremptory writ of mandate to be directed to the respondent as sheriff of San Diego county, commanding him to execute a writ of execution issued out of the superior court of Los Angeles county in a certain action wherein Van R. Kelsey was plaintiff and James Kennedy was defendant, and requiring him to immediately, in accordance with law, proceed to sell the personal property upon which said execution was levied. As shown by answer to the petition for the writ, his refusal to proceed in enforcing the writ of execution is based upon a restraining order issued in the case of City of San Diego v. Van R. Kelsey and James C. Byers, Sheriff, by the superior court of San Diego county enjoining him from so doing.

In a proceeding numbered 2952 (180 Pac. 662) wherein Van R. Kelsey is petitioner and the superior court of San Diego county is respondent, involving the validity of such restraining order and injunction, this court, for the reasons stated in an opinion this day filed, held that said superior court, by reason of continuing the hearing of the application made by the city of San Diego for a temporary injunction, had no jurisdiction to make any order in said matter other than one to dissolve the restraining order. It follows from what is said in the opinion so filed that the writ of mandate as prayed for should issue against said James C. Byers as sheriff, and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

40 Cal. App. 323

OLCESE v. HARDY. (Civ. 2745.)

(District Court of Appeal, First District, Division 2, California. March 18, 1919.)

1. Appeal and Error 🔑1002—Conclusiveness of Verdict Upon Review.

In a servant's action for injuries, *held*, that there was a substantial conflict in the evidence precluding the appellate court from disturbing the verdict.

2. Appeal and Error 🔑930(2)—Review — Presumptions.

In a servant's personal injury action, where the jury were instructed, in conformity with the Roseberry Act, that the damages might be diminished in proportion to the amount of negligence attributable by plaintiff, it must be assumed in support of the judgment for plaintiff that if there was evidence of plaintiff's negligence the jury made the proper deductions in arriving at verdict.

3. Appeal and Error 🔑1050(1)—Review—Harmless Error.

In a servant's action for injuries, error in the admission of evidence as to the furnishing of knives in a ripsaw machine *held* not prejudicial to defendant.

4. Master and Servant 🔑264(4)—Injuries to Servant—Defective Machinery—Issues and Proof.

Evidence as to defects in the blower or hood of a ripsaw machine used by plaintiff *held* admissible under general allegations of negligence in furnishing a defective machine, though followed by an allegation of special defects in the blades.

5. Appeal and Error 🔑1050(1)—Harmless Error—Evidence.

In a servant's personal injury action, the admission of plaintiff's testimony informing the jury that an insurance company was interested in the litigation, if error, was not prejudicial, where the master introduced evidence showing the insurance company's interest and particularly its inspection by cross-examination of the plaintiff.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Louis Burger against James H. Hardy for personal injuries alleged to have been received by plaintiff, in which Emilio Olcese, as administrator of the estate of Louis Burger, was substituted as plaintiff upon the plaintiff's death. Judgment for plaintiff, and defendant appeals. Affirmed.

James Alva Watt and Watt, Miller, Thornton & Watt, all of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

LANGDON, P. J. This action was instituted by the plaintiff's intestate, Louis Burger, against the defendant for damages for personal injuries alleged to have been received by Burger through the carelessness and negligence of the defendant while Burger was in the employ of the defendant. Burger having died on the 20th day of July, 1915, the plaintiff above named, as administrator of his estate, was substituted as plaintiff. The defendant answered denying any carelessness or negligence and setting up as a separate defense that the accident and injury were due solely to the carelessness of Burger. The jury rendered a verdict for the plaintiff, and judgment was rendered thereon in the sum of $5,750, from which judgment the defendant appeals. Appellant contends that the judgment should be reversed on the grounds that the evidence is insufficient to justify the verdict and errors in law occurring at the trial.

[1] The appellant argues at some length the insufficiency of the evidence to justify the verdict. He admits that the evidence of Burger given on his direct examination is sufficient to raise a conflict in the evidence and consequently to preclude this court from reviewing the evidence; but contends that Burger contradicted this testimony on cross-examination and at the taking of his deposition before the trial, and that therefore this testimony is without weight, and that without this testimony there is no evidence to support the verdict of the jury.

We do not believe that contradictory statements of plaintiff, if there are any, necessarily nullify his testimony. The weight to be given it might be lessened by such contradictions, or the jury might reject the testimony entirely, but the fact that the jury found for the plaintiff conclusively shows that they accepted his statements on direct examination as true. But admitting that there are conflicts and contradictions in his testimony, and considering that portion of his testimony which is least favorable to his contention, it seems to us that this court would not be justified in reviewing the evidence under the record in this case. Construing the portions of plaintiff's testimony which are quoted in the briefs of appellant and urged as contradictory, most strongly against plaintiff, we shall proceed to analyze the testimony.

The facts are briefly these: The defendant was engaged in the lumber and mill business in San Francisco. Louis Burger entered his employ and operated a ripsaw machine for a few weeks, after which he was made the working foreman of the mill and was placed in charge of a machine known as a "sticker machine." His work consisted in feeding the boards into the machine. The boards would then pass under the revolving rollers and move toward the revolving head, which made approximately 3,200 revolutions a minute. To this revolving head were attached re-movable blades of various shapes, and these blades or knives would cut or plane or curve, as occasion required, the pieces of lumber passing under the revolving head. When Burger took charge of the machine, there were certain blades there for use in the operation of the machine. Burger tried all of the blades, but claimed that a certain type of thin hard blade among the blades provided was the only type of blade with which the quantity of work expected to be done could be obtained. It was this type of blade which flew off the head and inflicted the injury upon Burger. In his direct examination Burger testified that within a few weeks after he took charge of the sticker machine he informed the defendant that the head was defective and asked him to get a new one. He testified that he told the defendant that the head had nicks in it that made it unsafe. He also testified that he suggested that an iron cylinder head in which the blades drop in a slot be obtained, and that the defendant promised to get a new head for the machine. Burger also testified in his direct examination that on many occasions prior to the happening of the accident these blades, clamped as they were to the head, worked loose while the head was revolving and flew out some distance from the machine, and that Burger called the attention of the defendant to this, and that the defendant himself was present and saw the blades fly out on several occasions. Burger also testified that the defendant inquired of him how the danger from flying blades could be overcome, and that he (Burger) directed his attention to a new type of sticker machine which was being generally used by mills in San Francisco. The defendant asked if the old machine could not be changed so as to overcome the danger, and Burger told him that that was impossible. The defendant then told Burger that, when business got a little better, he thought he could afford the new type of machine. The accident happened on April 16, 1913. On the evening of April 15, 1913, the defendant told Burger that there was some "stuff" to be worked on the next morning and to force the work as much as possible. On the morning of the accident, Burger arrived at his work about 8 o'clock. He was using a thin hard blade in the machine, one which had been in use in the machine the previous afternoon. After operating the machine for about 20 minutes, the accident occurred. The blade became loosened and flew out and struck Burger in the head, inflicting serious injury upon him.

We now come to a consideration of the cross-examination of the plaintiff, which it is claimed by appellant completely destroys the force of the evidence upon the direct examination. It is first claimed by appellant that the cross-examination shows that Burger himself purchased the particular blade which caused the injury. The evidence only goes to the extent of showing that Burger, acting for his employer, purchased the particular blade which was used on the day of the accident to replace others of the same pattern which had become worn. It does not contradict the testimony elicited in the direct examination that the form of blade was among the original blades furnished Burger by the defendant, and that Burger was not responsible for its introduction into use in defendant's business.

As opposed to Burger's testimony on direct examination to the effect that the head of the machine was defective, appellant points out that Mr. Burger testified on his cross-examination that an inspector for an insurance company made an inspection of the mill, including the sticker machine by the operation of which the plaintiff was injured, and the inspector and Burger talked of what changes of importance should be made in and about the sticker machine to make it safe; and that Burger did not inform the inspector of any defects in the head or blades or hood of the machine. While, of course, the fact that he did not make known these defects to the inspector is persuasive of the fact that they did not exist to his knowledge at the time, it is not direct evidence upon that fact, and we cannot say that it is directly contradictory of the evidence given on the direct examination, that the defects did exist. It is entirely possible for the defects to have existed and yet for the plaintiff not to have mentioned them to the inspector. And it is the duty of an appellate court to reconcile apparent contradictions in evidence whenever possible.

Appellant next argues that the cross-examination shows that Burger had full authority to make purchases and was in full charge and control of the mill. There is some testimony from which the jury might have taken this view of the matter, but there is also testimony to the effect that Mr. Hardy was consulted, and that he authorized the purchase of all supplies when such purchases were made, and there is testimony in regard to numerous conversations between Mr. Burger and Mr. Hardy concerning changes in the revolving head and in the machine, from which the jury might have believed that Mr. Burger's authority in making purchases and changes was a very limited authority. Under these circumstances, we do not think that we can interfere with the implied finding of the jury in regard to this matter.

Appellant refers to certain testimony elicited upon cross-examination, showing, he contends, that Burger was fully informed of the defects in the machine and that he continued to operate the machine after such knowledge. This would go to the defense of assumption of risk if that defense had been open to the defendant at the time of the accident. However, the Roseberry Act (St.

1911, p. 796) was in force at the time of the accident, and abolished this defense. Therefore this testimony can be of no avail to appellant.

It is argued that the testimony shows that the knife which injured Burger came loose, not because of any defect in it, but because of Burger's failure to tighten the nut and bolt that held it in place. This question was one for the jury, along with the general question of Burger's negligence in all particulars connected with the accident. We cannot disturb its finding thereon. It is the province of the jury to draw deductions from testimony, but the appellant overlooks this and asks us to decide from the testimony that the accident could not have occurred if a certain blower or hood attached to the machine had been down at the time the blade flew out. The jury was taken to the scene of the accident, and examined the machine in question. They had before them evidence to the effect that the hood was merely for the purpose of catching shavings; that the hood was defective and difficult to pull down, that it interfered with the speed of the machine, and that Burger had been requested to hasten with the work, and other similar matters. This question is again a part of the larger question of whether or not Burger had been negligent, and, as stated before, we cannot interfere with the finding of the jury upon this subject, so long as there is any substantial conflict of the evidence.

We have discussed the evidence at this length in an effort to demonstrate that, even if we construe the conflicts in Burger's testimony most strongly against him, yet there remains a substantial conflict in the evidence which will preclude us from going into the questions involved. Upon appeal, in this state, if there is any evidence to justify the verdict it cannot be disturbed. There is no standard for the sufficiency of evidence to induce belief, and, unless the evidence so clearly preponderates against the verdict that the court cannot conclude that the verdict was the result of a due consideration of the evidence, the verdict will not be disturbed.

[2] Appellant contends that the verdict is against law in certain particulars specified in his brief. Upon these matters, we have found the evidence conflicting. The instructions of the court fully covered the points and stated correctly the law to the jury. We must assume that the jury followed these instructions, and found the facts to be such as to justify their verdict in the light of the law contained in the instructions. Furthermore, the jury was instructed, in conformity with the Roseberry Act, that the law of this state provides that in an action to recover damages for a personal injury sustained within this state by an employé, while engaged in the line of his duty or in the course of his employment as such employé in which a recovery is sought upon the ground of want of ordinary care of the employer or of any officer, agent, or servant of the employer, the fact that such employé may have been guilty of contributory negligence—if such negligence was slight, while that of the employer was gross in comparison—will not preclude a recovery, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé. We must assume in support of the judgment that if, as the appellant contends, the evidence in any particular did show negligence on the part of Burger, the jury made the proper deductions therefor in arriving at its verdict.

[3] A number of alleged errors in the admission and exclusion of evidence are urged. On direct examination Burger was explaining the different kinds of knives which might be used in sticker machines, such as he was operating at the time he was injured. Defendant objected to a question wherein Burger was asked whether the defendant had furnished a certain type of high-tempered steel blade, which the plaintiff had previously testified was used by almost every mill in San Francisco. Defendant objected to the question and answer for the reason that the witness had previously testified that that type of blade was so soft that, "if a man runs 100 feet with one of them without stopping to sharpen, he is absolutely lucky," and also because the witness had previously testified in relation to the same type of blade that he did not believe that the blades could have been bought at the time of the accident. Appellant urges that, by permitting the question to be answered by the witness, the court left it to the jury to infer that, because the blades referred to were not furnished, the defendant was guilty of negligence, and that such an inference was not warranted in the light of the fact that Burger himself had testified that the blades were soft and unsuitable for his work, and that it was unlikely that they could have been procured by the defendant. If this was error, it was not prejudicial to the defendant because the jury had before them all the statements of Burger as to the blades, the uncertainty of procuring them, etc. If it drew inferences from the testimony, we must assume it drew inferences based upon all the testimony presented, and that it considered the statements of Burger with regard to the impracticability of these blades and to the improbability of being able to procure the same, in connection with his statement that they had not been furnished by the defendant.

The legal propositions urged by appellant in arguing his objections to this and other evidence are the same propositions which he has urged elsewhere, and, as stated before, we believe these matters were fully and fairly covered by the instructions of the court.

[4] While Burger was testifying, the court asked him a question regarding the position of the blade or knife. Burger answered this question, and, after answering it, proceeded with a lengthy explanation concerning his adjustment and operation of the machine on the day of the accident. In this explanation he mentioned certain defects in the blower or hood of the machine which he stated prevented it from being pulled down. Defendant objected for the reason that the defects in the blower or hood were not relied upon in the complaint, and that this matter was not within the issues. A portion of the answer of Burger was responsive to the question and to the issues in the case. The motion was to strike out the entire answer, and we think it was properly denied. But apart from this reason, we think that the evidence was properly admitted. The amended complaint alleged:

> 'That on said April 16, 1913, said sticker with the said steel blades attached thereto was defective and dangerous and insecure and was unsafe and dangerous. * * *" And also that "through the carelessness and neglect of the defendant to furnish a safe sticker and blades therefor, one of said blades became detached and broke."

Here is an allegation of defective machinery, as well as a later allegation of special defects in the blades attached thereto. The case of Monaghan v. Pac. Rolling-Mill Co., 81 Cal. 190, 22 Pac. 590, holds that, where there is an allegation of defect in machinery, the cause of action is not limited to a defect in one part thereof. Where general allegations of negligence are followed by an enumeration of specific acts, the plaintiff will not be limited to proof of specific acts unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts. United States Exp. Co. v. Wahl, 168 Fed. 851, 94 C. C. A. 260; Traver v. Spokane St. Ry. Co., 25 Wash. 225, 65 Pac. 284; Roberts v. Sierra Ry. Co., 14 Cal. App. 193, 111 Pac. 519, 527.

[5] The appellant urges several objections to evidence on the ground that the questions and answers had the effect of informing the jury that an insurance company was interested in the litigation and consequently of prejudicing the jury in favor of the plaintiff. While this testimony may have had that effect, incidentally, it becomes unnecessary for us to decide whether or not errors occurred in its admission, for the reason that the defendant could not have been prejudiced, because the defendant himself introduced considerable evidence showing that an insurance company was interested in the case. It brought out upon cross-examination of Burger that an inspector for an insurance company had visited the mill and examined the machinery for defects; also, that a few days prior to the accident a letter was written to the insurance company stating that all the defects in the plant had been remedied.

There are several other specifications of error in the rulings of the trial court upon evidence, all of which we have examined and find them to be without merit. It is unnecessary to discuss them separately here. From an examination of the entire record it appears that substantial justice has been done between the parties.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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39 Cal. App. 316

EASTERN OUTFITTING CO. Inc., v. MYERS et al. (Civ. 2481.)

(District Court of Appeal, First District, Division 1, California. Dec. 30, 1918. Rehearing Denied by Supreme Court Feb. 27, 1919.)

1. PARTIES ⚿96(6)—SUIT AGAINST ONE BY FICTITIOUS NAME—WAIVER BY ANSWER.

By answering in his proper name, a defendant sued by the fictitious name of "Doe" waived plaintiff's failure to file formal amendment substituting the real name for that of Doe.

2. BAILMENT ⚿21 — SALES ⚿480(1) — CONDITIONAL SALE OR LEASE—DEFAULT—RIGHT OF OWNER.

Where furniture was either sold conditionally by an outfitting company to the lessee of a hotel, or else was leased by it to him, title remained in the outfitting company, and on default by the lessee it became entitled on demand to a return of the property, whosoever might have possession of it.

3. REPLEVIN ⚿10 — DEFENDANT'S POSSESSION OF CHATTELS THROUGH TENANT.

Possession of furniture by defendant's tenant was sufficient to sustain judgment in claim and delivery against defendant, where he was resisting delivery of the property to plaintiff owner.

Sturtevant, Judge pro tem., dissenting.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Eastern Outfitting Company, Incorporated, against W. A. Myers, S. L. Goldstein, and another. From judgment for plaintiff, defendant Goldstein appeals. Affirmed.

Lloyd S. Ackerman, of San Francisco, for appellant.

Wm. Tomsky, of San Francisco, for respondent.

BEASLY, Judge pro tem. [1] This is an action in claim and delivery for certain

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

furniture. The case was tried under an agreed statement of facts, and judgment given against the three defendants, Myers, Goldstein, and Gray, for a return of the property or for the alternative sum of $750 in case delivery could not be made. Gray and Goldstein were sued by fictitious names under apt allegations in the complaint. The court made an order requiring an amendment of the complaint substituting other names for the fictitious names. The complaint seems not to have been formally amended, but Gray and Goldstein both answered, and in their answers each recited that he was sued by a fictitious name. Counsel for Goldstein, who alone appeals, now claims that the judgment is invalid as to him because of the failure to file the formal amendment substituting his name for that of Doe. Manifestly, by answering in his proper name, he has waived the amendment, and, besides, the agreed statement of facts, which under our practice constitutes the findings, showed that Goldstein was the owner of the Altoona Hotel property, including the furniture, and that Myers was the lessee in possession of the hotel. Myers, while the tenant of Goldstein, bought the furniture from the plaintiff for the purpose of replacing and renewing articles of furniture in the hotel. Myers' lease bound him to keep the furniture in good and sound condition, and, according to the findings, it was further covenanted and agreed in the lease that all alterations, additions, and improvements which might be added to or placed in the leased premises should be the property of Goldstein and should be surrendered to him with the premises.

Myers' lease was terminated on the 1st day of March, 1917, and the property was thereupon let by Goldstein to Gray, who, on March 1, 1917, took possession of the hotel and of the property sought to be recovered by this action. Gray had no notice or knowledge that plaintiff claimed the property and took the property in good faith and for a valuable consideration and is now in possession of the property as the tenant of Goldstein. Before this action was begun the plaintiff demanded the property from the defendants and delivery was refused.

The character of the transaction between Myers and the plaintiff at the time Myers acquired the property is the vital question in this case. A part of the agreed statement of facts consists of certain memoranda, or printed or written documents signed by Myers and apparently executed by him to the plaintiff at the time of the acquisition of the furniture. These are in the form of printed receipts, many blanks upon which are not filled. They recite, among other things, that "the undersigned lessee acknowledges to have received on lease from the Eastern Outfitting Company," denominated the lessor, the furniture described in the complaint. There are several of these interesting memoranda, and in two instances they are varied by language other than that above quoted which characterizes the transaction. For instance, in one dated July 8, 1916, it was recited that Myers "has this day leased of Eastern Outfitting Company the following goods," and that "all payments therefor are to be made at said Eastern Outfitting Company's office," and the document further reads:

> "Should I fail to make any of the payments as specified, I hereby agree to surrender and return said goods to the Eastern Outfitting Company in as good condition as when received, customary wear by careful usage excepted. And I further agree * * * that no agreement of sale of said goods is implied, nor shall a sale of same be deemed valid without a written receipt from said Eastern Outfitting Company therefor."

There are also agreements to keep the goods insured against fire and to pay such insurance, in case of loss, to the Eastern Outfitting Company, who is again denominated the lessor, and to pay $100 down and $50 per month rental thereafter "until total is paid."

[2] Reading these papers all together, they must be held to either constitute a conditional sale of the goods to the defendant Myers, or a lease thereof to him; and it seems to us that it is not necessary to decide whether the goods were taken under a lease or were purchased conditionally. For in either instance the title remained in the plaintiff, and upon default by Myers the plaintiff became entitled, upon demand, to a return of the property, whosoever might have possession of it.

[3] Goldstein, who alone appeals, contends that he was not in possession of the property. But his tenant, Gray, was in possession, and it seems to us that possession by his tenant was sufficient to sustain the judgment against him, where he is resisting the delivery of the property.

Judgment is affirmed.

I concur: LENNON, P. J.

STURTEVANT, Judge pro tem. (dissenting). This is an action in claim and delivery for certain furniture. The case was tried under an agreed statement of facts and judgment given against the three defendants, Myers, Goldstein, and Gray, for a return of the property or for the alternative sum of $750 in case delivery could not be made. Myers, while the tenant of Goldstein, bought the furniture from the plaintiff for the purpose of replacing and renewing articles of furniture in the hotel. Myers' lease bound him to keep the furniture in good and sound condition, and, according to the findings, it was further covenanted and agreed in the lease that all alterations, additions, and improvements which might be added to or placed in the leased premises should be the property of Goldstein and should be surrendered to him with the premises.

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The character of the transaction between Myers and the plaintiff at the time Myers acquired the property is the vital question in this case. The plaintiff claims as lessor. Its claim in this behalf is founded on nine written instruments. Two of those instruments purport to be forms of leases, and seven of them purport to be forms of supplemental leases. Each purported lease consists of a printed blank, having inserted thereon in the appropriate blanks the description of the article, the price, and the quantity. Each lease contains many blanks not filled out, and neither one of the purported leases is signed by either the lessor or the lessee; neither one of these purported leases is a contract. Barber v. Burrows, 51 Cal. 404; Las Palmas Winery & Distillery v. Garrett, 167 Cal. 397, 139 Pac. 1077. The papers purporting to be supplemental leases were signed by both parties. Each paper purporting to be a supplemental lease contains the statement, "This lease is supplemental to a lease dated—;" the blank is not filled, and the paper does not refer to either of the papers which purport to be leases. The purported supplemental leases do not, therefore, include the purported leases and give efficacy to the purported leases, because of the absolute want of reference thereto. The reference to the purported lease being in blank, the reference is a nullity. The record shows there were at least two purported leases and there may have been more. The record contains nothing showing any fact or circumstance pointing to the particular date intended to be inserted in the blanks above mentioned. The purported supplemental lease is not in and of itself a lease. It contains no covenants whatever on the part of the lessor. Each one of the purported supplemental leases is in different language, but each one contains blanks not filled. No term is stated in any one of them. The monthly payments are not stated in any one of them. The total payments are not stated in any one of them. In short, they are nothing but receipts in which the lessee acknowledges himself to be lessee; whereas, in truth and in fact, the papers show that he is not lessee.

When the defendant Myers surrendered the Altoona Hotel to the defendant Goldstein, these articles were contained in the hotel and were at that time in Myers' possession, and he was exercising acts of ownership over them. Under these facts he was presumed to be the owner. Subdivisions 11, 12 and 20 of section 1963, Code Civ. Proc.; Bickerdike v. State, 144 Cal. 698, 701, 78 Pac. 270. The unexecuted lease and the purported supplemental leases do not contain any evidence overcoming such presumption. On the facts as contained in the agreed statement of facts the plaintiff was not entitled to recover.

In my opinion the judgment in favor of plaintiff should therefore be reversed.

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40 Cal. App. 146

LEMLEY v. DOAK GAS ENGINE CO. et al.

(Civ. 2702; S. F. 8504.)

(District Court of Appeal, First District, Division 2, California. Feb. 28, 1919. On Hearing in Supreme Court in Bank, April 28, 1919.)

1. WORK AND LABOR 🔑4(2)—IMPLIED CONTRACT.

A contract is implied to pay for services accepted under such circumstances as to raise a presumption that one accepting them expected, or ought to have expected, that they were to be paid for.

2. MASTER AND SERVANT 🔑358 — WORKMEN'S COMPENSATION ACT—ACCEPTANCE OF STATUTE.

Employés employed at a daily wage are not required, by section 7 of the Roseberry Act, to file daily with employer that they refuse to be bound by the compensation provision of act.

3. MASTER AND SERVANT 🔑358 — WORKMEN'S COMPENSATION ACT—EMPLOYÉS SUBJECT—ACCEPTANCE OF PROVISIONS.

Where deceased employé was hired at a daily wage before employer became subject to the compensation provisions of Roseberry Act, but employer became subject to it 17 days before the accident, the employé's failure to give notice of refusal to be bound by the act as provided in section 7 was not acceptance thereof on his part.

4. EVIDENCE 🔑506 — EXPERT TESTIMONY — MATTER IN ISSUE.

An expert witness may give an opinion on the very issue which a jury is to decide.

5. EVIDENCE 🔑554, 558(9)—EXPERT OPINIONS—HYPOTHETICAL ANSWER.

Hypothetical statement of the data need not be made in giving an expert opinion, except by witnesses not having personal observation of the data for their opinion, and in such case opposing party may bring out facts on cross-examination.

On Rehearing in Supreme Court.

6. Appeal and Error 🔑232(2)—Matters Reviewable—Objections—Sufficiency.

Objection to evidence that "the proper foundation had not been laid" fairly presented question of sufficiency of evidence as to expert qualification of witness.

7. Evidence 🔑474(11)—Opinion—Special Knowledge—Qualification.

A machinist who had personally observed facts connected with operation of an engine on day that its flywheel broke, and had been working on it all day and up to a few moments of the accident, and who had been making similar tests of engines for the defendant for about a month, and gave facts connected with the operation and testing of the engine, was qualified to give his opinion as to what caused the flywheel to break.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Laida F. Lemley, as administratrix of the estate of Clyde V. Lemley, deceased, against the Doak Gas Engine Company and the Pacific Foundry Company. From an adverse judgment, the first-named defendant appealed to the District Court of Appeal, which affirmed the judgment. Hearing denied by Supreme Court.

Geo. J. McDonough, of Oakland, and Stanley Moore and Geo. K. Ford, both of San Francisco, for plaintiff and respondent.

Fitzgerald, Abbott & Beardsley, of Oakland, and Chickering & Gregory, of San Francisco, for defendant and appellant.

Thomas, Beedy & Lanagan, of San Francisco, for defendant and respondent.

LANGDON, P. J. This is an appeal from a judgment for $7,500 in favor of the administratrix of the estate of Clyde V. Lemley, deceased, on account of the death of said deceased. There are two questions presented by the appeal. The first of these is: Was the deceased at the time of the accident which caused its death subject to the compensation provisions of the Roseberry Act?

The facts of the case, pertinent to this inquiry, are as follows: Lemley, the deceased, was employed by the foreman of the defendant Doak Gas Engine Company about the middle of January, 1913, as a machinist's helper. He continued to work daily at the plant of the defendant until March 8, 1913, the date on which he was killed. He had been hired at a daily wage. At the time of his employment his employer, the defendant herein, was not subject to the provisions of the Roseberry Act (St. 1911, p. 796). On February 19, 1913, which was 17 days before the day on which Lemley was killed, the employer elected to accept the provisions of this act. The deceased had not given to the defendant any notice that he elected not to become subject to the compensation provisions of the act up to the time of his death. It is conceded that the accident which brought about the death of Lemley arose out of his employment and occurred while he was acting in the course of his employment. The solution of the first point raised by appellant depends upon the proper construction of section 7 of the Roseberry Act. The significant portion of said section is as follows:

> "Sec. 7. * * * Any employé as defined in subsection (2) of the preceding section shall be deemed to have accepted and shall, within the meaning of section 3 of this act be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:
>
> "(1) The employer charged with such liability is subject to the provisions of this act, whether the employé has actual notice thereof or not; and
>
> "(2) At the time of entering into his contract of hire, express or implied, with such employer, such employé shall not have given to his employer notice in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employé shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act."

[1, 2] The appellant seeks to bring deceased under the compensation provisions of said act by the contention that the contract of hire under which he was working at the time of his death was entered into after February 19, 1913, the date when the defendant became subject to the act, and that therefore deceased's failure to give notice in writing that he elected not to be subject to the act should be deemed an acceptance thereof. In support of this position appellant argues that the original employment, being at a daily wage, was a contract from day to day under the presumption raised by section 2010, Civil Code, and ended at the close of the first day; and that under section 2012, Civil Code, such express contract was replaced on each subsequent day that Lemley worked for the defendant by an implied contract of hire upon the terms of the original express contract. And this argument brings appellant to a position where it contends that the contract under which deceased was working at the time of his death was an implied contract, entered into the day of the accident upon the same terms as the original express contract, and that the deceased was under the obligation of rejecting the compensation provisions of the act on the morning of the accident or of being bound thereby. Section 2012, Civil Code, is as follows:

> "*Renewal of Hiring.* Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service."

We think that in this case since the employé actually made an express contract with his employer, the fact that under section 2012 he may have automatically renewed it each day upon the same terms as those of the original contract by going to work each morning does not change the fact that the contract of employment was an express contract, and was made about the middle of January, before the defendant was subject to the provisions of the act. Section 2012 merely provides for a renewal of the original contract. We think that the language of the Roseberry Act, "At the time of entering into his contract of hire, express or implied, * * *" has reference to the original contract of hire, and not to any automatic renewal thereof. Appellant argues that since the words "express or implied" are used, the Legislature must have meant by the word "implied" the implied contract raised by section 2012, Civil Code, because appellant states:

> "It is hard for us to conceive of any transaction to which this term [implied] can be attributed unless it be such a contract as is implied in law by section 2010 and 2012, Civil Code."

It is not difficult for us to conceive of an implied contract which shall also be the original contract of hire.

> "A contract is implied to pay for services accepted by the defendant under such circumstances as to raise a presumption that he expected, or ought to have expected, that they were to be paid for." Parsons on Contracts, vol. 1, p. 4; Krieger v. Feeny, 14 Cal. App. 538, 112 Pac. 901.

Section 7 of the act refers to the time of "entering" into the contract, and not to the time of "renewing" it. We believe that the section of the act above quoted plainly contemplates that an employé, under such circumstances as those in the present case, shall have 30 days after the employer accepts the provisions of the act within which to elect whether he (the employé) will be bound by the act or not. We are strengthened in this view by the fact, as pointed out by respondent in her brief, that the construction contended for by appellant would make it necessary for all employés whose compensation was fixed at a daily wage to file a notice with their employer each morning that they refused to accept the provisions of the act or else they would be bound thereby.

Appellant quotes from Matter of Zany, 20 Cal. App. 360, 129 Pac. 295, to the effect that a statute should be construed so as to avoid "absurd and unjust consequences," and we think that to so construe this statute as to place upon employés employed at a daily wage, the duty of filing with their employer each morning a written notice that they refuse to be bound by the provisions of the act would be to bring about a condition which would be both absurd and unjust. This clearly was not the intent of the Legislature. The "contract of hire" mentioned in the section quoted, we think, means the contract of hire made at the time the employé began his employment. That contract may have been either express or implied.

[3] The act provides that where the contract of hire was made in advance of the employer becoming subject to the provisions of the act (as in this case), the employé shall become subject to the provisions of the act when he shall remain in the service of his employer without giving notice in writing that he elects not to be subject to the act for a period of 30 days after the employer has filed with said board an election to be subject to the act. In this case the employé remained in the employment only 17 days after the employer became subject to the act, and therefore said employé did not become subject to the provisions of the act, and the trial court properly so decided.

The second point raised by appellant is that the court erred in admitting the testimony of one Downie as to his opinion of the cause of the accident, without any statement of the basis for such opinion, and that such error was prejudicial to the defendant.

The amended complaint set out three charges of negligence. First, that the deceased was not given a safe place to work; second, that the defendant knowingly directed the deceased to perform a particularly hazardous task without advising him of its dangerous nature; third, that the gas engine which was being tested by deceased at the time of the accident was being tested in a negligent manner in that no provision was made for the cooling of the flywheel after the same had been heated by friction and no protection was furnished to the employé against a possible breakage. The defendant company was engaged in the manufacture of internal combustion gas engines. On the day of the accident, certain engines were being tested as to horse power, one of them being the engine which caused the accident. The manner of testing was as follows: A 2×4 scantling about 10 feet long was placed under the flywheel of the engine, and an employé was directed to exert an upward force on the end of the scantling, away from the engine. The scantling came in contact with the flywheel, and necessarily retarded the same. Whether or not the requisite power was developed was determined by the amount of resistance the wheel could withstand. During a part of the day this engine was tested by a leather belt applied around the flywheel. The engine had been tested all day. The accident occurred late in the afternoon. The test was being performed by James E. Downie, a machinist employed by the defendant company. The flywheel had on several occasions during the day become heated. Lemley, the deceased, was a helper to Downie, the machinist, and was assisting in testing the engine. The deceased was instructed by Downie to hold the scantling against the flywheel of the engine while Downie went outside to inspect the exhaust pipe. While the deceased was applying this pressure the flywheel broke into many pieces, and a piece struck Lemley on the head, causing his death.

The witness Downie was called for the plaintiff and, after testifying fully regarding all the facts and circumstances surrounding the accident, he was asked the question: "Will you state to the jury, what, in your opinion, caused that flywheel to break?" Defendant objected to this question as "incompetent, irrelevant, and immaterial and calling for the opinion and conclusion of the witness on a matter not properly the subject of expert testimony, and upon the further ground that the proper foundation had not been laid, and it calls for an answer to the very question to be passed on by the jury." The court overruled the objection, and the witness answered: "I think the heat done it. That is why I went up and felt the flywheel."

[4] The ultimate questions to be passed upon by the jury were whether or not the engine was being negligently tested by the defendant company and whether or not the employer had furnished the employé with a safe place to work. However, even if the question of what caused the flywheel to break had been the question before the jury, we think there would have been no objection to receiving the opinion of the witness upon the subject for that reason. "It is sometimes said that an opinion is not to be offered on 'the very issue before the jury,' but this, as once remarked (Snow v. R. Co., 65 Me. 231), would rather 'seem to be a very good reason for its admission.' If the witness can add instruction over and above what the jury are able to obtain from the data before them, it is no objection that he refers to the precise matter in issue, and if his opinion is superfluous it is inadmissible even if it concerns a matter not directly a part of the issue." Greenleaf on Evidence, vol. 1 (16th Ed.) p. 551.

[5] No objection was made to the qualifications of the witness as an expert, and the appellant now urges that the facts upon which the opinion was based should have been stated to the jury, so that the jury could judge as to the existence of such facts and be able to value the opinion accordingly, and that Downie in rendering his opinion really acted as one of the jury and usurped the functions of that body. The appellant quotes from several decisions in foreign jurisdictions to sustain his position. The precise question raised is carefully analyzed in volume 1, Greenleaf on Evidence (16th Ed.), at page 559. The statements there made seem to answer completely every argument of the appellant. It is pointed out that where a witness testifies by stating his inferences from facts not personally observed by him, it is necessary, for the sake of the jury in dealing with his testimony, that the data on which he bases his inference be specified by him and stated as assumed or hypothetical. It is also said that where the witness has personal observation of the facts upon which he bases his opinion, these facts can be stated by him upon his direct examination or upon his cross-examination as the observed facts upon which he bases his opinion. But if he has not had any personal observation of the facts and forms his opinion merely upon testimony listened to or upon other intimations of the facts, it would be impossible for the jury, merely from his statement of opinion, to know what were the data for the opinion. It would therefore be necessary for him, in stating his opinion, not only to specify the data for it (if this were all, it might be done by a question on cross-examination), but to specify them hypothetically, i. e., as only assumed by him to exist. This is for the purpose of allowing the jury to reject the opinion as having no application to the facts of the case where the jury finds that the hypothetical facts upon which it is based do not exist. Thus, the necessity for stating the data hypothetically arises because the witness has no personal knowledge of them, and because it cannot be known, before the jury's retirement, what data they will find to be facts, and therefore what opinions are applicable to the case as found by the jury.

The argument made by appellant that the witness in stating his opinion based upon the facts which he had observed was "usurping the functions of the jury" is discussed by the author of the standard work on Evidence above mentioned. He points out that this objection, which has been frequently urged, has no foundation whatever, as the court does not empower the expert witness to decide any facts, nor is the jury bound to accept his assertion.

The class of cases (from jurisdictions other than California) from which appellant quotes to support his contention is not overlooked by Mr. Greenleaf. In regard to them, we have the following language, which seems so peculiarly applicable to the present case that we have thought it proper to quote it here:

> "As a matter of academic nicety, it might be thought to follow what even a witness speaking from personal observation might be required to specify the data for the opinion he founds on his observation; and to this extent a few rulings have gone. But in such a case the direct

examination or the cross-examination sufficiently brings out the data that serve to found the opinion on; and it may be taken as a proper deduction of principle that the hypothetical statement of the data need not be made except by witnesses not having personal observation of the data for their opinion."

The witness Downie had personally observed the facts connected with the operation of the engine on the day of the accident; he had been working upon it all day and up to a few moments of the accident; he had been making similar tests of engines for the defendant company for about a month before the accident. He had testified quite fully as to all facts connected with the operation and testing of the engine, and both upon his direct examination and upon his cross-examination the facts appear upon which he must have based his opinion. If there are any which do not appear, the defendant might have brought them out upon cross-examination, and if it failed to do so, it may not complain.

In the case of People v. Le Doux, 155 Cal. 535, 102 Pac. 517, relied upon by appellant in its brief, the expert witness whose opinion was asked had made no personal observation of the facts. Necessarily, his opinion would have to be based upon hypothetical facts which should have been stated by him. In the case of Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac. 43 (the only other California case cited by appellant), the expert witness was asked his opinion of the value of certain stock, and the court held this to be error because "there were no facts stated, either real or hypothetical, as a basis for an intelligent opinion." This statement is clearly not applicable to the case at bar.

We find no error in the record, and the judgment is therefore affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

On Hearing in Supreme Court.

PER CURIAM. [6, 7] In denying the application for a hearing in this court after decision in the District Court of Appeal of the First Appellate District, we deem it proper to say that the statement in the opinion of the District Court of Appeal, to the effect that no objection was made to the qualifications of the witness Downie as an expert, is, in our opinion, erroneous, as the objection "that the proper foundation had not been laid" fairly presented the question of the sufficiency of the evidence as to the expert qualifications of the witness. However, we are of the opinion that there was sufficient evidence as to such qualifications, and in so far as this ground was concerned the objection was properly overruled.

The application for hearing is denied.

180 Cal. 291

In re MINOR'S ESTATE. (S. F. 8823.)

(Supreme Court of California. May 1, 1919.)

1. Taxation 🔑879(1)—Inheritance Tax—Transfer in Contemplation of Death.

Facts *held* not to support the finding of the trial court that transfers were made "in contemplation of death," within the meaning of St. 1905, p. 341, relating to inheritance tax, whether the statute be construed separately or with the aid of the amendments thereto.

2. Taxation 🔑879(1)—Inheritance Tax—Construction — "Contemplation of Death."

The phrase "contemplation of death," as used in St. 1905, p. 341, and the Inheritance Tax Act, § 27, as amended in 1911, means that expectancy of death which actuates the mind of a person on the execution of his will, and not merely that expectancy of death which actuates the mind of a person in making a gift causa mortis.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

3. Taxation 🔑893 — Inheritance Tax — Transfer Subject—Burden of Proof.

The burden of showing that a transfer is subject to a collateral inheritance tax is upon the state.

4. Taxation 🔑879(1)—Transfer Tax—Evidence of Transfer.

At the time of making an oral antenuptial agreement *held*, that the death of testator was not presently or even remotely contemplated by either party, and that the transfers in question were not made in contemplation of death or in lieu of a testamentary disposition, so that they were not subject to inheritance tax notwithstanding the antenuptial settlement was ratified by will.

Department 2.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

In the matter of the Estate of Isaac Minor, deceased. Appeal from a decree in probate fixing an inheritance tax upon personal property disposed of by deceased during his lifetime. Reversed.

Frank McGowan, of San Francisco, and G. W. Hunter, of Eureka, for appellant.

Robert A. Waring, Inheritance Tax Atty., of Sacramento, for respondent.

J. Paul Miller, Asst. Tax Atty., of Sacramento, for the State Controller.

LENNON, J. This is an appeal from a decree in probate fixing an inheritance tax upon personal property disposed of by the deceased during his lifetime.

The three contentions of the appellant are: (1) That the transfer in controversy was not made in contemplation of death; (2) that the transfer was not made in lieu of a testamentary disposition; and (3) that the transfer, having been made pursuant to a marriage settlement, did not fall within the purview of the then existing inheritance tax law.

The deceased, Isaac Minor, was married to appellant on the 5th day of August, 1908. He was then 78 years of age. He was a rich man. His former wife had been dead for many years. He had a large family of sons and daughters, all of whom were married and most of whom had families. Appellant was a comparatively young woman, 29 years of age, sensible and accomplished, and employed in the occupation of a practical nurse. Marriage was considered, discussed, and finally agreed upon by her and Isaac Minor. Thereupon an oral antenuptial agreement was entered into by and between them, wherein and whereby the deceased, in consideration of her marriage to him, agreed to give, and appellant agreed to take, the sum of $100,000 as a marriage settlement. At the time of making this agreement, Isaac Minor was actively engaged in attending to his business interests and was planning for the future. He was then and continued for many years thereafter in good health. He was active in the management of his affairs up to the time of his death in December of 1915.

The oral antenuptial agreement was partially performed by Isaac Minor on the day of his marriage to appellant, August 5, 1908, by the payment to her of the sum of $50,000 in cash. On February 16, 1912, over three years after the marriage, the execution and existence of the oral antenuptial agreement and its previous partial performance were evidenced by a written instrument wherein appellant acknowledged the prior payment of $50,000 in cash for and on account of the antenuptial agreement and also the transfer and indorsement to her by Isaac Minor, on the day of the execution of the said written instrument, in full and final performance of the oral antenuptial agreement, of a fully secured promissory note in the sum of $50,000 originally executed and made payable to Isaac Minor. This instrument contained a further clause wherein and whereby the appellant promised on behalf of herself, her heirs, etc., in consideration of the full performance of the antenuptial agreement, to "release and forever discharge the said Isaac Minor, Sr., his heirs, executors, and administrators, of and from all manner of actions, causes of actions, suits, debts, dues, sums of money on account of any community interest which she has or may have by descent or inheritance in or to the estate of Isaac Minor, Sr., either in law or in equity. * * *" The whole of Isaac Minor's estate at the time of the marriage and at the time of his death was separate property and subject to his testamentary disposition. The $100,000 paid to the appellant in pursuance of the antenuptial contract was at all times held and controlled by her as her separate property.

Early in 1915, Isaac Minor executed his last will and testament, in which he stated:

> "I give and bequeath to my wife Caroline Minor * * * personal property as follows * * * she having received before this time one hundred thousand ($100,000) dollars in money as her share of my estate."

[1, 2] Upon the foregoing facts, which are practically undisputed, the court below based its findings that the transfers to appellant by Isaac Minor, aggregating in cash and its equivalent $100,000, were made without an adequate and valuable consideration, in contemplation of death, and in lieu of a testamentary disposition within the meaning of the inheritance tax laws of the state in force and effect on the dates of the said transfers and on the date of the decedent's death. From these findings the conclusion of law was that the transfers in question were covered and controlled by, and therefore taxable under, the inheritance tax law (Stats. 1905, p. 341). That law prescribed the imposition of a tax upon the transfer of any property, real, personal, or mixed, "when the transfer is of property made by a resident, or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale, assignment or gift in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death."

The facts hereinbefore narrated do not support the finding of the trial court that the transfers in controversy were made in "contemplation of death" within the meaning of the statute just quoted. This is so whether the statute be considered and construed separately and solely in the light of its own language or with the aid of the amendments thereto wherein the phrase "in contemplation of death" is defined to mean that expectancy of death which actuates the mind of a person on the execution of his will, and not merely that expectancy of death which actuates the mind of a person in making a gift causa mortis. See section 27 of the Inheritance Tax Act as amended in 1911 (St. 1911, p. 726). That is to say that, when measured either by the commonly accepted or by the statutory definition of the phrase "in contemplation of death," the transaction here involved cannot, upon the undisputed facts of the case, be fairly brought within and subjected to the provisions of the inheritance tax act as it existed and was in force and effect when the transaction was initiated and finally consummated.

[3, 4] The burden of showing that a transfer is subject to a collateral inheritance tax is upon the state. In re Wadsworth's Estate, 100 Misc. Rep. 439, 166 N. Y. Supp. 716. Fairly construed, the evidence adduced upon

the whole case falls far short of showing that at the time of the making of the oral antenuptial agreement the death of Isaac Minor was presently or even remotely contemplated by either party to the agreement. The state attempted to support the burden of making a case by proof of the oral antenuptial agreement and of the circumstances preceding, attending, and following the making of the agreement. But the agreement itself does not disclose, nor do any or all of the circumstances taken singly or collectively indicate, that the transfers in question were made in contemplation of death and in lieu of a testamentary disposition. Manifestly the marriage of Isaac Minor to the appellant was not a deathbed marriage. At the time he made the agreement to marry, on the day of the marriage, and for several years thereafter, Isaac Minor was not only in good health, but, despite his years, was physically and mentally active in the successful management of his extensive business interests. The transaction at its inception and up to the time of the partial performance of the antenuptial agreement on the day of the marriage certainly contains no suggestion that Isaac Minor was then contemplating anything but matrimony. In view of his then admitted good health and physical and mental activity, it would indeed be, to say the least, incongruous that he should have contemplated death and matrimony at the same time. It may, perhaps, be said that Isaac Minor was contemplating death when, some 3½ years after his marriage and the partial performance of the antenuptial agreement, he saw fit when making the final payment under that contract to insist, not only upon an acknowledgment in writing of the full performance of the contract, but also upon a release of his estate from any and all claims which appellant otherwise might have had thereto. Certain it is that Isaac Minor was contemplating death when he made his will. But it must be remembered that both of these instruments were executed several years after the making and the partial performance of the antenuptial contract. Clearly, therefore, these instruments cannot be held to be an integral part of the antenuptial agreement or anything more than an acknowledgment and affirmance of that agreement. Granting that at the time of the execution of the instruments Isaac Minor was contemplating death, this fact alone is not sufficient in and of itself to show that he was contemplating death when he entered into the antenuptial agreement.

It nowhere affirmatively appears that the oral antenuptial agreement involved the relinquishment of any right which appellant might have had in the estate of Isaac Minor as a result of her marriage to him. Consequently, if Isaac Minor had died between 1908 and 1912, appellant, in the absence of any other agreement to the contrary, might have claimed the sum of $50,000 from his estate upon the theory that it was due to her pursuant to the terms of the antenuptial agreement, and, obviously, if such a claim had been allowed and paid in satisfaction of a contract supported by the perfectly valid and valuable consideration of marriage, it could not have been subjected to a collateral inheritance tax. But even if it could be said that the evidence clearly and affirmatively reveals the fact that the oral antenuptial agreement was made and based in part upon the consideration of the appellant's relinquishment of all right in the estate of Isaac Minor, nevertheless, the evidence upon the whole indicates clearly enough, we think, and practically without conflict, that the marriage was the primary and controlling consideration for the making and ultimate consummation of that agreement.

Confirmatory of these conclusions is the added fact that the transfers in controversy took effect in full and unqualified possession and enjoyment during the lifetime of Isaac Minor, that admittedly being the intent and purpose of the antenuptial agreement. It is to be noted that when making an antenuptial agreement the parties doubtless may and often do consider the fact that certain property rights result by law from the assumption of the marriage relation. Especially is this so with respect to those rights which take effect upon the decease of one of the spouses. In such a case, the parties desiring a definite and final arrangement of property rights enter into an agreement settling and determining those rights. Obviously, the purpose of such a contract is to effect a disposition of the property as an end in and for itself. It is not made as a condition precedent to obtaining some other and independent benefit. When such a settlement assumes to fix the rights of one spouse in the estate of the other upon his or her death, or in effect to pass property in præsenti in lieu of testamentary or intestate disposition, the transfers involved therein can fairly be said to have been made in contemplation of death. It was this kind of antenuptial contract which was interpreted and the transfer thereunder held subject to tax in People v. Estate of Marshall Field, 248 Ill. 147, 93 N. E. 721, 33 L. R. A. (N. S.) 230, and in People v. Union Trust Co., 255 Ill. 168, 99 N. E. 377, L. R. A. 1915D, 450, Ann. Cas. 1913D, 514. But such, however, is not the situation where, as here, the parties primarily contemplate matrimony and a marriage settlement as a condition precedent thereto. Here the controlling consideration of the transfer was the marriage, a circumstance which necessarily excludes the idea that a desire to make a testamentary disposition was in any substantial sense a direct cause of the transfer. That such is the case may be demonstrated by a brief recapitulation of the facts. In 1908 Isaac Minor was 78 years of age. He was a wealthy man. His wife had been dead many years. His children had grown up, married, and had absorbing interests of their own. Appellant was a comparatively young woman of 29, a nurse by profession. She knew that she was making some sacrifices. Isaac Minor knew that he was getting a sensible and accomplished young woman to be his wife, to attend to his domestic affairs, and to care for him in his declining years. It may be admitted, as asserted, that the marriage would not have taken place had Isaac Minor been a poor man. That fact, however, would do nothing more tnan tend to show that appellant rightfully demanded some benefit to balance the sacrifice which youth was making to old age. Although Isaac Minor was a wealthy man, all of his property was and would continue to be his separate property subject to his absolute power of disposition. He would no doubt be pressed by the claims of a large family. In these circumstances, it was only fair and proper that appellant should have been provided for by a sufficient marriage settlement.

Concluding as we do that neither the antenuptial agreement itself nor the shown and undisputed circumstances preceding, attending, and following its making, indicate that the transfers in question were induced substantially or at all by any thought of death by either party to the agreement, we are constrained to hold that those transfers were not made in contemplation of death and in lieu of a testamentary disposition within the meaning of the inheritance tax law.

The decree appealed from is reversed.

We concur: MELVIN, J.; WILBUR, J.

180 Cal. 275

HANSON et al. v. CHOYNSKI. (S. F. 8700.)

(Supreme Court of California. April 28, 1919.)

1. CORPORATIONS 🔑619—DISSOLUTION—OFFICERS AS TRUSTEES.

Civ. Code, § 400, as amended by St. 1905, p. 563, making directors or managers of a corporation at the time of its dissolution trustees of the creditors and stockholders and members of the corporation with full power to settle its affairs, the Legislature contemplated that the act would apply to corporations dissolved for nonpayment of license taxes.

2. CORPORATIONS 🔑619 — DISSOLUTION — CREDITORS' SUITS—CONDITIONS PRECEDENT.

Where a corporation has been dissolved for nonpayment of its license tax, and its affairs are under the control of trustees pursuant to Civ. Code, § 400, as amended by St. 1905, p. 563, the creditors must, before bringing an equitable suit against the trustees to compel the application of funds to their claims, seek the usual remedies at law.

3. CORPORATIONS 🔑548(1)—INSOLVENCY AND DISSOLUTION — JURISDICTION OF EQUITY—RIGHTS OF CREDITORS.

Where the directors of an insolvent corporation appropriated funds held in trust for all the stockholders to the payment of their own claims, and where relief has been unsuccessfully sought in the bankruptcy court, which was the only legal tribunal able to defeat such a preference, creditors may invoke the interposition of equity.

4. CORPORATIONS 🔑545(1)—INSOLVENCY AND DISSOLUTION — PREFERENCE TO DIRECTOR—RIGHTS OF CREDITORS.

Where a director who is also a creditor of an insolvent corporation appropriates funds held by him for the benefit of all creditors and stockholders for the payment of his own claim, such application is void as against other creditors, since he cannot use his position to obtain a preference for his own claim.

5. CORPORATIONS 🔑548(7)—INSOLVENCY AND DISSOLUTION — CREDITORS' BILLS—PARTIES.

Where one of three trustees of an insolvent corporation has applied money held by him in trust for all the creditors and stockholders to the payment of his own claim, the other two directors are necessary parties to a bill by a creditor to subject all the preference to the general right of all the creditors, in view of Civ. Code Proc. § 389, and St. 1907, p. 746, § 10.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by E. J. Hanson and others against Herbert Choynski. Judgment for defendant, and plaintiffs appeal. Reversed and remanded, with directions.

Vogelsang & Brown and Wm. M. Cannon, all of San Francisco, for appellants.

Herbert Choynski, of San Francisco (James Raleigh Kelly, of San Francisco, of counsel), for respondent.

WILBUR, J. Plaintiffs are creditors of the Olson's Market, Incorporated. In September, 1907, it appeared that the corporation was insolvent, and negotiations were in progress between the defendant and one I. I. Brown, representing the creditors, wherein it was sought to settle the claims of the creditors at 30 cents on the dollar. In order to consummate these negotiations it was necessary to sell the property of the corporation, and, in addition thereto, for the stockholders to raise a certain amount, which, together with the amount for which the property was sold, would aggregate a sufficient amount to pay 30 cents on the dollar. While these negotiations were pending, on November 30, 1907, the charter of the Olson's Market, Incorporated, was forfeited for nonpayment of its license tax. Subsequent thereto two sales of the property of the corporation were effected which had been in contemplation as a part of the proposed settlement. Stock and fixtures were sold for $1,598, and a check therefor was drawn in favor of the corporation. This check was indorsed, "Herbert Choynski, trustee," and collected by the defendant, who was a director at the time of the dissolution of the corporation. Mr. Olson, one of the other directors, sold stock of goods for the sum of $467, and retained the possession thereof. There was at the time of the dissolution one other director, there being three in all, named H. B. Hawkinson. The total amount of indebtedness due for merchandise is alleged by the defendant to be about $10,000. The defendant claimed that the corporation was largely indebted to him, and in his answer states that the amount of that indebtedness was $19,000. It was believed by the creditors that the proceeds of these sales of the property of the corporation were being held to pay their claims, and that the delay was caused by the failure of the stockholders to raise the additional money required to completely liquidate the affairs of the corporation. Defendant subsequently refused to pay over the money in his hands, or any part of it, for division among the creditors of the corporation. Bankruptcy proceedings were thereupon begun against the corporation, upon the theory that there had been an illegal preference in favor of the defendant as a creditor of the corporation. The defendant, acting as attorney for the Olson's Market, Incorporated, filed an answer to the petition in bankruptcy, verified by him as an attorney, containing the following denial:

> "Denies that the said respondent did convey or transfer, or did permit to be conveyed or transferred to Herbert Choynski or any other person, the sum of $1,598, or any other sum. the property of said respondent, with intent to hinder, delay, or defraud the creditors, or either of them, of said respondent."

It was also alleged in said answer that the corporation had been dissolved November 30, 1907. It denied specifically any transfer of its property, "to wit, the sum of $1,598 or any other sum to one of its creditors, Herbert Choynski, or to any other person, with intent to prefer said Herbert Choynski, or any other person, as a creditor over its other creditors, or either of them." Upon the trial before the referee, according to the testimony of Brown and the referee, the defendant Herbert Choynski, testified that he had received the check for $1,598 in trust for the creditors, and that he did not receive it, and was not holding it adversely to the creditors. In his answer in this case the defendant alleges that the corporation was indebted to him in the sum of $19,000; that it was agreed between himself and Henry Olson, one of the other trustees, that this sum of $1,598 should be applied upon the defendant's claim, but subsequently "$1,000 of said sum was returned to the said Henry Olson for the reason that it was believed that the same would be considered a preference." On the trial the defendant testified with relation to the matter as follows:

> "We had this bankruptcy proceeding under way, and I told him, I said, 'Olson, our bankruptcy court cannot adjudicate this corporation a bankrupt, because this corporation was dead, and they have no right to take any action with respect to a dead corporation any more than they have with respect to a dead person. They will never be able to adjudicate this a bankrupt, and the court will not make that adjudication.' Now I have been the only friend this corporation has had. I explained to him that I was entitled to $500 of the money anyhow, even if there was an adjudication of bankruptcy. I would be entitled to have paid the costs that were paid by me and my $500 attorney's fees, and no bankruptcy court would be permitted to adjudicate that question, and this other $1,000 I ought to be able to get that and use and apply on there, because if the whole thing did go into bankruptcy they wouldn't get one cent on the dollar, and it wouldn't be distributed among enough people to make it worth anybody's while. He said, 'All right, I would rather have you have it than anybody else.' I said, 'All right, then if anything comes up after this you will understand that you have given me permission to take it,' and he said, 'Yes.' That is all that took place at that time. That took place between me and Mr. Olson at the very time the Olson's market was charged with giving me a preference of $1,598.
>
> "Q. You carried out the preference then while that proceeding was going on? A. Yes; I did. I tried in every way to get it; I will tell you that candidly.
>
> "Q. You waited until you testified in the bankruptcy proceeding that there was no preference, and then you went and had a preference after testifying and before the proceeding was decided? A. I guess that is it."

The court in this action found:

> "That in August, 1909, the defendant agreed with his cotrustee, Henry Olson, that the defendant should apply the sum of $1,598 as part payment on account of defendant's own claim against Olson's Market, Incorporated, exceeding said sum by a considerable amount, and the defendant did then so apply said sum; and thereupon he paid over to said Olson $1,000 thereof."

The court further found that the bankruptcy proceedings were begun April 14, 1908, upon the ground of a preference of defendant as a creditor in the sum of $1,598, and upon the ground of a transfer to the defendant of the sum of $1,598, with intent to prefer him as a creditor, and upon no other ground, and that, after a full hearing of the petition, in the month of August, 1910, "said court adjudicated that none of the alleged acts aforesaid had been committed," and thereupon dismissed the said bankruptcy proceedings. Thereafter plaintiffs brought this proceeding on behalf of themselves and other creditors, praying, among other things:

> "That the sum of $1,598, with interest, be paid by the defendant to the clerk of the court for the benefit of plaintiffs and such other creditors of the Olson's Market, Incorporated, as are entitled to participate therein, and that the funds be ordered distributed proportionately according to the respective amounts of their valid claims among the creditors of said Olson's Market, Incorporated, entitled legally to participate therein, and for general relief."

The defendant in his answer and upon the witness stand denied that he was a director or trustee of the defunct corporation, but the finding of the court was to the contrary.

The rights of the parties depend in large measure upon the statute concerning the effect of a dissolution of a corporation in force at the time of such dissolution. Judgment was for the defendant, and plaintiffs appeal. Appellants predicate their right to recover in this form of action on the theory that immediately upon the dissolution of the corporation the directors became trustees for the stockholders and creditors of the corporation, under section 400, Civil Code. They, therefore, claim the aid of a court of equity in the administration and distribution of the trust. The statute providing for a forfeiture of a corporate charter for failure to pay the license tax (Stats. 1907, p. 746, § 10a) declares (italics ours):

> "In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation, whose charter may be so forfeited, * * * are deemed to be *trustees of the corporation and stockholders or members of the corporation* whose power or right to do business is forfeited and have full power *to settle the affairs of the corporation*, and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of the state by any person having a claim against any of said corporations."

This statute does not in express terms make the directors trustees for the creditors. However, section 400 of the Civil Code, as it stood at the time of the dissolution of the corporation, provided:

> "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation."

[1] It is claimed that these two statutes must be construed together, and when so construed the directors are trustees for the creditors as well as the stockholders. The power to manage the property of the defunct corporation, and to settle its affairs, necessarily involves the payment of the creditors' claims, where there is sufficient property, and the creditors are therefore necessarily interested in the conduct of the trustees. The question of the method of enforcing their claims, however, is more difficult, and depends upon the legislation on the subject. In order to correctly understand the rights of a corporation, its stockholders and creditors, in case of dissolution for nonpayment of license tax, it is necessary to consider the history of this legislation. The original statute imposing a license tax was approved March 20, 1905. Stats. 1905, p. 493. It provided for the forfeiture of the charters of all corporations failing to pay the license tax (section 6), and declared that any person who shall exercise "any powers under the charter of any such corporation after the same shall become forfeited to the state, shall be guilty of a misdemeanor." No provision was made therein for settling the affairs of such a dissolved corporation, or disposing of its property. To provide for this defect, the Legislature the next day (March 21, 1905) repealed section 399 and amended section 400 of the Civil Code to read as above quoted. Stats. 1905, p. 563. This amendment merely substituted "a" for "such" before the word "corporation." The reason for the change was that section 399, Civil Code, stated that the dissolution of corporations, if voluntary, was provided for by the chapter on dissolution of corporations (Code of Civil Procedure, tit. 6, pt. 3), and involuntary by the chapter on quo warranto (chapter 5, tit. 10, pt. 2, of the Code of Civil Procedure); consequently the words "such corporation" in section 400, Civil Code, might be construed to apply only to corporations dissolved by one of these two methods. It is obvious, therefore, that the Legislature contemplated that section 400, Civil Code, would apply to corporations dissolved for nonpayment of license tax, and that it was amended as a part of the general scheme of dealing with corporations so dissolved. The effect of this legislation was to destroy the corporation so that no suit could be brought against it, and that a judgment secured in a suit prosecuted against the corporation, if before or pending the suit the corporation was thus dissolved, was void. Newhall v. Western Zinc Mining Co., 164 Cal. 380, 128 Pac. 1040; Crossman v. Vivienda Water Co., 150 Cal. 575, 580, 89 Pac. 335.

> "It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing cor-

poration than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. * * * Statutes similar to our section 400 of the Civil Code above quoted do not have the effect of continuing the existence of the corporation as cestui que trust, or otherwise, so as to render it capable of defending actions in its corporate name." Crossman v. Vivienda Water Co., supra.

The effect of this legislation was very far-reaching and disastrous. Corporate charters were forfeited without any knowledge on the part of the creditors of such forfeiture. The Governor of the state, on June 1, 1906, in his call for an extra session of the Legislature, specified as one of the purposes of such session the amendment of the statute of 1905, "so as to increase the license tax on such corporations, * * * and provide for the revival, under certain conditions, of the corporations which have not paid their tax, and make provision for settling the affairs of corporations where said license tax has not been paid. * * *" The Legislature, on June 13, 1906, at its special session, passed an act amending the law of March 20, 1905 (Stats. 1907, Extra Sess. 1906, p. 22), by amending every section thereof excepting the section providing for appropriations, and adding two new sections, 10a and 10b. Section 6 provided that by payment of the delinquent license tax between July 1, 1906, and September 6, 1906, with penalties therein provided, the corporation "shall be relieved from the forfeiture prescribed by the act, and all persons exercising the powers of any such corporation making such payment shall be relieved from the provisions of section nine of the act." Section 10a was added in the same terms as above quoted from the amendment of 1907 (Stats. 1907, p. 745; Extra Sess. 1906, p. 22). The amendments of 1907 (Stats. 1907, p. 745) further defined the rights of creditors upon such dissolution, by adding two provisos, as follows:

> "Provided always that no action pending against any corporation shall abate thereby, but may be prosecuted to final judgment and the same may be enforced by execution with the same force and effect and in like manner as though no forfeiture has occurred; and
>
> "Provided further: That where judgment has been entered against any corporation prior to forfeiture under this act, that notwithstanding execution may be issued thereon and the property of said corporation, or which may come into the hands of any trustees for it may be levied upon, seized and sold to satisfy the same with like force and effect as though such forfeiture had not occurred."

By the various amendments to the law of 1905 (Stats. 1905, p. 493), opportunity was given to pay the tax and thus revive the corporation. Stats. 1907, Extra Sess. 1906, p. 22; 1907, p. 745; 1909, p. 454; 1911, p. 1094; 1913, pp. 513, 680; 1915, p. 422; 1917, pp. 371, 378. So that, while the Legislature of 1905 contemplated the complete dissolution and settlement of the affairs of the corporation, all the subsequent legislation on the subject, beginning with the special session of 1906, looked to the revival of the corporation. The rights of the creditors to seek the aid of a court of equity to supervise and direct the trustees must be determined in the light of this policy. The creditors have the right to sue the trustees (section 10a, Stats. 1907, p. 746) to recover their claims. In Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161, this court had under consideration the right of a stockholder to force a sale of the very extensive and valuable property of the corporation for the purpose of winding up the affairs of a defaulting corporation. It was there held that the purpose of the law was to vest the trustees with a discretion as to the sale which could not be controlled by a court of equity, except in case of an abuse of power. The court there said:

> "In order to justify the interference of a court, says the Supreme Court of Alabama, the mere fact of dissolution, or forfeiture of the charter, is not enough; the facts appearing 'must be of a character to show that the trustees are incompetent, or unfaithful, or are mismanaging the property to the injury of the complainant, or are without power and authority to subserve some peculiar interest or right of the party complaining and that he is being injured thereby.' Weatherly v. Capital, etc., Co., 115 Ala. 172, 22 South. 142. This language was used with reference to an application for the appointment of a receiver to take charge of and administer the corporate assets, as also was the language in the Havemeyer Case, but the same principles apply to any application for the intervention of the judicial power to supersede, supervise, or control the powers conferred by the statute upon the trustees."

[2, 3] It follows, therefore, that the creditors must ordinarily seek the usual remedies at law, and the question in this case is whether sufficient facts are stated to justify an application to a court of equity, and if not whether a cause of action at law is stated. It appears from the complaint that one of the directors of a defunct insolvent corporation, in custody of its funds as such official of the company, seeks to appropriate the major part of its assets to his own claim, in violation of his duty to the corporation, its stockholders and creditors. Title Ins. & Trust Co. v. Cal. Development Co., 171 Cal. 173, 214, 152 Pac. 542, citing with approval Morawetz on Corp. § 787. The findings are to the effect that two of the three directors consented to such an arrangement, but that subsequently $1,000 was returned to the custody of trustee Olson. Without undertaking to define the duties of such directors to creditors, it is clear that the directors cannot, with due regard to their duties to stockhold-

ers and to creditors, pay themselves from the funds held in trust for all the stockholders. Where it is apparent, as it is here, that the directors or trustees are using their power and authority for the purpose of benefiting themselves at the expense of both creditors and stockholders—for the stockholders are interested in having the best terms possible made with the creditors—and where relief has been sought in the only legal tribunal that could defeat such a preference, and where the corporation is insolvent, the interest of the creditors in the fund is sufficient to justify the interposition of a court of equity at the instance of a creditor.

[4] Plaintiffs in this action sought to invoke the power of a court of equity, praying, among other things, "That the said defendant, Herbert Choynski, be declared and held trustee of said sum of $1,598 * * * for the benefit of plaintiffs and any and all creditors * * * who come in this action and establish their claims. * * *" Notwithstanding this prayer and that the court found the fact to be that $598 was in the possession of the respondent under circumstances which charged him with a trust in favor of the creditors and stockholders of the corporation, the judgment rendered was that plaintiffs take nothing and defendant have judgment for costs. Such a judgment was erroneous. The complaint was framed in three counts. Most of the allegations in each were the same, the allegations of the first count being incorporated into the second and third counts by reference. In the first count it is alleged that there were three trustees of the corporation, one of whom was the respondent, at the time of the dissolution. In the last count it was alleged that "one Henry Olson was the only director of said corporation in office and engaged in the management of its business and affairs." In the first count it was alleged that the respondent agreed with his cotrustees Olson and Hawkinson that he would apply the sum of $1,598 received by him in payment of the claims of the creditors of the corporation, while in the last count it was alleged that this agreement was made between respondent and Olson, as the only director of the corporation in office and who was managing its affairs at the time of its dissolution. It appeared from the evidence to the satisfaction of the trial court that there was no specific agreement on the part of the respondent to use said money in payment of appellants' claim, and that the money was held by him as one of the three trustees of the corporation. Respondent's claim that he held the money in his own right by virtue of his agreement with Olson that the amount should be applied to respondent's indebtedness is not tenable, for a director, "Who is at the same time a creditor, is precluded from using his position as director to obtain a preference over other creditors in the payment of his own claims." Title Ins., etc., Co. v. California Dev. Co., supra, 171 Cal. 214, 152 Pac. 559. Hence the application of the money in the hands of the respondent in payment of his own claim was void, and the finding of the court in that regard is in legal effect a finding that the $598 was held by the respondent as one of the three trustees of the defunct corporation.

[5] In order to determine the controversy before the court, to wit, the ownership of the $1,598, $598 of which was conceded to be in the hands of the respondent, it was therefore necessary that the other two trustees be joined as codefendants. It was the duty of the court, if no application was made therefor, to require the pleadings to be amended so as to bring in the other two trustees, for there could be no adjudication binding upon the property of the corporation in their absence. Code Civ. Proc. § 389; Grain v. Aldrich, 38 Cal. 514, 522, 99 Am. Dec. 423; O'Connor v. Irvine, 74 Cal. 435, 443, 16 Pac. 236; Alison v. Goldtree, 117 Cal. 545, 550, 49 Pac. 571; Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. (N. S.) 275. The defendant alone would not have authority, by default or otherwise, to bind the property of the corporation. Newhall v. Western Zinc Min. Co., 164 Cal. 380, 383, 128 Pac. 1040; Stats. 1907, p. 746, § 10a.

The trial court made no finding as to the statute of limitations. It appears from the record that on September 25, 1907, the Olson's Market, Incorporated, acknowledged plaintiffs' claims in writing. The original complaint was filed September 16, 1910. If these facts are true, the four-year period for commencing an action after such acknowledgment had not then elapsed. The evidence on a new trial, however, may be different, and we need not, therefore, pass on the question.

The judgment is reversed, and the trial court is directed to grant plaintiffs leave to amend their complaint to join the other trustees of the Olson's Market, Incorporated, as codefendants, and to make other appropriate amendments to determine the rights of the plaintiffs in and to the fund in the hands of the defendant.

We concur: MELVIN, J.; LENNON, J.

SHAW, J. I concur in the judgment. The complaint and the findings showed that Choynski held $598 as trustee for the creditors and stockholders of the defunct corporation; that he denied the trust and applied the money to his own use, and that the two other directors were also trustees to administer and settle the affairs of said corporation, bound to the same duties as Choynski. The court had full authority in a suit against Choynski alone to give judgment declaring that he held that sum as such trustee. But it could not go further and direct the administration and distribution of the trust funds, unless the two other trustees were parties to the suit.

Under these circumstances, if the plaintiffs or Choynski had asked to have the other two trustees made parties, it would have been the duty of the court to grant the application, have the parties brought in by proper amendment, proceed to determine the entire controversy, and order that the trust be settled. The cases cited in the opinion of Justice Wilbur so declare. But I do not think they are authority for the proposition that the court was bound of its own motion to require the pleadings to be amended so as to bring in the other two trustees. In other words, if the court below had, upon the complaint and findings, given judgment that Choynski had $598 in his possession, and that he held the same in his capacity as one of the trustees of the defunct corporation, for the benefit of the stockholders and creditors, including the plaintiffs, I do not think this court would be justified in reversing the case because it did not, of its own motion, go on and have the other parties brought in so as to give relief which no one had prayed for. In all other particulars I agree with the opinion of Justice WILBUR.

We concur: LAWLOR, J.; OLNEY, J.

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180 Cal. 287

SAX v. CLARK et al. (L. A. 4779.)

(Supreme Court of California. May 1, 1919.)

1. Lis Pendens 🔑16—Names of Parties.

Under Code Civ. Proc. § 409, the names of all parties to an action are essential to a proper lis pendens.

2. Lis Pendens 🔑3(4)—Necessity—Foreclosure of Liens.

A lis pendens is not required in a suit for the foreclosure of liens filed within 90 days, under Code Civ. Proc. § 1190, and a purchaser of the land during the pendency of such a suit must be held to have had constructive notice thereof.

3. Mortgages 🔑151(3)—Mechanics' Liens—Trust Deeds—Priority.

Where the construction of a building for which lien claimants furnished material was begun on September 15, 1912, and the lien claimants entered into their contract for furnishing materials for such building on October 1, 1912, and furnished such materials between such date and January 15, 1913, a materialman's lien, properly filed, attached September 15, 1912, and was superior to a trust deed dated October 21, 1912, under Code Civ. Proc. § 1186.

4. Appearance 🔑24(1) — Defective Summons—Waiver of Infirmities.

A party who appears in an action and demurs to the complaint waives all possible infirmity in the summons or service thereof.

5. Process 🔑25—Summons—Names.

The names of all the defendants need not appear in the title in a summons, where all the names are given in the body thereof, under Code Civ. Proc. § 407.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Caroline Sax against William E. Clark and others. Judgment for plaintiff, and defendants appeal. Reversed.

R. L. Horton, of Los Angeles, for appellants.

James Brunken and S. M. Johnstone, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff successfully sued to quiet her title to lot 57 of the Cumberland tract, as per map thereof recorded in book 19, page 29, of Miscellaneous Records in the office of the county recorder of Los Angeles county, state of California. Defendants have appealed from the judgment.

The source of title is common. It was stipulated that prior to October 21, 1912, Alice G. Handy and Harry Handy were owners of the property. On that day they delivered to the Title Insurance & Trust Company a trust deed to secure a note for $700 in favor of Marie L. Barrett. This was recorded. On June 24, 1913, the Title Insurance & Trust Company, in accordance with the terms of the trust deed, conveyed the property to Marie L. Barrett, who on the following day quitclaimed to Anna M. Colkins, and on July 26, 1913, Anna M. Colkins, by grant deed, conveyed the property to plaintiff herein.

The title which appellants assert is based upon the following facts:

On March 26, 1913, a mechanics' lien was recorded against the property in question and Alice Handy and F. C. Handy, and in favor of B. W. and W. E. Clark, doing business as Clark Bros. On April 9, 1913, there was recorded a mechanic's lien in favor of Antonio Silva against A. Handy, covering the premises in question. On June 20, 1913, an action was commenced and a lis pendens was recorded wherein B. W. Clark et al. were plaintiffs and Alice G. Handy et al. were defendants. In said action the Handys, Barrett, Moyer, and Title Insurance & Trust Company were made parties and served with process. The Title Insurance & Trust Company, holding the legal title as trustee, filed a demurrer to the complaint. Thereafter judgment was rendered against all the defendants named in said action and in favor of the plaintiffs therein for an amount greater than $600 and for foreclosure of the mechanics' liens. On May 18, 1914, the sheriff of Los Angeles county sold the premises upon execution issued in said suit to Clark Bros. Lumber Company, a corporation, delivering a certificate of sale, which was recorded July 15, 1914. On March 10, 1915, Clark Bros. Lumber Company conveyed the property to defendant Hammond Lumber Company, and thereafter the sheriff of Los Angeles county made and delivered his sheriff's deed to the premises to said Hammond Lumber Company. This chain of title was asserted by Hammond Lumber Company by way of cross-complaint in the action at bar.

[1, 2] It is the contention of respondent that the suit for the foreclosure of the liens had no binding force against her or her title because she had neither actual nor constructive notice of the pendency of that action. In this behalf she calls attention to her uncontradicted testimony that she knew nothing of the said suit, and to the infirmity of the lis pendens which was entitled, "B. W. Clark et al., Plaintiffs, v. Alice G. Handy et al., Defendants," after which was the usual statement that an action was pending upon the complaint "of the above-named plaintiffs" against the "above-named defendants.". Our attention is called to the fact that while the notice describes the land and gives the amount of the lien claims and costs, it contains no further identification of the parties to the action. It is doubtless true that the names of such parties are essential to a proper lis pendens (section 409, Code Civ. Proc.), but this fact can give no comfort to respondent because a lis pendens is not required in a suit for the foreclosure of liens filed within 90 days. Section 1190, Code Civ. Proc.; Tulloh v. Boyce, 174 Pac. 680; s. c., 177 Pac. 847. We must hold, therefore, that plaintiff had construtive notice of the pendency of the action.

Respondent insists, however, that upon the authority of Metropolis Trust & Savings Bank of Barnet, 165 Cal. 449, 132 Pac. 833, her title must be held senior to that depending upon the mechanics' liens, and that the suit and the resulting judgment can have no binding force against her deed from the trustee. There is language in the opinion in that case which, if removed from the context, would seem to support this contention, but the facts of the two cases are not at all similar. That was a suit to restrain the sheriff from selling property under a judgment in an action to foreclose mechanics' liens. The plaintiff and respondent therein had been a defendant in the lien suit and the judgment decreeing the sums claimed as liens upon the real property involved found them subject and subordinate, however, to the lien of the respondent under its deed of trust. It was therefore properly held that respondent's title acquired, during the pendency of the action, from the trustee, by sale according to the terms of the trust deed need not be set up by supplemental answer in the lien suit.

[3] In the case before us the facts are entirely different. In the foreclosure complaint it is alleged that the Title Insurance & Trust Company was grantee in the trust deed dated October 21, 1912, recorded by the county recorder of Los Angeles county; that the construction of the building for which the lien claimants furnished material was begun on or about September 15, 1912; that Clark Bros. entered into their contract for furnishing materials for that building on October 1, 1912, and furnished such materials between said date and January 15, 1913. It followed therefrom that the liens of the claimants attached about September 15, 1912; that the trust deed was subsequent to and subject to such liens. Section 1186, Code Civ. Proc. There was also the usual allegation that the claims of the defendants, including the Title Insurance & Trust Company, "are subsequent to and subject to plaintiffs' claims of lien sued upon herein." The lien claimants prayed for judgment foreclosing their liens, and decreeing "that the liens of the plaintiffs be declared prior to those of the defendants, and each of them," and that the Title Insurance & Trust Company be restrained from selling the premises pending the litigation. The Title Insurance & Trust Company, trustee by virtue of the deed of trust, filed a demurrer to the complaint. Thereafter a judgment by default was given against all the defendants, in which, among other things, it was adjudged that the liens of plaintiffs were superior to any claim of the defendants, including the trustee. That this judgment is, under the circumstances, binding upon the plaintiff herein we are convinced.

[4, 5] Respondent has made the further assertion that the defendants in the suit upon the claims of lien were never properly served with summons, and that the court never acquired jurisdiction of them or of the subject-matter of the action. This point if good, would be of no value to plaintiff herein, for the reason that the holder of the legal title to the property, the trustee, who was one of her predecessors in interest, did appear in the action and demur to the complaint, thus waiving all possible infirmity in the summons or the service thereof. In re Clarke, 125 Cal. 388, 58 Pac. 22; Security Loan & Trust Co. of Southern California v. Boston & South Riverside Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296. The summons in that action was entitled "B. W. Clark et al., Plaintiffs, v. Alice G. Handy et al., Defendants," and the respondent insists that it was a nullity as against all of the defendants except, possibly, Alice G. Handy, basing her contention upon the authority of Lyman v. Milton, 44 Cal. 630. There is no force in the attack

on the summons, and the cited case is not opposite because in the body of the criticized summons the names of all of the defendants were given. There is no provision in the statute that such names must appear in the title. Section 407, Code Civ. Proc. Therefore, conceding that the plaintiff in this action may attack the summons in the suit on the lien claims, we are constrained to hold that there was a substantial compliance with the law in the form of the summons served upon the defendants in that litigation.

For the reasons above given, the judgment is reversed.

We concur: WILBUR, J.; LENNON, J.

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40 Cal. App. 285

PATTERSON v. ALMOND CITY LAND & DEVELOPMENT CO. et al.

(Civ. 2732.)

(District Court of Appeal, First District, Division 2. California. March 14, 1919.)

1. APPEAL AND ERROR ⟹757(1) — BRIEF ON APPEAL—SUFFICIENCY.

Where a brief to which is appended a résumé of the evidence of certain witnesses contains conclusions of fact to support which no reference is made, either to the transcript or the appendix to the brief, and the brief contains nothing clearly informing the court what the issues were, and sets out only one of the findings, the court will not examine a 400-page transcript in search of error upon which to base a reversal.

2. APPEAL AND ERROR ⟹1011(1)—REVIEW—QUESTIONS OF FACT.

Where there is a substantial conflict of evidence upon the facts found, the appellate court will not overturn the findings below.

3. APPEAL AND ERROR ⟹1043(7)—REVIEW—HARMLESS ERROR.

Where it was stipulated that the evidence of an absent witness might be introduced after other evidence, error, if any, in refusing a continuance for the continued absence of such witness was harmless, where his evidence would only create a further conflict as to whether defendant knew of the admitted fraud perpetrated on plaintiff, by its agent.

4. EXCHANGE OF PROPERTY ⟹11—RESCISSION — OFFER OF RECONVEYANCE — SUFFICIENCY.

In a suit to rescind a contract for the exchange of land, a deed of reconveyance by plaintiff was sufficiently tendered by depositing the deed in a bank and notifying defendant to call for it.

5. JUDGMENT ⟹403 — SUIT TO SET ASIDE—CONCLUSIVENESS—INDIRECT ATTACK.

Where an equitable suit is brought to set aside a judgment at law, the judgment is not res adjudicata on the issues, since, while it is not a direct attack on the judgment, neither is it collateral, but is an indirect attack.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Suit by Mary Hughes Patterson against the Almond City Land & Development Company, Frank Barnet, as sheriff, and another, to rescind a contract for the exchange of lands, and to set aside a judgment. Decree for plaintiff, and the named defendants appeal. Affirmed.

H. S. Derby, of San Francisco (J. C. Nichols, of Berkeley, of counsel), for appellants.
J. M. Latimer (J. E. Pemberton, both of San Francisco, of counsel), for respondent.

HAVEN, J. [1] The appeal is from a judgment in favor of the plaintiff in a suit to rescind a contract for the exchange of real property upon the ground of fraud, and to set aside a prior judgment of the superior court in Alameda county in a suit which grew out of one phase of the dealings between the parties under the contract. The appeal is taken in the so-called "alternative" method. The typewritten transcript of testimony covers something over 400 pages, and the findings of fact alone cover 12 typewritten pages. As an appendix to appellants' brief there is printed what is designated a résumé of the evidence of three witnesses, with some references to transcript pages. In the brief itself are certain conclusions of fact, to support which no reference is made either to the transcript or the appendix. There is nothing printed in either brief to inform the court clearly what the issues were before the lower court, and but a single one of the findings is printed, and that in the appendix to respondent's brief. Under these circumstances, the court will not examine the voluminous typewritten transcript in search of error upon which to base a reversal. Scott v. Hollywood Park Co., 176 Cal. 680, 169 Pac. 379; Randall v. Allen, 26 Cal. App. Dec. 852, on rehearing in Supreme Court, see 180 Pac. 941.

[2] While the above authorities, and many other pronouncements by the appellate courts of this state, justify a refusal to examine any portion of the record not printed in the briefs, we are loath to refuse to pass upon the merits in any case where counsel have endeavored properly to present their points. In this case the appellant contends the judgment should be reversed because of laches on the part of the plaintiff, because of her waiver and ratification of the fraud perpetrated upon her, and because of her failure promptly to meet every requirement of the law in regard to rescission. Giving to the appellants' statement of evidence its

strongest force, it appears from the similar unsatisfactory statement of evidence in the respondent's brief that there was a clear conflict of evidence as to the time when plaintiff had knowledge of the fraud, and as to the extent of such knowledge, upon which facts the defenses of laches, waiver, and ratification are all dependent. It must be assumed, therefore, the findings were supported by sufficient evidence. This court cannot overturn the findings of the court below where there is a substantial conflict of evidence upon the facts found. Tracy v. Smith, 175 Cal. 161, 165 Pac. 535.

[3] The same conditions of conflict exist and the same rule applies to the appellants' contention that the plaintiff failed to show the defendants knew of the fraud perpetrated by their agent. Upon this latter point the appellants claim that a new trial should have been granted on the ground of surprise, because of certain proceedings connected with the nonappearance of one Fitch, whose evidence was desired by the defendant company. At the opening of the trial counsel for the parties entered into a stipulation in open court, made a part of the record in the case by the direction of the judge who was presiding, to the effect that the trial should proceed at that time, and, after all available evidence had been introduced, the evidence of the witness Fitch might be introduced. At the close of the trial the appellants sought a continuance of the case in order that the evidence of Fitch might be taken upon his arrival from abroad, a statement being made that he was expected to reach the place of trial within about ten days. The attention of the court was called to the stipulation, notwithstanding which continuance was refused. It is claimed by the appellants that a formal showing would have been made for the continuance but for the stipulation, and that its disregard and the refusal to adjourn the trial deprived the appellants of substantial evidence. So much of the record as is presented by the briefs fails to support this contention. The evidence which the appellants claim would have been given by the witness Fitch was that the defendant company had no knowledge of the admitted fraud perpetrated upon the plaintiff by the company's agent. Apart from any question of the imputed knowledge of the principal, it appears that another agent and officer of the defendant corporation testified that he knew of the fraudulent acts of which complaint was made; that he knew that the agent of the corporation was also the agent of the plaintiff and was receiving compensation both from the plaintiff and from the defendant corporation. Under these circumstances, the evidence of Mr. Fitch could have had no greater force than to import a further conflict of evidence in the case upon an immaterial matter. If there was error in this particular, the appellant has failed to show injury therefrom. We cannot say, therefore, that the refusal of the trial court to grant the continuance or to grant defendants' motion for a new trial was reversible error.

Appellants further claim that the plaintiff failed to establish collusion or fraud in the transaction complained of. The court found the existence of such fraud; and the record discloses sufficient evidence to support such finding.

[4] Objection is made to plaintiff's offer to rescind the fraudulent contract on the ground that the deed of reconveyance from plaintiff to the defendant company of the Yolo county land, which had been conveyed to plaintiff under the contract, did not accompany the offer, and was not tendered to the corporation at its office in San Francisco. The deed referred to was deposited in a bank at Woodland, and the defendant company was notified to call for it. Under the circumstances, this was a sufficient notice of rescission and offer to restore the consideration. The notice was received by the defendant company, and it was advised where the deed to it could be obtained upon compliance by it with the plaintiff's demand for a reconveyance to her of the land she had deeded to the company under the contract.

[5] The further contention of appellants that the judgment in a prior action between the same parties is res adjudicata and conclusive upon the issues here involved is answered by consideration of the fact that the present action is a suit in equity to set aside the very judgment relied upon. While this is not a direct attack upon the judgment, neither is it collateral, but is properly designated as an indirect attack. In such a case the judgment is not conclusive. In Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 Pac. 24, 25 (48 Am. St. Rep. 110), the Supreme Court says:

> "In fact, when an action is brought in a court of equity to set aside a judgment at law the attack, although not collateral, is always indirect. Freeman on Judgments, § 485. The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity, or apparent validity, that the plaintiff requires to be relieved from it."

The case of Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597, relied upon by appellants, is distinguished from the instant case for the reason that that suit was brought to set aside the contract, the validity of which had been determined in the prior action, and was not an attack on the judgment itself.

We find no prejudicial error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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40 Cal. App. 358

PEOPLE v. BERNAL. (Cr. 700.)

(District Court of Appeal, First District, Division 1. California. March 21, 1919. Rehearing Denied by Supreme Court May 19, 1919.)

1. Criminal Law 🔑1159(3)—Questions of Fact—Review.

The appellate court cannot review a finding of fact by the jury on conflicting evidence.

2. Criminal Law 🔑785(10)—Instruction—Credibility of Witnesses.

The court properly instructed the jury that "in determining as to the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance and manner of the witness while on the stand, the interest of the witness, if any, in the result of the trial, the motives which actuate the witness in testifying, or in giving contradictory or false testimony, the witness' relation or feeling toward the defendant, and the probability or improbability of the witness' statement being true when considered with all other evidence, etc.

3. Criminal Law 🔑786(2)—Instructions—Credibility of Defendant.

The court did not err in instructing: "The defendant in this case has offered himself as a witness in his own behalf, and you are to judge his evidence by the same rules that you would that of any other witness. You have no right to disregard his testimony merely upon the ground that he is the defendant and stands charged with this crime, but you should fairly and impartially judge his testimony, together with all other evidence in the case."

4. Criminal Law 🔑785(9)—Credibility of Witnesses—Interest—Instructions.

The court properly instructed the jury that: "In judging the credibility of a witness, whether such witness be the defendant, the prosecutor, or any other witness produced on either side, you may consider the interest and relation of such witness in and to the case."

5. Criminal Law 🔑800(6)—Instructions—Definition of Intent.

Where the court had instructed as to the necessity for proving "motive," it did not err in instructing: "Now, gentlemen, upon this question of intent and motive, I will read you the definition as laid down in the Penal Code in section 21," relating to the manifestation of "intent."

6. Criminal Law 🔑798(½)—Argumentative Instructions—Duties of Jury.

Where the court prefaced an instruction with the words "in view of the arguments in this case," and proceeded to tell the jury, in substance, that it was not concerned with what might be the final judgment or sentence in the event that they should find the defendant guilty, and that the jury must put out of consideration entirely what the court might or might not do, such instruction was not open to the objection that it was argumentative.

7. Criminal Law 🔑829(1)—Requested Instruction.

An accused cannot complain of rejection of instructions, where the points concerned were fully and correctly covered in the court's charge.

8. Criminal Law 🔑1137(8)—Invited Error—Misconduct of Court and Counsel.

Where accused while on the stand related a remarkable story of brutal treatment at the hands of the authorities, the effect of which, if true and believed, would tend to prejudice prosecution and put in question the mental soundness of accused, remarks of judge and district attorney that accused must be crazy, followed by an investigation the effect of which was to entirely discredit accused's story, were not prejudicial; accused having undoubtedly sought to influence the jury by his testimony.

9. Criminal Law 🔑1035(3), 1037(2)—Appeal—Objections.

Where no assignment of misconduct of court or district attorney, or request for an admonition to the jury to disregard the objectionable remarks, was made at the time of the trial, the matter will be deemed to have been waived.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Pedro A. Bernal was convicted for lewd and lascivious acts, and appeals from the judgment of conviction and from an order denying his motion for a new trial. Affirmed.

Frank A. Henning, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. Defendant was charged by an information with the violation of section 288 of the Penal Code. He was convicted and sentenced to imprisonment in the state prison for the term of one year. He now appeals from such judgment and from the order denying his motion for a new trial.

Appellant complains that the evidence is insufficient to support the verdict. The prosecuting witness, a girl upon whose person the lewd and lascivious acts were committed, was about 11 years old at the time of the trial. She testified in detail to the acts of the defendant constituting the crime. Her testimony was corroborated by the testimony of her mother and two other witnesses, to the effect that shortly after the acts complained of defendant was brought before the little girl, who told what had happened. The defendant was thereupon asked if the little girl was telling the truth, and he answered, "Yes." He further stated to these three witnesses:

> "I was tempted, a funny feeling came over me, I don't know why I did it."

Later the defendant stated to the district attorney, when questioned about the matter:

> "Well, I didn't harm her. I looked at her and saw that she was young, and I stopped just in time. I guess because I was passionate."

[1] The defendant introduced no testimony other than his own concerning the occurrence. He positively denied the commission of the offense. There was therefore presented only a conflict of testimony which it was the duty of the jury to pass upon, and, it having done so, this court cannot review the evidence in this regard.

[2] Defendant complains that the court erred in giving the jury the following instructions:

> "In determining as to the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance and manner of the witness while on the stand; the interest of the witness, if any, in the result of the trial; the motives which actuate the witness in testifying, or in giving contradictory or false testimony, the witness' relation or feeling toward the defendant, and the probability or improbability of the witness' statement being true when considered with reference to all other evidence, facts, and circumstances proved in the case."

The instruction was proper. People v. Wong Ah Foo, 69 Cal. at page 183, 10 Pac. 375; People v. Dolan, 96 Cal. 315, 31 Pac. 107. By the instruction the court simply informed the jury of certain facts and circumstances in the case before them which they would perhaps, as men of ordinary observation, have been bound to know. People v. Bush, 71 Cal. 602, 12 Pac. 781.

[3] The court instructed the jury as to defendant's testimony as follows:

> "The defendant in this case has offered himself as a witness in his own behalf, and you are to judge his evidence by the same rules that you would that of any other witness. You have no right to disregard his testimony merely upon the ground that he is the defendant and stands charged with this crime; but you should fairly and impartially judge his testimony together with all other evidence in the case."

The court did not err in giving the instruction. It did not go as far as did the court in instructions which have been upheld. People v. Cronin, 34 Cal. 191; People v. Lang, 104 Cal. 363, 37 Pac. 1031; People v. Wells, 145 Cal. 138, 78 Pac. 470.

[4] The court instructed the jury that:

> "In judging the credibility of a witness, whether such witness be the defendant, the prosecutor, or any other witness produced on either side, you may consider the interest and relation of such witness in and to the case."

No error was committed by the court in this regard. People v. Bush, supra; People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[5] The court instructed the jury that if the evidence in the case failed to show a motive on the part of the defendant for committing the crime charged in the information, that that was a circumstance which the jury must consider in connection with all the other evidence in arriving at its verdict, and that the absence of motive on the part of the defendant was a strong factor in favor of his innocence, and in that connection gave the following instruction:

> "Now, gentlemen, upon this question of intent and motive, I will read you the definition as laid down in Penal Code in section 21: 'The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots or lunatics, nor affected with insanity.'"

This was not error, and appellant's attempt to draw a distinction between the use of the word "motive" in the instructions and the use of the word "intent" in the Code section does not impress us as worthy of further consideration.

[6] The court prefaced one instruction with the words "in view of the arguments in this case," and proceeded to tell the jury, in substance, that it was not concerned with what might be the final judgment, or sentence, of the court in the event they should find the defendant guilty, and that the jury must put out of consideration entirely what the court might or might not do in the case. Appellant contends that this instruction was argumentative. There is nothing in the point. The giving of other instructions is complained of, but our examination satisfies us that the court committed no error in its charge.

[7] The court declined to give the jury certain instructions proposed by the defendant; as to presumption of innocence, the difference between civil and criminal causes in respect to the degree or quality of the evidence necessary to justify a jury in finding for the plaintiff, and relative to the good character of the defendant. The court, however, fully and correctly covered each of these points in its charge. The rejected instructions were only repetition. The court is not bound to state the law to the jury more than once. People v. Hong Ah Duck, 61 Cal. 387; People v. Feld, 149 Cal. 464, 86 Pac. 1100.

[8, 9] The defendant while on the stand denied the commission of the offense and contradicted the testimony of the witnesses for the prosecution. He devoted the greater part of his testimony to the attempt to establish what he termed a "frame-up" on the part of the family of the prosecuting witness, and the officials of Santa Clara county. He related a most remarkable story of alleged brutal treatment at the hands of the authorities when first placed in the county jail. The effect of the testimony, if true, and believed by the jury, would tend to prejudice the prosecution, and put in question the mental soundness of the defendant. It was apparently given for that purpose. At the conclusion of defendant's testimony, the following occurred in open court, in the presence of the jury:

> "By the Court: Mr. Thomas, I would like to call some deputy sheriff, or whoever has charge of these men and investigate this particular charge that he is making here; to test the man's knowledge of things, to put it mildly. Who had charge of this man, Mr. Buffington?
>
> "By Mr. Buffington: Billy Rowland.
>
> "By the Court: Where is Rowland, is he here?
>
> "By Mr. Buffington: Yes.
>
> "By the Court: Bring Rowland in; you may step down, Mr. Bernal.
>
> "By Mr. Free: He is entirely crazy, or making believe.
>
> "By the Court: That is what I want to find out."

Mr. Free, who took part in this colloquy, was the district attorney of the county, and had testified as a witness for the prosecution. He apparently took some part in the conduct of the case. Witnesses were called to testify as to what really took place in the jail, the effect of which was to entirely discredit the defendant's story. Appellant contends that the remarks of the court and the district attorney tended to prejudice the defendant in the minds of the jury, and constituted a reversible error. Appellate courts are continually warning trial courts, and prosecuting officers, of the danger of giving utterance to any statements tending, or in any wise so conducting themselves as to cause prejudice against defendants in the minds of jurors. But bearing in mind that defendant had undoubtedly sought to influence the jury by his own testimony, to which we have referred, we cannot feel that prejudicial error was committed by either the court, or the district attorney, in the manner so complained of. Furthermore, no assignment of misconduct, or request for an admonition to the jury to disregard the objectionable remarks, was made at the time of the trial, in which state of the record the objection will be deemed to have been waived on appeal. People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Amer, 8 Cal. App. 143, 96 Pac. 401; People v. Ye Foo, 4 Cal. App. 743, 89 Pac. 450.

Certain rulings of the court on the admission of testimony are complained of, but our examination of the record satisfies us that no prejudicial error was committed.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

40 Cal. App. 364

NAY v. BERNARD et ux. (Civ. 2736.)

(District Court of Appeal, First District, Division 2. California. March 21, 1919.)

1. Appeal and Error ⇨1011(1)—Review—Questions of Fact.

Findings based on conflicting evidence will not be disturbed.

2. Easements ⇨8(2,3)—Prescription—Permissive Use.

A right of way by adverse user or prescription cannot be based upon a permissive use of the road.

3. Easements ⇨18(3)—Ways of Necessity—Other Means of Access.

The owner of land bordering a county road who has constructed a road over such land to the county road cannot claim a right of way by necessity over the land of another to another county road.

4. Evidence ⇨461(4)—Parol—Easements.

Where the owner of land severs it and retains an easement, whether such easement is in gross or appurtenant to the dominant estate may be shown by facts aliunde the deed, notwithstanding that no description of the dominant estate is included in the grant of the servient tenement.

5. Easements ⇨17(5)—Quasi Easement—Creation.

Where the owner of land severs it and sells a part after the establishment of a road across the land conveyed, a quasi easement is created in favor of and as an appurtenance to the land retained by the grantor; the easement being obviously apparent and the parties having knowledge thereof at the time of the grant.

6. Easements ⇨14(2)—Reservation of Right of Way by Grantor—Effect of Other Reservations.

An easement for a right of way reserved by the grantor upon the severance of the estate and the conveyance of part thereof is not affected by an express reservation of another right of way for another purpose, especially if the latter reservation was for a right of way for a future use.

7. Easements ⇨3(2)—Construction of Reservation in Deed—Conveyances.

Where an owner of land severs it and conveys part thereof, expressly reserving a right of way, the easement is appurtenant to the land retained, in view of Civ. Code, § 1069, requiring reservations in a deed to be construed most favorably to the grantor, and passes by transfer of the land itself, without particular reference thereto, in view of section 1084.

8. EASEMENTS 🔑71—SUITS TO ESTABLISH—FINDINGS.

Where the grantor of land conveyed part thereof, reserving a right of way, a subsequent grantee of the land retained was not entitled to judgment in a suit to establish the right of way as appurtenant to his land, in the absence of findings that the road existed prior to the conveyance severing the estate.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by H. L. Nay against J. Bernard and wife. From a judgment for defendants, plaintiff appeals. Reversed.

W. F. Cowan, of Santa Rosa, for appellant.

Lyman Harford and Juilliard & Harford, all of Santa Rosa, for respondents.

HAVEN, J. Plaintiff appeals from a judgment in favor of defendants in an action to establish a right of way, to restrain defendants from interfering therewith, and to recover damages for prior interference. In 1894 the adjoining ranch properties of plaintiff and defendants were owned by Calvin H. Holmes, and held by him as a single tract of land. In September of that year he divided this tract by conveying to his son-in-law, Charles H. Foote, the southerly portion thereof, which is now owned by defendants and is hereinafter referred to as the "Bernard property," retaining title at that time in himself to the northerly portion of the tract, which is now owned by plaintiff and is herein referred to as the "Nay property." The plaintiff acquired title to the Nay property in 1906 by mesne conveyances from Calvin H. Holmes. The title to the Bernard property was conveyed by Charles H. Foote to the defendant John Bernard by deed dated March 12, 1913. The deed of the Bernard property from Holmes to Foote contained the following habendum clause:

> "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever, excepting the privilege of conducting water through a six-inch pipe at any point on the premises from said Yellow Jacket creek. The right hereby is reserved to my heirs and assignees forever of six inches of water therein with the right of way to conduct said water and the right of way to travel over said land by a road to be laid out or kept open for travel."

A road from the Nay property across the Bernard property to the county road had existed for a number of years prior to the division of the tract by the execution of the above-mentioned deed. The evidence is conflicting as to the extent and nature of the use of such road prior to the date of the deed, but the grantee testified that it was a traveled road at that time, and its use to some extent and the recognition of its existence were clearly established.

[1, 2] Appellant claims that the evidence established: First, that the easement of the right of way for a road was appurtenant to the Nay property; second, that a right of way by necessity existed; third, that plaintiff had acquired an easement by adverse user and prescription; fourth, "that defendants were estopped from disputing the rights of plaintiff." Upon the question of a right of way by adverse user and prescription, the trial court found that the plaintiff had never traveled any portion of the road adversely to defendants nor under any claim of right, "but whenever plaintiff has traveled said road it has always been with the permission of the owners of the land over which said way runs," and, further, "that the portion of said road crossing the lands of defendants and the gates thereon were never used by others than the owners of said land except by and with the permission of such owners." These findings are supported by evidence offered on behalf of the defendants. The evidence of plaintiff is in conflict therewith; but, under that state of the record, the findings cannot be disturbed. A right of way by adverse user or prescription cannot be based upon this permissive use of the road.

[3] The claim of a right of way by necessity was waived by the attorney for the appellant on the argument; and necessarily so, as the evidence discloses that the Nay land itself borders on a county road to which appellant has constructed a road over his own land.

The question chiefly argued in the briefs is whether the easement of a right of way for a road was appurtenant to the Nay property or was an easement in gross, personal to Calvin H. Holmes, the grantor in the above referred to deed. If appurtenant, it passed to plaintiff as an incident to the land conveyed to him. If personal to Holmes, plaintiff proved no title thereto, as no conveyance of the easement as such was offered in evidence. The trial court found the execution of the deed with its habendum clause as above set forth. To such finding the following is added:

> "That in said deed there is no mention or description of the lands hereinbefore described, and found to now belong to plaintiff or any portion of said lands, nor does said deed mention or describe any other lands or property

than said 538.55-acre tract therein conveyed to said C. H. Foote. That neither said road or right of way or any portion thereof over said lands of defendants is now or ever has been appurtenant to the lands now owned by plaintiff or any portion thereof. That at the time of the conveyance of said 538.55-acre tract from Calvin H. Holmes to Charles H. Foote, said Calvin H. Holmes owned the whole of the present Nay ranch described in plaintiff's complaint, and thereafter continued to own said ranch for several years. That said ranch was thereafter, after several successive transfers, conveyed to plaintiff; that none of the deeds or conveyances in the line from said Calvin H. Holmes to plaintiff in any way mention or refer to said right of way."

It is evident that the conclusion of the trial court that the easement was not appurtenant to the Nay property is based upon the finding that said property is not described nor referred to in the deed by which the Bernard property was conveyed. Such conclusion is warranted by the case of Wagner **v.** Hanna, 38 Cal. 111, 99 Am. Dec. 354, if the rule of that case is still the law of this state. The principle there announced is that, upon severance of an entire tract of land by conveyance of a portion thereof, an easement reserved by the grantor, for the benefit of the portion of the tract retained, is not appurtenant thereto unless the latter tract is described in the deed. We are of the opinion, however, that, while this case has not been expressly overruled, later decisions of the Supreme Court are so inconsistent therewith as to destroy its authority upon the particular point here involved.

In Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874, the plaintiff and defendant owned adjoining quarter sections of land. Defendant granted to plaintiff a right of way for a road over defendant's land. The deed contained an exact description of the granted right of way by metes and bounds, but did not describe either the land of plaintiff in connection with which the right of way was to be used or the remaining land of defendant from which the right of way was carved. The exact question considered by the court was whether, under such circumstances, the easement was personal to the grantee or appurtenant to his adjoining land. After citation of authority to the effect that an easement is never presumed to be in gross when it can fairly be construed to be appurtenant to some other estate, the court held that the right of way there involved should be considered as appurtenant to plaintiff's land. In reaching that conclusion the court quotes with approval from a Massachusetts case (Dennis v. Wilson, 107 Mass. 591), as follows:

> "When there is in the deed no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relations."

This is a distinct holding that the nature of the easement, whether personal or appurtenant, may be determined by evidence aliunde the deed, which is the very thing that the case of Wagner **v.** Hanna, supra, holds cannot be done.

[4] The principle established by Hopper **v.** Barnes, supra, has been applied in a number of later cases, in all of which an easement conveyed by an express grant was held to have been appurtenant to a dominant tenement by reason of facts appearing aliunde the deed, and notwithstanding that no description of such dominant tenement was contained in the grant. Jones **v.** Sanders, 138 Cal. 405, 71 Pac. 506; Jones **v.** Deardorff, 4 Cal. App. 18, 87 Pac. 213; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900.

The case of Wagner **v.** Hanna is not referred to in any of the later cases, but we cannot escape the conclusion that it is practically overruled thereby.

[5] If the deed from Holmes to Foote had contained no reservation whatever of a right of way for a road, a quasi easement for that purpose would have been created in favor of, and as an appurtenance to the land retained by the grantor, which is now the Nay property. In Cave v. Crafts, 53 Cal. 135, 139, the court adopts the rule laid down in a leading New York case (Lampman **v.** Milks, 21 N. Y. 505) as follows:

> "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. * * * No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale."

This rule is repeated in the same language in Quinlan v. Noble, 75 Cal. 250, 252, 17 Pac. 69, and is applied in the recent cases of Cheda v. Bodkin, 173 Cal. 16, 158 Pac. 1025, and Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593.

Under the common law and many authorities in other jurisdictions, the doctrine of an implied right of way is limited to cases of rights of way by necessity. In this state, however, the rule is applied whenever the quasi easement is obviously apparent or the parties had knowledge of its existence at the time of the grant. Civ. Code, § 1104; Jones v. Sanders, supra. The record in this case discloses that the road here involved had existed and been used for a number of years prior to the deed from Holmes to Foote, and it is apparent that both parties had knowledge of its existence and use at the time of the execution of that deed.

[6] Respondent claims that all of the clauses found in the habendum in the deed from Holmes to Foote should be construed as having reference to the privilege of conducting water, and that the right of way "to travel over said land by a road to be laid out or kept open for travel" has reference to such a right of way for the purpose of visitation and repair of water pipes alone; in other words, that the only right of way reserved by this clause in the deed is not for a road for general travel, but solely for the purpose of being used as an incident to the privilege of conducting water, referred to in other portions of the habendum clause. If this construction is correct, manifestly the deed had no effect upon the quasi easement which is based upon the act of Holmes in conveying a portion of his land over which an established road for travel existed. Such easement reserved to the grantor upon the severance of his estate would not be affected by an express reservation of another right of way for another purpose, especially when the latter reservation was for a right of way for future use. If, on the other hand, the clause referred to is to be construed as an attempted reservation by the grantor of a right of way for a road in existence or another one to be laid out for general travel, we are of the opinion that the intent of the grantor to reserve such easement for the benfit of and as appurtenant to the portion of the land which he did not convey sufficiently appears from the record before us.

[7] The conclusions which we have reached are strengthened by the provisions of section 1069, Civil Code, to the effect that, in case of a reservation in a deed, the construction most favorable to the grantor must be placed upon the language of such reservation. We hold, therefore, that the easement here involved was appurtenant to the land retained by Holmes at the time of the execution of his deed, and passed by the subsequent conveyances of that land to the plaintiff. Such an easement passes by transfer of the land itself without particular reference thereto. Civ. Code, § 1084; Cave v. Crafts, 53 Cal. 140.

[8] Notwithstanding our conclusions in favor of appellant's title to the right of way in dispute, a judgment in his favor cannot be directed, unless the findings of the trial court will support such judgment. We have no power to modify the findings as made. The only finding as to existence of the road here involved is that it has been in existence "for more than five years last past." For support of a judgment in favor of appellant, under the views hereinabove expressed, findings are necessary as to the existence and use of the road prior to the execution of the deed from Holmes to Foote in 1894. In the absence of such findings, we cannot direct the entry of a judgment.

The judgment appealed from is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

40 Cal. App. 179

DAVIDSON v. ROFFY et al. (Civ. 1935.)

(District Court of Appeal, Third District, California. March 6, 1919. On Petition for Modification, April 5, 1919. Rehearing Denied by Supreme Court May 5, 1919.)

1. ASSIGNMENTS 🔑20—RIGHTS ASSIGNABLE—WRITTEN INSTRUMENTS.

A written obligation, secured by a real estate mortgage and in form a promissory note, conditioned upon the nonpayment of dividends upon shares of stock received by the payee, and providing that, if the dividends are less than as guaranteed by the maker, they be credited on the note, whether a promissory note or a guaranty, is assignable; Civ. Code, §§ 954, 1458, providing that a right arising out of an obligation may be transferred.

2. GUARANTY 🔑4—INDEMNITY 🔑1—SCOPE AND EXTENT OF OBLIGATION.

Where the purchaser of land gave in payment shares of stock and a note secured by a mortgage on the land, with a proviso in the note for its cancellation if the payee received dividends from the shares equal to the amount of such note, *held*, the contract was not one of indemnity or guaranty against loss incident to the purchase of the stock, but a direct promise of the maker of the note to pay the amount thereof.

3. PLEDGES 🔑20—MORTGAGE—SHARES OF STOCK.

Where the purchaser of land gave in payment thereof shares of stock and a note secured by a mortgage on the land, with a proviso in the note for its cancellation if the payee received dividends from the shares equal to the amount of such note, such stock did not constitute additional security for payment of the sum.

4. MORTGAGES 🔑414—FORECLOSURE—CONDITIONS PRECEDENT—NOTICE.

Where shares of stock and a note secured by a mortgage on the land were given in payment of land purchased, and the note contained a proviso for its cancellation if the payee received dividends from the shares equal to the amount of such note, failure of vendor to notify the purchaser's successors that the stock had failed to pay dividends, and that he would hold the land under the mortgage, did not estop his assignee from foreclosing the mortgage; such notice not being necessary.

5. MORTGAGES ⚷178, 427(1), 557, 559(3)—ACTIONS AGAINST PURCHASERS OR GRANTEES—PARTIES—ORIGINAL MORTGAGOR—FAILURE TO MAKE PARTY—EFFECT.

In a foreclosure action by the assignee of a mortgage, the mortgagor, who had disposed of his interest in the land, is not a necessary party, and failure to serve him with summons and bring him into court does not operate to release a subsequent purchaser and junior mortgagee from the burden of the mortgage; the mortgagor's personal liability not being thereby released, nor deficiency waived against him.

6. MORTGAGES ⚷559(3) — PARTIAL RELEASE OF MORTGAGE—DEFENSE TO CLAIM FOR DEFICIENCY JUDGMENT.

In a foreclosure action, in order to have an alleged release of land of greater value than the amount of the mortgage operate as a payment of the mortgage debt as to defendants, they must show that such release was without their consent, and unless so established it does not constitute a defense to the claim for deficiency judgment against them.

7. MORTGAGES ⚷454(1)—FORECLOSURE—DEFENSES — EXONERATION — PLEADING SPECIALLY.

In a foreclosure action, a defense that the land has been exonerated from liability must be pleaded specially.

On Petition for Modification.

8. APPEAL AND ERROR ⚷762—DISREGARDING CONTENTIONS.

On appeal, contention of an appellant as to what was necessary for the defendants to plead and for the court to find will not be disregarded by the appellate court, because made for the first time in appellant's closing brief, if made in response to a claim of defendants in their brief.

9. APPEAL AND ERROR ⚷654—RECORD—MATTERS NOT APPARENT OF RECORD—RECORDS IN OTHER CASES.

Contention by defendant that it was understood and agreed in the court below that the case and another case involving the same subject-matter should be considered together, and that the evidence in both cases might be considered in determining each, is not ground for modifying or changing the record on appeal, where there is nothing in the record to show such an understanding, nor any contention that it was agreed that both records be considered on appeal.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action for foreclosure by John H. Davidson, with Paul F. Fratessa, assignee, substituted as plaintiff, against Joseph T. Roffy and others. From the judgment rendered, plaintiff appeals, making George D. Richey and certain of the other defendants respondents. Reversed.

J. J. West and Paul F. Fratessa, both of San Franciso, and Frank J. O'Brien and John W. Johnston, both of Sacramento, for appellant.

A. C. Huston, of Woodland, and Thomas B. Leeper, of Sacramento, for respondents.

BURNETT, J. The action was brought by the assignee to foreclose a mortgage on land located in Sacramento county. The written obligation to secure which the mortgage was given was as follows:

"$1,500.00. Oakland, Calif., Oct. 26, 1907.

"On or before two years after date I promise to pay Geo. L. Woodford, or order, the sum of fifteen hundred dollars, gold coin of the United States, with interest at the rate of one per cent. per month from and after maturity, value received. If the principal and interest, or either, shall not be paid when due, then the whole of the said indebtedness shall be due and collectible at the option of the holder hereof. This note is upon the following conditions as to its payment prior to its maturity, or at maturity: That inasmuch as George L. Woodford has received from the maker hereof two thousand shares of the capital stock of the Roffy Electrical Company, upon which the maker hereof has and does guarantee a dividend each year for two years from January 1, 1908, of $750.00. If, therefore, in the said two years dividends have been received by Woodford on the said shares to the full sum of $1,500.00, then this note to be canceled. If the said dividends during said two years does not amount to $750.00 each year, then this note shall be credited with the dividends, whatever they may be, and the maker hereof shall then at maturity pay the balance.
"[Signed] Joseph T. Roffy."

On January 11, 1910, the said Woodford assigned the said note and mortgage to John H. Davidson, who commenced this action. He afterwards assigned to Paul F. Fratessa, who has been substituted as plaintiff. The summons was not served on Roffy; he having disposed of his interest in the mortgaged land before this action was commenced. The complaint was answered by defendants W. H. Leeper, G. D. Richey, and M. D. Butler, as administrator of the estate of James A. Butler, deceased, successors to Roffy's interest in the land mortgaged by him to Woodford. They denied the execution of the assignment by Davidson to Fratessa and the nonpayment of the note.

[1] There seems to be some contention by respondents that there can be no assignment of the said written instrument—of the note and mortgage. However, there appears to be no question about that, since, whether the said written instrument be considered a promissory note or a guaranty for the payment of money, it was plainly assignable by virtue of the provisions of sections 954 and 1458 of our Civil Code. There are many decisions also cited by appellant to the point

that such obligations are assignable, but we deem it unnecessary to notice them.

[2] We are entirely satisfied, also, that respondents are entirely in error in contending that the said written instrument constitutes a contract of indemnity against loss incident to the purchase of the shares of stock, and that no cause of action could arise therefrom without such loss by the holder of both the shares of stock and the note, and that the note would have no validity where it had been assigned without an assignment of the shares. There is nothing in the language of the note or of the mortgage to support this view. It is true that the maker used the word "guaranty"; but it is not contended by respondents that there was any guaranty, as that term is understood by the authorities. It is claimed, however, by them that the maker "warranted" the payment of said dividends, and that he intended to indemnify the payee against loss in consequence of any failure of said dividends. But it must be understood that Roffy was a debtor and Woodford a creditor to the extent of $1,500. In other words, that the former obligated himself to pay the latter the said sum, and, if the stock should pay any dividends, the amount was to be credited on the payment of said $1,500. In other words, Woodford was to pay himself out of said dividends a portion or all of the said money which Roffy promised to pay, and, if no dividends were obtained, the amount of $1,500 was to be paid by said Roffy. There could, therefore, be no loss to Woodford, by reason of the nonpayment of dividends, since the amount was to be paid at any rate. The condition in reference to the application of any dividend that might be received to the payment of the claim was a favor to Roffy, and could not be a detriment to Woodford. In fact, if the obligation be considered in any sense a "warranty," it amounted to nothing more than a "warranty" that Roffy would pay his own debt, either from the dividends or otherwise. The truth is that the instrument constitutes a direct promise of the maker to pay Woodford the sum of $1,500, with the proviso that Woodford might pay himself this amount, or a portion thereof, out of any dividends that might be received from said stock.

When we consider the mortgage itself, we find it was given entirely and exclusively for the purpose of securing the payment of the debt of $1,500, according to the terms of said promissory note. There is not a word in said mortgage in reference to any warranty or guaranty or indemnity. The language of the mortgage, as far as necessary to quote, is as follows:

> "That the mortgagor mortgages to the mortgagee that certain parcel of land [describing it] as security for the payment to the said mortgagee of the sum of fifteen hundred ($1,500.00) dollars, with interest thereon according to a certain promissory note of even date herewith, made by said mortgagor to the mortgagee herein."

We may add that there is nothing in the evidence in the case to support the theory of respondents as to indemnity. The only testimony on the subject is that of Woodford, who declared that he sold the land to Roffy for 2,000 shares of stock in a certain corporation and $1,500 in cash, but for the cash was substituted a note secured by the mortgage. In other words, it appears without conflict that Woodford became the owner of the stock and that the note and mortgage were given to secure the payment of the sum of $1,500 in cash.

[3, 4] The foregoing facts show, also, the fallacy of the position of respondents that the stock also constituted security for the payment of said sum. It follows that they are mistaken in the contention that the mortgage herein could not be foreclosed against respondents without taking into account said stock. There was no occasion for an election between two securities, since only one security was given to secure the payment of said $1,500. Neither is there any ground for the contention that plaintiff is estopped from foreclosing the mortgage by reason of the fact that Woodford never notified respondents that the stock had failed to pay dividends and that he would hold their land under the mortgage. He was not required to give any such notice. The recordation of the mortgage was sufficient to notify all subsequent purchasers and incumbrancers that the land was held as security for the payment of said $1,500. Nor was he required to begin an action to foreclose the lien, nor was there anything in the agreement between him and Roffy to preclude the assignment of said note and mortgage. If the respondents were led to believe that the stock had paid dividends to the amount of the note it was their own fault. If they had any reason to so believe, they could and should have made inquiry of Woodford, and we cannot see anything inequitable in his conduct in respect to the nonpayment of said dividends. In fact that, as we have seen, was a matter of interest exclusively to himself and Roffy.

[5] Another point made by respondents is, we think, more debatable. It grows out of the fact that the plaintiff failed to bring the maker of the note into court; it being claimed by respondents that plaintiff dismissed said action and waived deficiency against Roffy, the maker, and proceeded to trial over the objection of defendants. It is contended by respondents, and this view seems to have been adopted by the trial court, that by so doing he released the claims of the subsequent purchaser and junior mortgagee from the burden of the mortgage.

Coyle v. Davis, 20 Wis. 568, involved the interest of a subsequent purchaser of a portion of the mortgaged premises, and it was held that the release of the mortgagor by the mortgagee from any personal liability discharged the land from the lien of the mortgage. The court said:

> "The plaintiff and her husband, by their purchase of a portion of the mortgaged premises, acquired the right to redeem from all the mortgages, by paying the entire mortgage debt, and then to obtain satisfaction by the foreclosure and sale of the residue of the premises, and if they proved insufficient, to resort to the personal liability of Jarman, the mortgagor. * * * She stands in the relation of a surety for Jarman, and any agreement between Joseph Davis and him, which operated to diminish her security or to increase her liability, was a release of all obligation on her part. The right of insisting upon the personal liability of Jarman, was one of the safeguards of the plaintiff's title, and, by voluntarily depriving her of that, Joseph Davis deprived himself of the right of insisting upon the liens of his mortgages upon the lands owned by her."

In Sexton v. Pickett, 24 Wis. 346, it was held that—

> "A mortgagee, who diminishes the security of a second mortgagee by releasing the mortgagor's personal liability, if he does not absolutely discharge the premises from the lien of his mortgage, as in the case of a subsequent purchaser, at least subordinates his lien to that of such second mortgagee."

The answer of appellant to these cases is that they "cannot apply to the case at bar, where there was no release of Roffy's (the mortgagor's) personal liability"; and it is further contended that the law has been virtually declared otherwise by the Supreme Court of this state. The fact that the mortgagor was not served with summons would not, of course, relieve him from personal liability. Nor did appellant acquit him of any further liability for the indebtedness. He simply announced: "We are not asking for a deficiency judgment against him." Manifestly, he could not obtain such judgment when Roffy had not been brought within the jurisdiction of the court. There is nothing in the law or in equity to compel the plaintiff to proceed against the mortgagor, where he had disposed of his entire interest in the land. Respondents were interested in the matter, because they were redemptioners and had the legal right to be subrogated to the claims of the senior mortgagee. But in order to discharge the lien it would be necessary for them to pay the entire debt, and therefore they should have the benefit of any deficiency judgment that might be obtained against the mortgagor. The conduct of plaintiff did not prejudice this right. They could have had the mortgagor brought in and all the equities determined in the one proceeding. They did not choose to do so, and they cannot complain because plaintiff did not see fit to relieve them of this trouble.

Appellant also relies upon the case of Gutzeit v. Pennie, 98 Cal. 327, 33 Pac. 199. Therein the court said:

> "The only question in the case at bar requiring special notice is this: 'Is a judgment foreclosing a mortgage valid as against grantees of the mortgagor and subsequent incumbrancers, although a representative of the deceased mortgagor is not before the court at the time of the judgment—the plaintiff waiving all recourse against any of the property of the estate except the mortgaged premises?'"

The court held that said judgment was valid as against said parties. Respondents contend that the only thing decided in that case was that the representative of the deceased mortgagor was not a necessary party to the foreclosure; but there was virtually a waiver of all personal liability of those succeeding to the interest of the mortgagor in the land mortgaged. This would seem to affect the security and liability of the subsequent grantees and incumbrancers in the same manner as if there had been a release from liability of the mortgagor if living. In support of its position the court quotes from Schadt v. Heppe, 45 Cal. 437, and Hibernia S. & L. Soc. v. Herbert, 53 Cal. 378, and cites Belloc v. Rogers, 9 Cal. 124, Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540, Story on Equity Pleading, 197, and Pomeroy on Remedies, § 326, and notes. In the Belloc Case there were two mortgages, and the junior mortgage was foreclosed first and the property purchased by the mortgagees therein. The senior mortgagee then brought suit to foreclose his mortgage, making the mortgagor and the second mortgagees parties, and he had personal service upon the mortgagor, but before judgment the mortgagor died and his administrator was made a party defendant.

The judgment was for the amount of the mortgage debt, for a sale of the premises, and, in case the proceeds were not sufficient, then a judgment for the residue. The appeal was by the administrator, and only from that part of the judgment ordering a sale of the premises. The case is hardly analogous to this, and in the language of the Supreme Court the only question for solution was "whether, the facts being admitted, 'showing the first and second mortgage, and the sale of the equity of redemption under the second mortgage, the estate of Saroni had such an interest in the premises as to render it necessary that the probate court should order the sale, upon the application of the administrator, or of the plaintiff, and to oust the district court of jurisdiction to order a sale.'" In the course of the opinion a quotation was made, however, with approval, from Bigelow v. Bush, 6 Paige, 345, that "the grantee of the mortgagor could not complain if the mortgagor was not made a party, for the reason that the grantee could not be injured."

Goodenow v. Ewer, supra, embraces a comprehensive consideration of the nature of a mortgage and the proceedings provided by our law for its foreclosure, and it was held that the grantee of the mortgagor was a necessary party to the suit for foreclosure in order to enforce the lien against his interest; the court saying:

> "It is only when the owner of the estate—whether such owner be the mortgagor or his grantee—has had his day in court, that a valid decree can pass for its sale."

It was further held that the bid by the plaintiffs, being for the full amount of their judgment, satisfied it, and the effect of this satisfaction was to discharge from the lien of the mortgage the portion held by the grantee, who was not made a party. It thus involved a different question from the one before us, but the court reiterated the rule as to the mortgagor not being a necessary party, where he has disposed of his interest and no deficiency judgment is sought against him.

The declaration from Story is:

> "Where the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the bill to foreclose."

Pomeroy states it:

> "It follows, as an evident corollary from the proposition just stated, that the mortgagor who has conveyed away the whole of the mortgaged premises is no longer a necessary party defendant in a foreclosure action; that is, he is not indispensable to the rendition of a simple judgment of sale, if no decree for a deficiency is asked."

The decision in 98 Cal. 327, 33 Pac. 199, thus seems to support appellant's view of the rule, but many authorities hold with Jones on Mortgages, § 727, as follows:

> "But if a mortgagee releases the mortgagor from personal liability, he thereby diminishes the security of a subsequent purchaser of part of the premises, and therefore the lien of the mortgage, so far as the rights of such subsequent purchaser are concerned, is discharged."

[6] Respondents contend, furthermore, that the mortgage was satisfied as to them because plaintiff with full knowledge of their status released land of greater value than the amount due on his mortgage. He released, so it is stated, "the land of defendant Howes, of the stipulated value of $1,457.20, and the land of defendant Reclamation District 1000, by dismissing as to them, of the value of $1,085.50, and he entered into an agreement with defendant Butler that the latter would pay him one-half the amount of his mortgage independent of the result of this suit." As we understand the record this latter amount is about $750. Thus it is claimed that plaintiff has virtually received "through his releases and agreement about $3,500, as against $2,150, paid for the mortgage." However, as to the land of the Reclamation District, it appears that a portion of the consideration at least was paid to respondents; but we may eliminate that entirely, and the principle contended for will apply, since the sum of $1,457.20 and $750 exceeds the amount paid by plaintiff for the mortgage.

The reason for this claim of respondents is that the grantee and the subsequent mortgagee of the whole or of a portion of the premises are redemptioners of the whole of the land subject to the original mortgage, and their right cannot be prejudiced by the release or sale of a portion without their consent, and without applying its value to the reduction of the amount secured by the senior mortgage. In this respect, since they are subrogated to his rights, their situation is similar to that of the original mortgagor where the mortgagee has released without the former's consent. In Woodward v. Brown, 119 Cal. 292, 51 Pac. 4, 63 Am. St. Rep. 108, it is said:

> "We cannot perceive upon what principle of equity or by what construction of this section [section 726, C. C. P.] it can be held that the mortgagee may, without the consent of the mortgagor, let go a part of the security to a purchaser from the mortgagor, at less than its value may be, and then look to the mortgagor to make up the deficiency. It would be a gross injustice to the mortgagor to hold him liable for a deficiency which the mortgagee has, without the mortgagor's authority or consent, created. The deficiency which the Code directs may take the form of a personal judgment is a deficiency arising from the sale of all the mortgaged security, and not a part of it."

In Merced Savings Bank v. Simon, 141 Cal. 11, 74 Pac. 356, it was held that—

> "Where subsequent to the execution of a mortgage the mortgagor granted a right of way over the mortgaged lands to a third party, the mortgagee could not, subsequent to that deed, prejudice the owner of the right of way by releases of other portions of the mortgaged premises."

In section 4841 of Elliott on Contracts the author, after stating that the second mortgagee has the right to redeem the property from the prior mortgage, says:

> "The second mortgagee, in such cases, stands in the place of the mortgagor, having the same rights and coming within the exception of a statute which provides that recorded mortgages 'shall not be valid against any person other than the parties thereto.' "

Many authorities sustaining this position of respondents might be cited, and the principle seems to be pretty well established. The point is made, however, by appellant that there is no finding that said release of a portion of the land was not agreed to by respondents. It is clear that, in order to have said release operate as a payment of the mortgage debt as to respondents, the release must have been without their consent, and unless so established it does not constitute a defense to the action.

[7] Again, it is settled that in a foreclosure action a defense that the land has been exonerated from liability must be specially pleaded. Barnhart v. Edwards (Sup.) 47 Pac. 251;[1] Cassinella v. Allen, 168 Cal. 677, 144 Pac. 746. There was no such pleading in the case.

Of course, the settled rules of pleading and practice should be observed as far as possible to promote uniformity in the administration of justice. These suggested defects may be easily remedied in case of new trial, but, as the record is presented, it is believed that the judgment should be reversed; and it is so ordered.

We concur: BUCK, Presiding Judge pro tem.; HART, J.

On Petition for Modification.

PER CURIAM. [8] In their petition for modification of the opinion and judgment, respondents claim that we should disregard the contention of appellant that it was necessary for the defendants to plead "that the land had been exonerated from liability, and also for the court to find that said release was not agreed to by respondents." This claim is based upon the proposition that appellant makes the contention for the first time in his closing brief. However, the contention of appellant is in response to the claim of respondents in their brief that "the mortgage was satisfied as to the contesting defendants, because plaintiff released land of greater value than amount of mortgage."

The rule invoked by respondents is therefore hardly applicable to the case. It is true that some evidence was received on the subject without objection, and it appears that the cause was tried upon the theory that such an issue was made. This would preclude appellant from thereafter making the objection that the matter was not pleaded. However, there is no finding upon the subject, and under the view we take of the case the findings that are made are insufficient to support the judgment.

[9] It is claimed by respondents, furthermore, that it was understood and virtually agreed in the court below that this case and Richey v. Butler, 28 Cal. App. Dec. 629, decided by this court on March 18, 1919, relating to mortgages on the same piece of land, should be considered together, and that the evidence in both cases might be considered in the determination of each.

It is furthermore claimed that the evidence in the latter case sufficiently showed that the note and mortgage in this case had been paid and discharged. We have no reason to doubt the statement of counsel in this respect; but there is nothing in the record before us to show that such was the understanding, and, moreover, there is not even any contention that it was agreed that both records might be considered by this court. It would be a departure from well-established practice in appellate proceedings to permit the record to be thus modified or changed. Furthermore, there is no finding in this case that the note has been paid or the mortgage released or discharged.

We can find no authority for changing the record and modifying the judgment, as requested by respondents. If they are right in their theory, the matter can be easily adjusted in the lower court, but, in view of what is before us, we think the petition must be denied; and it is so ordered.

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40 Cal. App. 376

GRBAVACH v. CASUALTY CO. OF AMERICA. (Civ. 2413.)

(District Court of Appeal, Second District, Division 1, California. March 21, 1919.)

INSURANCE 🔑686—REINSURANCE—ACTIONS ON REINSURANCE POLICY — BURDEN OF PROOF.

In an action by an insured upon a reinsurance contract covering liability for injuries, whereby the reinsurer agreed to settle the claims and losses of the original insurer, and which provided for the transfer of cash or securities by the original insurer to the reinsurer as a prerequisite condition, proof by plaintiff that such company had complied with its obligations under the contract was essential to recovery, in view of Civ. Code, §§ 2646, 2649.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by Peter Grbavach against the Casualty Company of America and another. Judgment for plaintiff, and the named defendant alone appeals. Reversed.

Bowen & Bailie, of Los Angeles, for appellant.

Herbert W. Kidd, of Los Angeles, for respondent.

JAMES, J. The plaintiff herein recovered judgment against one Reed for personal injuries alleged to have been suffered while the plaintiff was being conveyed as a passenger in an automobile operated by the said Reed. Reed carried insurance protection by policy issued by the defendant Pacific Coast Casualty Company. By the terms of that policy the insurance company agreed that its liability thereunder would inure to the benefit of any person who recovered judgment against the insured. Taking advantage of that condition, plaintiff, after securing judgment against Reed, brought this action against defendant Pacific Coast Casualty Company, and joined defendant Casualty Company of America because of the fact that the latter company had entered into a certain reinsurance agreement with the defendant first named. The Casualty Company of America disclaimed any liability to the plaintiff here, and appeals from the judgment entered against it.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 115 Cal. xvii.

It is insisted that in the complaint of plaintiff no cause of action was stated as against the appellant, and, further, that the evidence was insufficient to show that any liability had accrued under the alleged reinsurance agreement. It requires, indeed, a most liberal interpretation of the language used in the complaint in order to sustain it as sufficient in its statement of a cause of action against appellant. That portion of the complaint which purports to show such liability is as follows:

> "That as plaintiff is informed and believes and therefore alleges, on or about February 28, 1916, the defendant Casualty Company of America entered into a certain reinsurance agreement with the defendant Pacific Coast Casualty Company, under the terms of which said Casualty Company of America reinsured all of the outstanding liabilty of defendant Pacific Coast Casualty Company, including the liability of said Pacific Coast Casualty Company by reason of the execution of the policy of insurance before mentioned, and said Casualty Company of America thereupon assumed all outstanding liability of said Pacific Coast Casualty Company, including all liability by reason of the execution of said policy of insurance by the defendant Pacific Coast Casualty Company."

The allegation that a certain reinsurance agreement was made and that "under the terms of which said Casualty Company of America reinsured all of the outstanding liability of defendant Pacific Coast Casualty Company," standing by itself, certainly does not show that such an agreement was made as to make the appellant liable for the damages alleged. Under the Code provisions, the original insured has no interest in a contract of reinsurance. Section 2649, Civ. Code; Commercial Union Assurance Co. v. American Central Insurance Co., 68 Cal. 430, 9 Pac. 712. By the language quoted, nothing is described other than a contract of reinsurance such as defined by section 2646, Civil Code, and unless the latter part of the allegation quoted, that "said Casualty Company of America thereupon assumed all outstanding liability of said Pacific Coast Casualty Company, including all liability by reason of the execution of said policy of insurance by the defendant Pacific Coast Casualty Company," shows an extension of liability beyond that of an ordinary contract of reinsurance, the complaint was insufficient. The use of the words, "assumed all outstanding liability," may, perhaps, import that the contract was so extended, and under such construction it would be proper to hold that a sufficient cause of action is stated. However, we think that the second point made as to there being a lack of evidence to substantiate the allegations of the complaint must be sustained. Plaintiff offered in evidence the alleged reinsurance agreement, from which it appeared that upon certain conditions stated—plainly prerequisite—the appellant agreed to adjust and settle the "claims and losses" of the Pacific Coast Company. As consideration therefor, the Pacific Coast Company was to "transfer, assign and set over to the 'Casualty' in cash or securities acceptable to the 'Casualty,' an amount equal and corresponding to the aggregate amount of the 'Pacific's' legal loss reserves as of December 31, 1915. * * *" Plaintiff made no proof or showing that the Pacific Coast Company had complied with its obligations under the contract; hence it would follow that there was no evidence from which it could be inferred that conditions had occurred which would require this appellant to settle the claims and losses of the Pacific Company. The appellant admitted the execution of the agreement and the filing thereof with the insurance commissioner of the state of California, but objected to the introduction in evidence of the same on the general ground that the evidence was incompetent, irrelevant, and immaterial. The case as made by the evidence of the plaintiff was incomplete, and for that reason the judgment cannot be maintained.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

40 Cal. App. 393

SAN DIEGO INV. CO. v. CRANE. (Civ. 2877.)

(District Court of Appeal, Second District, Division 2, California. March 21, 1919.)

1. JUDGMENT 🔑23 — WHAT CONSTITUTES—FINDINGS AND CONCLUSIONS OF LAW.

Findings and conclusions of law do not constitute a judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment.]

2. APPEAL AND ERROR 🔑939—CLERK'S CERTIFICATE TO TRANSCRIPT—PRESUMPTION.

The clerk's certificate of correctness of transcript on appeal must be assumed true in the absence of anything to the contrary.

3. APPEAL AND ERROR 🔑123—NECESSITY OF FORMAL JUDGMENT.

Appeal expressed to be from the judgment entered must be dismissed, where the certified transcript on appeal shows only findings and conclusions of law bearing the indorsement "entered" as of a certain date.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the San Diego Investment Company against Alex T. Crane. Plaintiff appeals. Appeal dismissed.

Sam Ferry Smith, of San Diego, and Laurence H. Smith, of San Francisco, for appellant.

E. S. Torrance, of San Diego, for respondent.

FINLAYSON, P. J. The appeal is from "the judgment entered in the above-entitled court on the 4th day of February, A. D. 1916." We have searched through the record in vain to find such a judgment, or, indeed, any judgment. There is none.

We do not know to what appellant refers when, in its notice of appeal, it says it "hereby appeals * * * from the judgment entered * * * on the 4th day of February, A. D. 1916," unless it be the findings and conclusions of law, which, for some unaccountable reason, bear the indorsement, "Entered February 4th, 1916." These, however, do not constitute a judgment. Miller v. Sharpe, 54 Cal. 590; Thompson v. Lynch, 43 Cal. 482. The clerk's certificate certifies that "the foregoing transcript on appeal is correct, and contains a true copy of the judgment roll in the action." In the absence of anything to the contrary, we must assume that the clerk's certificate states the truth; if it does, then the transcript "contains a true copy of the judgment roll." Since no judgment appears in the judgment roll as printed in the transcript, the only possible conclusion is that, as yet, no judgment has been given or made. There is therefore nothing from which to appeal, and the appeal should be dismissed. Miller v. Sharpe, supra.

Appeal dismissed.

We concur: SLOANE, J.; THOMAS, J.

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40 Cal. App. 383

RUNYON et al. v. CITY OF LOS ANGELES et al. (Civ. 2873.)

(District Court of Appeal, Second District, Division 2, California. March 21, 1919.)

1. APPEAL AND ERROR 🔑110—ORDERS APPEALABLE.

An appeal from an order denying a motion for new trial, taken after Code Civ. Proc. § 963, had been amended in 1915, will be dismissed.

2. APPEAL AND ERROR 🔑695(2) — MATTERS REVIEWABLE—RECORD—QUESTIONS OF FACT.

When exceptions are taken to a nonsuit or to a directed verdict, all the evidence necessarily becomes a part of the case, and it cannot be determined on appeal that the ruling was erroneous, unless all the evidence is in the record.

3. LANDLORD AND TENANT 🔑124(1)—LEASE OF PART OF BUILDING.

A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised.

4. LANDLORD AND TENANT 🔑124(1)—LEASE OF STORE—APPURTENANCES.

The general rule is that where a store is leased everything then in use for the store, as an incident or appurtenance, passes by the lease.

5. APPEAL AND ERROR 🔑907(4)—PRESUMPTIONS OF REGULARITY.

On appeal every intendment must be indulged in favor of the regularity of the lower court's procedure; and, in the absence of part of the evidence, it will be presumed that, if all the evidence was in the record, it would support a state of facts sufficient to uphold the judgment.

6. LANDLORD AND TENANT 🔑152(4)—DUTY OF TENANT TO REPAIR.

If a basement under a store, a part of a larger building, was cut off by brick walls from the rest of the building and was included in the lease of the store, the tenant's covenant to keep the premises in repair applied to an iron grating in the sidewalk admitting light and air into the basement.

7. MUNICIPAL CORPORATIONS 🔑668 — EXCAVATIONS UNDER SIDEWALK—GRATING—NUISANCE.

An abutting owner whose title extends to center of street may excavate a vault or cellar under sidewalk with permission of city authorities, express or implied, and may insert in sidewalk, for purpose of admitting light and air, an iron grating or other similar device, if safely and properly constructed, and such a contrivance is not a nuisance per se.

8. LANDLORD AND TENANT 🔑167(5)—INJURY TO THIRD PERSONS—LIABILITY OF LANDLORD.

If an abutting property owner makes an excavation under sidewalk and exercises care in constructing a grating, coal hole, or other similar device with permission of proper city authorities, and work is not inherently in its nature a nuisance per se, he is not liable for injuries to third persons due to lack of repair, where device was in good condition at time owner leased premises to tenant under a lease wherein it was duty of tenant to make repairs.

9. LANDLORD AND TENANT 🔑167(5)—GRATING IN SIDEWALK—INJURY TO PEDESTRIAN.

Where a pedestrian is injured by reason of a grating in a sidewalk being out of repair, the occupier of the premises, and not the owner, is the one to whom responsibility prima facie attaches.

10. LANDLORD AND TENANT 🔑167(5)—INJURIES TO THIRD PERSONS — GRATING IN SIDEWALK—LIABILITY OF LANDLORD.

Even though premises leased be but a part of the whole building, landlord is not liable for injuries to a third person by reason of failure to repair a grating in sidewalk, which it was duty of tenant to keep in repair, where grating in sidewalk was used exclusively for benefit of and in connection with part of building leased by tenant.

11. LANDLORD AND TENANT 🔑167(2)—INJURY TO THIRD PERSON — LIABILITY OF LANDLORD.

One who upon express or implied invitation of tenant enters, or is proceeding to enter, upon the leased premises is an invitee, and as such stands in the shoes of the tenant, and may not recover for injuries received due to lack of repairs, if tenant cannot.

12. LANDLORD AND TENANT 🔑164(2)—INJURIES TO TENANT—LACK OF REPAIRS.

A tenant may not recover from his landlord damages for injuries suffered by reason of lack of repairs, where burden of repairing rests upon tenant.

13. LANDLORD AND TENANT 🔑169(5)—INJURIES TO THIRD PERSONS—EVIDENCE—ADMISSION BY MAKING REPAIRS.

Voluntary repair by a landlord of a defect in leased premises, after an injury to a third person resulting therefrom, is not an admission of liability.

14. APPEAL AND ERROR 🔑907(4) — PRESUMPTIONS OF REGULARITY.

Where on appeal from judgment based on a directed verdict appellant has not all evidence in record, it will be presumed that any errors in admission or rejection of evidence were cured by evidence not brought up.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Alice Runyon and William S. Runyon against the City of Los Angeles and others. From a judgment for defendants and an order denying motion for new trial, plaintiffs appeal. Affirmed.

C. E. Joslin, of Los Angeles, for appellants.

Norman Sterry and Gibson, Dunn & Crutcher, all of Los Angeles, for respondents.

FINLAYSON, P. J. [1] Action by husband and wife to recover damages for injuries to the wife, received from falling through a broken iron grating in the sidewalk in front of a barber shop on the First street side of the Nadeau Hotel Building—a building on the southwest corner of First and Spring streets, in the city of Los Angeles, and owned by the defendants other than the city. The city's demurrer to the complaint was sustained without leave to amend, leaving the owners as the sole remaining defendants. At the conclusion of the evidence the court directed the jury to return a verdict for defendants. From the judgment and an order denying their motion for a new trial, plaintiffs appeal. The appeal from the order must be dismissed; it having been taken after section 963 of the Code of Civil Procedure had been amended in 1915.

At the time of the accident the hotel was vacant, but all the ground floor storerooms on the First street side of the hotel building were leased to tenants, including the storeroom known as 212 West First street, in front of which, in the sidewalk, was the broken grating that was the cause of the injury. This storeroom was then occupied and used as a barber shop by one Cooley, a tenant of the owners under a written lease wherein it is expressly provided that the tenant, at his own cost, shall make all necessary repairs during the term of the lease.

The broken grating, which was 27 inches long by 11½ inches wide at one end and 10 inches at the other, was made of iron bars an inch in thickness, extending from end to end. At the date of the execution of the lease one bar was out of the grating. It was stipulated at the trial that Mrs. Runyon could not have been injured by the grating with only one bar out. So that, though one bar was out at the date of the lease, the grating was not then dangerous, and therefore, at that time, not a nuisance. The second bar—the breaking of which caused the grating to become a menace to public safety and a nuisance—was broken by a third person while delivering paper to a subtenant who had sublet from Cooley a part of the basement under the barber shop. Under each storeroom on First street is a separate basement, separated by brick walls from the basement under each of the other storerooms and likewise from the hotel basement. The door to Cooley's barber shop is set in from the line of First street about 6 feet. On the right or west side of this inset is a bootblack stand, extending from the line of the sidewalk to the door of the barber shop. The iron grating came flush up to the property line. It was over an opening under the sidewalk that led into the basement under the barber shop and gave light and air thereto. It was the custom of the owners, whenever they leased a storeroom, to deliver possession of the basement thereunder. Cooley testified that he bought the establishment from a Mrs. Sanborn, to whom the premises had been let under the written lease; that after the lease had been made to her, Mrs. Sanborn put him in possession of the storeroom; that afterwards he asked the agent of the owners if the basement did not go with the storeroom, and that the agent said "Yes," and gave him the key. The agent for the hotel property testified that he knew the lease was assigned to Mr. Cooley; that he delivered the storeroom and basement to him; that Cooley asked him if the basement did not go with the lease; that he told Cooley it did, and gave him the key; and that whenever the owners of the building leased a storeroom they always delivered possession of the basement that is under such storeroom, without specifying the basement in the lease.

Immediately prior to the accident Mrs. Runyon and her cousin were on the north side of First street, opposite the shoe-shining stand in front of Cooley's barber shop. The cousin, desiring to have her shoes shined, crossed over to the shoe-shining stand, leading the way, while Mrs. Runyon followed, intending to wait for her cousin while the latter had her shoes shined. Without noticing the broken grating, Mrs. Runyon stepped into the opening made by the absence of the two broken iron bars, and her right leg was jammed or crowded down between the remaining bars nearly to the knee.

[2] The record before us, as presented by the bill of exceptions, contains a part only of the evidence, it appearing affirmatively therefrom that several witnesses, none of whose testimony is set forth, were sworn and testified. This being so, we very properly might affirm the judgment without any further discussion. When exceptions are taken to a nonsuit, or to a directed verdict, all the evidence necessarily becomes a part of the case. Such a ruling is based upon the entire evidence. It cannot be determined that the ruling was erroneous without an examination of all the evidence; for it may be that the error complained of was cured by the omitted evidence. However, we shall endeavor to dispose of the case on its merits, notwithstanding the incompleteness of the record, though the failure to include all the evidence in the bill of exceptions necessarily will compel us to resolve every material question of fact against appellants.

There are two crucial facts respecting which it cannot be said that the evidence before us is complete. They are: (1) Was the basement under Cooley's storeroom necessarily used with, or reasonably necessary to the enjoyment of the storeroom as a barber shop? and (2) did the basement, as an independent and separate inclosure, include, as an integral part thereof, and separated from all other parts of the building, the excavation or space under the sidewalk over which the grating was constructed?

[3, 4] The written lease does not expressly mention the basement under Cooley's barber shop. The language of the lease is:

> "That certain storeroom known and numbered as 212 West First Street, * * * said storeroom hereby leased being the room now occupied by the party of the second part. * * * The said storeroom is to be used by the party of the second part for the purpose of conducting a barber shop therein, for which said purpose it is now occupied by the party of the second part."

A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. Miller v. Fitzgerald Dry Goods Co., 62 Neb. 270, 86 N. W. 1078; Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340, 96 N. W. 487; Herpolsheimer v. Funke, 1 Neb. (Unof.) 471, 95 N. W. 688. The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease. Hall v. Irvin, 78 App. Div. 107, 79 N. Y. Supp. 614; Browning v. Dalesme, 3 Sandf. (N. Y.) 13. From the testimony to which reference already has been made, it may be inferred that the basement was necessarily used with, and was reasonably necessary to the use of, the barber shop occupied by Cooley. A fortiori, it may well be that the evidence that was introduced in the court a quo, but not brought up by the record on this appeal, showed that the basement necessarily was used with the barber shop, and that therefore it passed by the lease as an incident or an appurtenance to the storeroom described in the written document itself.

[5] Appellants claim that the excavation under the sidewalk, over which was the grating that caused the accident was no part of the basement occupied by Cooley; that it was not so physically connected with that particular basement as to be an integral part thereof and of that basement only. The agent for the property testified:

"This basement under Mr. Cooley's store has no connection with or entrance into the hotel basement. It is separate. * * * The grating out of which the bars were broken was over an opening that led into Mr. Cooley's basement."

From this it may be inferred that the basement under Cooley's store, shut off from every other basement by solid brick walls, included, as an integral part thereof, the space under the sidewalk over which the grating in question had been constructed, and that such excavation under the sidewalk was shut off from every other basement. At any rate, the incomplete evidence before us does not conflict with this view. Since every intendment must be indulged in favor of the regularity of the court's procedure, it will be presumed that if all the evidence were in the record it would support a state of facts sufficient to uphold the judgment.

For the foregoing reasons we must assume, as unavoidable hypotheses, that the basement under the leased storeroom included the excavation over which the grating was constructed, separated from every other basement; that the basement was reasonably necessary to the enjoyment of the leased storeroom or barber shop, and that, therefore, it passed with the lease as a necessary incident or appurtenance. Upon this state of facts—a state of facts that we necessarily must assume would be established if all the evidence were before us—respondents are not liable.

[6, 7] The written lease, if the facts be as we have stated them, included the iron grating that permitted the entrance of light and air to Cooley's basement, and the tenant's covenant to keep in repair applied to it. Boston v. Gray, 144 Mass. 53, 10 N. E. 509; Rider v. Clark, 132 Cal. 382, 64 Pac. 564. The grating when originally constructed was not a nuisance per se. Nor was it, per se, a nuisance at the time when the lease was executed, though at that time one bar was broken; for the fact that one bar was out did not cause the contrivance to become a source of danger. The abutting owner, whose title extends to the center of the street, may excavate a vault or cellar under the sidewalk. Such owner, with permission of the city authorities, express or implied—implied or inferred where, after a reasonable time, no objection has been made by the proper officials—may insert in the sidewalk, for the purpose of admitting light and air to the vault or cellar, an iron grating, or other similar device, if safely and properly constructed, and such contrivance in the sidewalk is not a nuisance per se. Rider v. Clark, supra; Morrison v. McAvoy, 7 Cal. Unrep. 37, 70 Pac. 626; Hirsch, etc., v. Remick Co., 177 Pac. 876; Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422.

[8, 9] The original structure having been legal and in a safe condition when respondents leased the premises to their tenant, and the injuries having been received in consequence of the grating getting out of repair during the tenancy—the tenant and not the landlord being bound to repair—respondents are not liable as owners, or otherwise. If the abutting property owner making the excavation and constructing the grating, coal hole, or other similar device in the sidewalk does so with the permission of the proper city authorities, and the work is not inherently, in its nature and character, a nuisance per se, the owner is liable only in the event that he fails to use ordinary care and diligence in constructing the grating or other similar contrivance and keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk. West Chicago Masonic Ass'n v. Cohn, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am. St. Rep. 327. When the premises are in good repair at the time they are let, and the landlord, under the terms of the lease, is not bound to keep them in repair, the tenant in possession, and not the landlord, is liable for an injury resulting from a failure to repair the pavement in front of the premises. Lindstrom v. Pennsylvania Co., 212 Pa. 391, 61 Atl. 940; Fisher v. Thirkell, supra. The general rule is that it is the occupier, and he alone, to whom such responsibility prima facie attaches. Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778; City of Lowell v. Spaulding, 4 Cush. (Mass.) 277, 50 Am. Dec. 775. To this general rule the following exceptions are recognized, and the owner of the leased premises may be made liable: (1) If the lease be one under which he, and not the tenant, is required to keep the premises in repair; (2) if the dangerous and defective condition by which the injury was occasioned existed when the premises were leased; (3) if that which occasioned the injury was, inherently, in its nature and character, a nuisance, and was upon the premises when the lease was executed. West Chicago Masonic Ass'n v. Cohn, supra. The proof does not bring respondents within any of these exceptions to the general rule. The grating being safe at the date of the lease, the neglect which caused the injury to Mrs. Runyon was not that of respondents, but of their tenant Cooley, who had covenanted to keep the leased premises in repair.

[10] It is contended that where the owner of a building is granted the privilege of excavating a vault under the sidewalk of a public street, and has constructed in the sidewalk an iron grating, coal hole, or other similar device for the admission of light and air for the benefit of his premises, he assumes, by implication, the duty of keeping the sidewalk in as good condition and as

safe for the public use as if the grating, coal hole, or other like construction had never been made; that such duty is imposed by law for the public safety; and that, while the alienation of the entire premises, either permanently, as by deed, or temporarily, as by lease, will transfer the duty to the grantee or tenant, still the lease of a part only of the premises will not relieve the owner of the duty he owes to the public and cast the same upon the tenant of such leased part of the entire premises, even though the opening in the sidewalk has no relation to any other portion of the building than that in possession of the tenant. This view seems to have obtained the sanction of the New York Court of Appeals in the case of Canandaigua v. Foster, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575. Of this case the Illinois Supreme Court in West Chicago Masonic Ass'n v. Cohn, supra, said:

> "Fowler, the owner and landlord, was not in possession, but the coal hole had been constructed without the consent of the city and constituted a nuisance, and Fowler let the premises with the nuisance upon them. His case fell within one of the exceptions to the general rule hereinbefore mentioned as recognized in this jurisdiction."

The New York courts always have held the owner to a stricter accountability than is consistent with the weight of authority. Fisher v. Thirkell, supra. It is conceded by the courts of that state that the owner and landlord who has made the excavation under the sidewalk and constructed the iron grating, or other similar contrivance, may divest himself of all responsibility by demising or leasing the premises as a whole. If an owner who has constructed a contrivance that becomes a source of danger and a nuisance may divest himself of future responsibility under any circumstances whatever, as, for example, by demising the entire building, we fail to perceive why he may not equally divest himself of such responsibility by exacting from his lessee a covenant to keep the leased premises in repair, even though the premises so leased be but a part of the whole building, provided the contrivance in the sidewalk be used exclusively for the benefit of and in connection with that part of the building which is leased. The abutting owner is liable only in the event that he fails to use ordinary care in the original construction of the iron grating, or other similar device in the sidewalk, or in keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk. If, as originally constructed, the contrivance is safe and not a nuisance per se, and if, at the date of the execution of the lease of the part of the premises to which it is solely appurtenant, it is safe and not, in its nature and character, a nuisance, the owner exercises ordinary care to keep it in such condition if he exacts from his lessee a covenant to make all necessary repairs. The true rule—the rule that has the sanction of authority and reason—is stated by the Illinois Supreme Court as follows:

> "If the coal hole and vault were constructed and are used for the benefit of the entire premises, the leasing of a portion, only, of the premises would not absolve the owner from his duty to use ordinary care to keep the coal hole and the covering thereto in a good and safe condition; but if the vault into which the coal hole opens has no connection with any other part of the building than the basement leased to the tenant, and no benefit inures from it to any other portion of the premises, and the tenant, as against the owner, has, and is entitled to have, exclusive possession and control of the basement, coal hole, and vault, and has covenanted to keep the same in good repair, then the case should be regarded as within the operation of the general rule that the occupant of the premises, and not the owner thereof, is responsible for injuries received in consequence of a failure to keep the premises in repair." West Chicago Masonic Ass'n v. Cohn, supra.

[11, 12] We have assumed in our discussion of the case that Mrs. Runyon was one of the general public using the sidewalk, and was not a guest or invitee of the tenant in possession. The rule is that one who, upon the express or implied invitation of the tenant, enters or is proceeding to enter upon the leased premises, is an invitee, and as such stands in the shoes of the tenant, and therefore may not recover if the tenant cannot, and that the tenant may not recover if the burden of repairing rests upon him. Mackey v. Lonergan, 221 Mass. 296, 108 N. E. 1062, L. R. A. 1916F, 1098; Leaux v. New York, 87 App. Div. 398, 84 N. Y. Supp. 514. In Canandaigua v. Foster, supra, the general rule is stated:

> "It must be further conceded that, if the store was in proper condition at the beginning of the term, the owner was not bound to repair it for the protection of those who, upon the express or implied invitation of the tenant, might enter it for the transaction of business or any other purpose."

Mrs. Runyon evidently proceeded to enter the space occupied by the bootblack stand, assuming that she would be permitted by the subtenant to enter upon and remain on his premises as a guest or invitee while her cousin was having her shoes shined.

[13, 14] Appellants complain that the court erred in refusing to allow them to show that, after the accident, respondents, as owners, made and paid for repairs to the broken grating. Voluntary repair by a landlord of a defect in the demised premises after an injury resulting therefrom, is not an admission of liability. Kearines v. Cullen, 183 Mass. 298, 67 N. E. 243. However, as to this and

all other complaints made by appellants respecting the admission or rejection of evidence, it may be said that every intendment is in favor of the correctness and regularity of the proceedings below, and that, since appellants have not brought up all the evidence for review, we will, if necessary, infer that the evidence not brought up cured the errors, if any there were. Barlow v. Barnes, 172 Cal. 98, 155 Pac. 457.

Appeal from the order denying the motion for a new trial dismissed.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

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40 Cal. App. 443

CONSOLIDATED CONCESSIONS CO. v. McCONNELL. (Civ. 2667.)

(District Court of Appeal, First District, Division 1, California. March 25, 1919.)

1. Corporations ⚷514(1)—Actions—Pleading—Allegations of Corporate Capacity.

Complaint alleging that plaintiff was incorporated on certain date without alleging that it continued to be such corporation for or at any time thereafter, or that it was such corporation at the time of any of the transactions referred to in the complaint, or at the time of the institution of the action, is insufficient.

2. Cancellation of Instruments ⚷37(3)—Pleading — Sufficiency of Complaint — Execution of Contract.

In corporation's action to cancel a contract and note and shares of stock executed by corporation pursuant to the contract, complaint alleging that the execution of such contract and note, and the issuance of such stock, was purported to be authorized by resolutions purporting to have been adopted at meetings of the corporation, which were never held, but failing to allege that such contract and note were in fact executed, and that such stock was in fact issued, is insufficient.

3. Corporations ⚷189(11)—Contract with Stockholders—Actions — Fraud — Sufficiency of Complaint.

In corporation's action to set aside contract and note, authorized to be executed, and stock authorized to be issued to defendant stockholder at fictitious meetings of directors, who were merely nominal stockholders, allegation that defendant used the corporation as a "tool and catspaw," and thereby received certain amount "paid into said company by the public as the proceeds of plaintiff's stock," *held* insufficient allegation that there were bona fide stockholders who were defrauded by such wrongful acts.

4. Corporations ⚷189(11) — Fraudulent Contract by Nominal Stockholders—Action to Set Aside Contract—Complaint.

In corporation's action to set aside contract note and stock issue authorized at fictitious meetings of directors, who were merely nominal stockholders, and constituting fraud on the corporation, complaint must allege that there are bona fide stockholders who are real parties in interest, who such persons are, and to what extent and in what way they were injured by such acts and proceedings.

5. Pleading ⚷225(2)—Demurrer — Leave to Plead Over—Discretion.

Court, in sustaining demurrer to fifth amended complaint, did not abuse its discretion in denying plaintiff leave to amend.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Consolidated Concessions Company against Emmett W. McConnell. Judgment for defendant, and plaintiff appeals. Affirmed.

H. D. Newhouse, of San Francisco, and Milton Shepardson, of Oakland, for appellant.

Wise & O'Connor, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant after an order sustaining his demurrer to the plaintiff's fifth amended complaint. The action purported to be one instituted by the plaintiff as a corporation to annul and cause to be canceled a certain contract between the plaintiff and the defendant for the sale by the latter and purchase by the former of certain capital stock in other corporations, and for delivery up for cancellation and annulment of a certain promissory note of the plaintiff for the sum of $500,000, and for the cancellation and annulment of 60,000 shares of the capital stock of plaintiff, which was to have been issued to the defendant pursuant to said contract, and for an accounting between the defendant and the plaintiff as to the funds received by the former as a result of these transactions, and for general relief.

The demurrer of the defendant to the fifth amended complaint was both general and special, and was sustained by a general order of the trial court, and from the judgment thereupon entered the plaintiff prosecutes this appeal.

[1, 2] A mere cursory view of the plaintiff's fifth amended complaint will serve to show that the defendant's demurrer to its sufficiency was well taken upon several grounds. In the first place, while it is averred that the plaintiff was incorporated on or about July 15, 1913, there is no averment that it continued to be such corporation for or at any time thereafter, or that it was such corporation at the time of any of the transactions referred to in the plaintiff's pleading, or at the time of the institution of this action in the month of April, 1917. The defendant's

demurrer aimed at this defect is both general and special, and obviously is good. Again, this complaint alleges that certain transactions, embracing the execution of a contract with the defendant and the issue of certain stock to him pursuant thereto, and the receipt from him, as the consideration therefor and for the promissory note of the plaintiff, of certain shares of stock of other corporations, was purported to be authorized by certain resolutions purporting to have been adopted at certain meetings of the corporation which were never held, but the complaint fails to aver that such contract was ever in fact executed or acted upon, or that such stock was ever in fact issued, or that said promissory note was ever executed or delivered to the defendant; in a word, the complaint utterly fails to aver that the several instruments which it is the main purpose of the action to have rescinded, canceled, and surrendered, ever in fact came into being or were in existence or in the possession of or under the control of the defendant at the time the action was begun.

[3, 4] A yet more serious deficiency in the complaint before us is this: The action is one apparently to set aside the contract, stock, and promissory note authorized to be issued to the defendant at fictitious meetings of the directors of the corporation who were merely nominal stockholders therein, who are alleged never to have had any interest therein or to have given any consideration for their stock, which collectively amount to but 10 shares, and, having accomplished the cancellation of these documents, to recover from the defendant the sum of $90,000, which it is alleged the defendant has defrauded the public out of. In view of these objects to be attained by this action it would seem to have been an essential averment that there were stockholders of the corporation other than the defendant and the few nominal incorporators thereof who are alleged to have no interest therein, yet this fifth amended complaint contains no averment that there are any such stockholders, save the inferential allegation that the defendant used the corporation as a "tool and catspaw" of himself and a fellow conspirator, and as a "means and instrumentality of defrauding and swindling the public, by which process he wrongfully and fraudulently received from the Consolidated Concessions Company about $90,000 paid into said company by the public as the proceeds of plaintiff's stock." It is clear that these averments are altogether insufficient to base a right of action for the recovery of money upon. If, as alleged, this corporation was the "tool and catspaw" of the defendant and his fellow conspirators, there is nothing to show that it is not still such, or that, being particeps criminis in the alleged fictitious and fraudulent transactions, it has any right of action to set aside such transactions or recover moneys, unless so to do would redound to the benefit of bona fide stockholders of the corporation, who are the real parties in interest and the only persons defrauded by the defendant's alleged wrongful acts. It was essential therefore to have alleged that there were such persons, and who they were, and what their interest in the corporation amounted to, and in what specific way and to what extent they were injured by the acts and proceedings complained of. Such averments are altogether lacking from this complaint.

It was the existence of these and a number of other defects in this fifth amended complaint which caused the court to properly sustain the general and special demurrer to it.

[5] The main contention of the plaintiff on this appeal appears to be that the trial court sustained said demurrer without leave to amend. Had this been a demurrer to the original complaint there might be some reason or force to this contention, but there is a limit to which the patience of the trial court may be extended in the matter of allowing repeated attempts to amend a faulty pleading. This was pointed out in the case of Billesbach v. Larkey, 161 Cal. 649, 120 Pac. 31, wherein the Supreme Court, in affirming a judgment rendered after a third ineffectual attempt to amend a complaint, said:

> "Ordinarily the trial court should be liberal in allowing amendments where the defect in the complaint is one of form only. This, however, is a matter which is almost entirely within the discretion of that court, and this court can reverse the case only where there is a manifest abuse of discretion in giving final judgment on demurrer without leave to amend. The plaintiff does not have a positive right to amend his pleading after a demurrer has been sustained to it. His leave to amend afterwards is always of grace, not of right. * * * In the present case the final pleading of plaintiffs was the third amended complaint. It was therefore their fourth attempt to state a cause of action. * * * The refusal of leave to amend was not an abuse of discretion."

We do not deem it necessary to pursue the subject further. Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

40 Cal. App. 416

PEOPLE v. PREWETT. (Cr. 843.)

(District Court of Appeal, First District, Division 1, California. March 22, 1919. Rehearing Denied by Supreme Court May 19, 1919.)

1. CRIMINAL LAW ⚷711 — LIMITATION OF ARGUMENT.

Where defendant's counsel upon court's inquiry stated that he did not think his argument would consume more than an hour and a half, and court thereupon suggested that no more than an hour and a half would be allowed either side unless the court session was to run into the night, such limitation of argument was not a material detriment to defendant nor an abuse of discretion.

2. HOMICIDE ⚷311 — INSTRUCTIONS — PENALTY.

In homicide prosecutions the giving of instructions as to the penalty for the various degrees of homicide is not to be commended.

3. CRIMINAL LAW ⚷823(17)—INSTRUCTIONS—PENALTY—CORRECTION.

In homicide prosecution, court's action in reading to jury Pen. Code, §§ 190, 193, 1168, relating to the punishment for murder in first and second degrees and for manslaughter and to indeterminate sentences, was cured by an instruction immediately following, charging jury not to permit the penalty to influence it in determining the degree or grade of the crime, if any, of which defendant was guilty.

4. CRIMINAL LAW ⚷1144(15)—APPEAL—PRESUMPTIONS.

Jury will be presumed to have followed court's instructions.

Appeal from Superior Court, Monterey County; Benj. K. Knight, Judge.

Samuel M. Prewett was convicted of murder in the second degree, and he appeals. Affirmed.

Feliz & White, of Salinas, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of murder in the second degree. The appellant urges three grounds for the reversal of such judgment. The first of these is that the court erred in limiting the argument of the defendant's counsel to the jury. This contention we find to be without merit. At the outset of the argument of the cause the judge of the trial court inquired as to how long a time it was expected by counsel would be consumed in argument, to which Mr. Feliz, one of the defendant's counsel, stated that on account of his having a severe cold he did not imagine that he would occupy an hour and a half, whereupon the court suggested that that was all the time that could be allowed on each side unless the session of the court were run into the night. No objection was at this time made by defendant's counsel to the court's suggestion, and the argument proceeded. After the opening argument on the part of the people, Mr. White, one of defendant's counsel, occupied an hour in opening the argument on behalf of the defense, and thereafter Mr. Feliz, in closing for the defense, spoke for an hour and ten minutes, at the end of which time the court made the following observation:

> "If we are to complete this case to-day, Mr. Feliz, I think you had better conclude your argument within the next 15 or 20 minutes."

To this remark on the part of the court the defendant's counsel took an exception, and Mr. Feliz then proceeded with his argument, concluding the same within about 10 minutes thereafter.

[1] Upon this state of the record we are satisfied that the defendant sustained no material detriment from the limitation of the argument of his counsel under the circumstances above set forth.

In the case of People v. Morrell, 28 Cal. App. 729, 153 Pac. 977, this court laid down the rule that—

> "Trial judges have the right to regulate the proceedings in their courts and have the right to exercise a reasonable discretion in the direction of limiting the arguments to be made by counsel."

We are of the opinion that there was no abuse of such discretion in the instant case.

[2] The next contention of the appellant is that the court committed an error in giving certain instructions to the jury with relation to the penalties for murder and for manslaughter. The record in that regard discloses that after the jury had been generally instructed by the court and had retired for deliberation, it returned to the court for further instructions, whereupon the court proceeded to read to the jury sections 190, 193, and 1168 of the Penal Code, relating to the punishment for murder in the first degree, for murder in the second degree, and for manslaughter, and also relating to the recent changes effected by the amendment of section 1168 (St. 1917, p. 665) in relation to indeterminate sentences. We are not pointed to any authority on the part of the appellant holding the giving of such instructions to be reversible error; but we are inclined to agree with the appellant's suggestion that the practice of giving such instructions is one that is not to be commended. Nevertheless the record discloses that at the time of giving the foregoing instructions and as a part thereof the court gave to the jury the following instruction:

> "The jury is further instructed that its sole province is to pass on the guilt or innocence of

the defendant and to determine the grade or degree of crime of which it finds him guilty, if it finds him guilty of any, and the matter of the penalty which may be attached to the commission of the crime must not in the slightest degree influence you in determining the question of his guilt or innocence. Nor shall such penalty influence you in the slightest degree in determining the degree or grade of crime committed, if any. As you have been heretofore instructed, the defendant's guilt or innocence and also the degree or grade of crime committed by him, if any, must be determined by you from all the evidence in the case, and not from the nature or extent of the penalty fixed by the statute for the commission of said grades or degrees of crime."

[3, 4] The instruction last above quoted would, if followed by the jury, have the effect of effacing whatever prejudice the defendant might have suffered from the giving of the court's instructions in relation to penalties; and, in the absence of any indication to the contrary, this court will assume that the jury did in fact obey the last above quoted instruction of the court in its further deliberations and in the rendition of its verdict.

As to the appellant's final point, that the verdict of the jury is not sustained by the evidence, it is sufficient to say that the examination we have made of the record satisfies us that this contention must be resolved against the appellant.

No prejudicial error appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 276

NATIONAL BANK OF SAN MATEO v. WHITNEY. (Civ. 2744.)

(District Court of Appeal, First District, Division 2, California. March 14, 1919. Rehearing Denied by Supreme Court May 12, 1919.)

1. Banks and Banking 🔑106—Deposits—Execution of Note — Abstraction of Funds by Cashier.

If depositor hands note to cashier, with instructions to charge it to his personal account and credit proceeds to account of corporation of which he is president, and cashier charges note to personal account, and abstracts proceeds without crediting them to corporation's account, the loss falls upon bank, and not depositor.

2. Bills and Notes 🔑90—Consideration—Delivery.

Where depositor left note signed in blank with bank cashier, with directions to fill in note, and charge to his personal account and credit to account of corporation of which he was president, and cashier upon filling in note and charging to depositor's personal account abstracted proceeds without crediting corporation's account, depositor was not liable on note; there being no consideration for note and no delivery thereof to bank.

3. Banks and Banking 🔑106—Abstraction of Bank Funds—Deposits—Loss of Bank.

If a merchant sends his bookkeeper to bank with check to be deposited and bookkeeper delivers check to bank's teller, with instruction to deposit proceeds to merchant's account, and teller destroys deposit slip and treats check as cash transaction, abstracting money, and not crediting deposit to account of merchant, it is bank's loss, not merchant's.

4. Bills and Notes 🔑63—Delivery—Acceptance by Bank.

There is no legal delivery of note to bank by bank's customer until the bank or some one acting for it takes affirmative action, such as orally consenting to advance money represented by note, or entering note on books of bank, and transferring proper credit, or some other act, since bank does not accept delivery until such affirmative act.

5. Bills and Notes 🔑64—Note to Bank—Delivery—Disregard of Conditions.

If conditions prescribed by maker of note are fraudulently disregarded by the discounting bank or its agent, there is no delivery binding the maker; there being no meeting of the minds.

6. Bills and Notes 🔑92(1)—Consideration—Bank Funds.

Where bank customer's note was charged to his account by cashier, who, instead of crediting proceeds, pursuant to directions, to account of corporation of which depositor was president, filed note with bank papers and abstracted proceeds from bank's funds, depositor was not liable on note, under Civ. Code, § 1605, as being supported by a consideration because of prejudice suffered by bank; for such prejudice was by reason of the theft, and not by reason of the note.

7. Bills and Notes 🔑493(4)—Consideration—Presumption—Evidence.

The presumption that depositor's note charged to his personal account, and placed on file with bank papers by cashier upon his abstraction of proceeds from bank funds, was based upon a consideration, cannot overcome direct evidence that note was not credited to account of depositor, or of corporation of which he was president, showing that neither received any benefit from note.

8. Banks and Banking 🔑106—Cashier—Deposit of Note With Bank—Abstraction of Funds.

Where depositor left blank note with bank cashier, with instructions to fill in note and charge it to his personal account, and credit proceeds to account of corporation, of which he was president, the cashier in abstracting proceeds of note after having filled in and charged note to depositor's personal account, without crediting proceeds to corporation's account, was not depositor's agent in abstracting the money, nor in receiving it as a thief.

9. TRIAL 🔑404(2)—FINDINGS—CONCLUSIONS OF LAW.

Finding "that no part of principal sum or the interest on said promissory note is due or owing" is a conclusion of law.

10. APPEAL AND ERROR 🔑1071(5)—HARMLESS ERROR—FINDINGS—CONCLUSIONS OF LAW—SURPLUSAGE.

In action on note, finding "that no part of principal sum or the interest on said promissory note is due or owing," though a conclusion of law, was not prejudicial, where there was no delivery of nor consideration for the note; such finding being surplusage.

11. TRIAL 🔑404(1)—FINDINGS—CONSTRUCTION.

Findings must be construed together to uphold judgment entered thereon.

12. ESTOPPEL 🔑72—INNOCENT ACTS—PARTY INJURED.

Where depositor left blank note with cashier, with instructions to fill in note, charge to his personal account, and credit proceeds to account of corporation, of which he was head, and cashier, after charging note, abstracted proceeds thereof, without crediting proceeds to corporation's account, depositor is not liable on note under the rule that, where one of two innocent parties must suffer by the act of the third, the loss must fall upon the first negligent actor.

13. PRINCIPAL AND AGENT 🔑180—IMPUTED KNOWLEDGE—FRAUDULENT TRANSACTION.

The rule that, where an agent receives notice, it is not imputed to the principal, if the agent is engaged in committing an independent fraudulent act upon his own account, does not apply, where the agent is the sole representative of the principal in the transaction, and does not deal with the principal or with any other agent acting for him; in such case the knowledge of agent being imputed to principal.

14. PRINCIPAL AND AGENT 🔑116(6)—IMPUTED KNOWLEDGE—FRAUDULENT TRANSACTION—BANK CASHIER.

Where depositor left blank note with cashier, with directions to fill in amount, charge note to personal account, and credit proceeds to account of corporation of which depositor was president, and cashier, instead of crediting the proceeds of note, after having charged note to depositor's account, abstracted proceeds and placed note in bank files, the cashier's knowledge of the limited purpose to which the proceeds of note could rightfully be applied was imputed to bank, notwithstanding cashier's fraudulent act.

15. APPEAL AND ERROR 🔑1071(6)—RECORD—FAILURE TO MAKE FINDING.

A judgment will not be reversed for failure to find upon an affirmative defense, if the record does not show that evidence was introduced in support thereof.

16. APPEAL AND ERROR 🔑1071(6)—REVIEW—HARMLESS ERROR—FINDINGS.

Judgment will not be reversed for failure to make finding, where the evidence introduced was not sufficient to support finding, if it had been made.

17. APPEAL AND ERROR 🔑1032(1)—REVIEW—HARMLESS ERROR.

It is incumbent upon appellant to show, not alone error, but injury from error.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the National Bank of San Mateo against Leslie D. Whitney. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter H. Linforth, of San Francisco, and Ross & Ross, of Redwood City, for appellant.
Norman A. Eisner, of San Francisco, for respondent.

HAVEN, J. This suit was to recover $3,000 on an instrument, in form a promissory note, dated July 14, 1915, and signed by the defendant. Defendant denied the execution of the note and the debt, and in a separate defense and by way of cross-complaint alleged facts to which further reference is made in this opinion, and which were claimed to constitute a complete defense to the action.

The judgment was in favor of the defendant. On this appeal by plaintiff numerous contentions are made, for an understanding of which it is necessary to state the facts disclosed by the evidence.

[1-3] The Leslie Salt Refining Company was a corporation of which Leslie D. Whitney was the president, his brother St. John Whitney was a member of its board of directors and business manager, and W. M. Roberts was a stockholder and a director. Roberts was also the cashier of the plaintiff bank. The Salt Company and Leslie D. Whitney were both customers of the plaintiff bank, and had been frequent borrowers for at least five years prior to July 1, 1915. All of the dealings of the defendant, both individually and on behalf of the Salt Company, with the bank had been carried on with Roberts as cashier. On June 30, 1915, the defendant, Leslie D. Whitney, who was about to enter a hospital for treatment, visited the bank and explained to Roberts that the Salt Company might shortly thereafter require accommodation, and since its bank loans were already close to its margin of credit, he (Whitney) desired to leave in the hands of Roberts a blank note to be filled in by Roberts upon the order of his brother or himself, then to be charged to his personal account, and the proceeds to be applied to the credit of the Salt Company. Under these conditions he signed the blank note and left it with Roberts. On the same day he went to the hospital, where he remained for some weeks. On July 14, 1915, without having received instructions from either of the Whit-

neys, Roberts filled in the blanks of the note over the name of Whitney for $3,000. Roberts was clearly acting as the agent of Whitney and in violation of his trust in filling in the note, but so long as it remained in his possession no one was injured by his action. When the note was filled in by Roberts the legal position of the parties was exactly the same as if Whitney himself, on July 14, 1915, had taken or sent to the bank a completely filled and signed note in the words of the instrument in suit. If on that day Whitney had handed the note to Roberts with instructions to charge the same to his personal account and to credit the proceeds to the Salt Company account, and Roberts had charged the note to the personal account and had abstracted $3,000 of the bank's funds, there could be no question as to the loss falling upon the appellant. With the $3,000 note in his possession as the agent of Whitney, Roberts did what neither Whitney himself, nor his agent, could have done. By virtue of his position as cashier of the bank, he placed the note in the bank's files and caused it to be charged to Whitney's personal account. It is claimed by the appellant that this act on the part of Roberts constituted a delivery of the note from Whitney to the bank. It is true that there was manual tradition of the note from Roberts as Whitney's agent to the bank's papers in violation of Roberts' duty to Whitney. If Roberts' activities had terminated at that point, however, there could be no doubt that the bank could not have recovered on the note, because there was no consideration at that time passing to Whitney or suffered by the bank. All further dealings with the note and with the bank's accounts must have been had by some employé or agent of the bank. The note being in possession of the bank, and the control of it having passed entirely from Whitney and his agent, Roberts, or some other employé of the bank, abstracted $3,000 of the bank's cash; the note being charged to the personal account of Whitney to hide the peculation. It was the bank's money which was stolen, and not Whitney's. The bank could not have recovered on the note in its possession before the theft, and it cannot recover on the note because of the theft of its own funds by its own officer or employé. If a merchant sends his bookkeeper to his bank with a check for $3,000 to be deposited, and the bookkeeper delivers the check to the bank's teller with instructions to deposit the proceeds to his employer's account, and the teller destroys the deposit slip and treats the check as a cash transaction, abstracting the money and not crediting the deposit account of the merchant, the loss, of course, would fall on the bank. The principles of law applicable to this transaction are so clear that citation of authority seems unnecessary. The judgment of the lower court was in accordance with these principles. The only questions open are whether or not the contentions of the appellant in its attack upon the findings are convincing.

[4, 5] The lower court found that the note in suit was never made, executed or delivered to the plaintiff by the defendant. On behalf of the appellant it is said there is no evidence to contradict the facts: (1) That the defendant signed the note; (2) that he left it with Roberts; (3) that on the date of the note and before its maturity Roberts placed the note in the possession and in the files of the plaintiff; (4) that the employés of the bank entered the note on the day of its date in regular course of business on the books of the bank; (5) that the note remained in the possession of the plaintiff until the trial. These facts correspond in detail with the statement above made. When Roberts placed the note in the files of the bank, there was manual tradition, but there was no delivery in legal effect. Roberts, as the cashier of the bank, when he placed the note in the bank's files, had no intention of giving either Whitney or the Salt Company credit for it. Manual tradition was not accepted by the bank in the ordinary course of business, and the delivery, without such acceptance was not effectual at law. 8 Corpus Juris, p. 210, § 340; 1 Daniels on Negotiable Instruments, § 63. If a customer manually delivers his note to a bank, there is no delivery within the meaning of the law until the bank, or some one acting for it, takes affirmative action, which may be a mere oral consent to advance the money represented by the note, the entry of the note in the books of the bank, and the transfer of proper credit, or perhaps some other act; but, until the affirmative act is taken, there is no acceptance of delivery by the bank. If conditions prescribed by the maker of the note are fraudulently disregarded by the bank, or its agent, there is no delivery binding the maker, for the reason that there is no meeting of minds. In this case it is contended that when Roberts, or some one acting under his direction for the bank, charged the note against the account of Whitney, that act constituted an affirmative act necessary to complete delivery; but the record shows that, while a charge was made against Whitney, credit was not given either to Whitney or to the Salt Company. Without such credit the delivery was neither complete nor binding.

[6] It is next contended that under section 1605 of the Civil Code the bank suffered a prejudice by reason of the note, in that Roberts, the bank's cashier, obtained $3,000 of the bank's funds on the strength of the note, and therefore that the second finding that the note was without consideration is not supported by the evidence. Manifestly the prejudice suffered by the bank was by reason of the theft, and not by reason of the

note. If another customer of the bank whose account was overdrawn had called at the bank on July 14, 1915, and handed the cashier, Roberts, his note for $3,000, with instructions to charge him with the note and credit the proceeds to his commercial account, and Mr. Roberts had placed the note in the files of the bank, charged it to its maker, but instead of giving the customer credit, had himself abstracted the money, it could not be claimed that the maker of the note was liable thereon. This case presents the same situation.

[7] The appellant relies upon the presumption of consideration because the note was written, and cites cases to the effect that the burden of showing a want of consideration rests upon the party seeking to avoid it. The presumption cannot overcome the direct evidence in this case that neither Whitney nor the Salt Company received any benefit from the note. Williams v. Hasshagen, 166 Cal. 386, 137 Pac. 9.

[8] It is contended that, since Roberts was the agent of Whitney until the note passed into the possession of the bank, and since Roberts had access to the bank's cash, from which he abstracted $3,000, the agent of Whitney received the proceeds of the note. The evident answer to this contention is that Roberts was not the agent of Whitney in abstracting the money from the bank nor in receiving it as a thief. The large number of cases cited by the appellant simply establish the rule that, where one trusts another with commercial paper, either signed or unsigned, and the person trusted misapplies the funds received for such commercial paper, the loss falls on the trustor, because the wrongdoer was at all times his agent. Where the agent subsequently gets possession of the money of another principal, as Roberts did in this case, the cases relied upon by the appellant do not apply. For instance, the appellant cites Demarest v. Holdeman, 34 Ind. App. 685, 73 N. E. 714, as an illuminating case. The bank in question was located at the town of Elkhart, and one Kerstetter was its cashier. Finn, a depositor from the town of Goshen, handed Kerstetter $2,900 to be by him deposited in the bank to Finn's credit. Kerstetter did not deposit the money. It was sought to hold the bank for Kerstetter's defalcation. The court very properly decided that Finn did not intrust the money to Kerstetter as cashier, and that Kerstetter never received it as cashier, and therefore the bank never received it. In this case the facts are similar up to the point where Roberts placed the note in the bank's files, and thereafter, solely as the bank's cashier, caused the entries to be made in the bank's books and took from the bank's cash the money to which, as Whitney's agent, he could have had no access.

[9-11] The third finding was that no part of the principal or interest of the note had been paid, and "that no part of the principal sum or the interest on said promissory note is due or owing." On behalf of the appellant it is maintained that the last clause of the finding is a conclusion of law. This contention is correct, but, as there was no delivery of, nor consideration for, the note, the appellant is not prejudiced by the addition of a clause which is but surplusage. The findings must be construed together to uphold the judgment entered upon them. Flora v. Bimini Water Co., 161 Cal. 495, 119 Pac. 661.

It is further claimed that the blanket findings of the truth of the allegations of the defendant's separate defense in the cross-complaint were not supported by the evidence. The argument is based on the contention that the cashier of the bank as such had no power to make the original agreement with Whitney in regard to filling in the note and carrying it to the credit of the Salt Company when instructed by Whitney or his brother to do so, for the reason that express authority had never been given him by the bank to that end. Whitney testified that he had had similar transactions, where he had left signed blank notes with Roberts as cashier of the bank, and the bank had carried through the transactions as agreed upon between him and Roberts. This evidence was sufficient to support findings 4 and 5.

[12] It is sought to apply the rule that, where one of two innocent parties must suffer by the act of a third, the loss must fall upon the first negligent actor. The analysis of the facts of this case shows that the rule has no application here. As above stated, if Whitney himself had handed his filled in and signed note to Roberts in the bank with the instruction that Roberts should charge it to his personal account and give the credit to the Salt Company, it would have been an ordinary banking transaction, and would have implied no suggestion of negligence on the part of any one. This was exactly the position on July 14th, when Roberts put into the bank's files the fully filled in and signed note. His subsequent appropriation of $3,000 was not because of any negligence of Whitney, but by virtue of his connection with the bank.

[13] Many cases are cited to support the proposition that, where an agent receives notice, it is not imputed to the principal if the agent is engaged in committing an independent fraudulent act upon his own account. The contention is that the bank was not chargeable with any notice of the limited purpose to which the proceeds of the note could rightfully be applied, for the reason that the knowledge of its cashier, Roberts, on that matter was acquired by him in furtherance of his own fraudulent plan to rob the bank. The rule contended for is subject to this well-established exception: Where the agent is the sole representative of the principal in the transaction, and does not deal with

the principal, or with any other agent acting for him, the general law of agency is still applicable, and the knowledge of the agent is imputed to the principal. In such a case it makes no difference that the agent has an opposing personal interest, or is engaged in a personal fraud against his principal. This exception to the rule is clearly recognized in the cases of McKenney v. Ellsworth, 165 Cal. 326, 329, 132 Pac. 75, L. R. A. 1916D, 127, Ann. Cas. 1915B, 261, and Williams v. Hasshagen, 166 Cal. 386, 393, 137 Pac. 9. The cases from other jurisdictions are collated, and the two rules contended for by the opposing parties to this action are distinguished in a note in 2 L. R. A. (N. S.) 993. See, also, Mechem on Agency (2d Ed.) § 1825.

[14] The facts of the instant case bring it within the exception to the rule above referred to. Roberts alone acted for the bank throughout the entire transaction. In furthering his own fraudulent designs, he dealt with no representative of the bank other than himself as its cashier. Here his knowledge as such must be imputed to the bank.

It is contended on behalf of the appellant that the note was not signed in the ordinary course of business. This, too, may be conceded. The method of signing and filling in the note has nothing to do with the case. It was signed by Whitney, it was filled in by his agent, and it was not until the note passed into the files of the bank that the bank had any interest in it.

[15, 16] The last contention of the appellant is that the finding that the defendant had done no acts and was guilty of no omission or conduct to estop him from denying the making, execution, and delivery of the note and alleging its want of consideration is a conclusion of law, since an estoppel is always a deduction or conclusion, and cases are cited to this effect. Cases are also cited to the proposition that it is the duty of the court to find upon all the material issues. Facts were set up in the answer to the cross-complaint from which it was claimed the defendant was estopped. The facts set up in the answer to the cross-complaint, however, were simply a detailed statement of the facts set up in the cross-complaint itself. "It is well settled that a judgment will not be reversed for failure to find upon an affirmative defense, if the record does not show that evidence was introduced in support thereof, and the same rule must obtain where the evidence introduced was not sufficient to support a finding in favor thereof if such finding had been made." Estate of Barclay, 152 Cal. 753, 758, 93 Pac. 1012, 1014. If finding 6 is not a sufficient finding of fact from the evidence, the court could only have enlarged upon the statement that the defendant had done no acts upon which the claim of estoppel could be based.

[17] The court found that the note was never delivered and that it "was and is entirely without and unsupported by consideration." Those findings control the judgment. Others are immaterial. It is incumbent upon the appellant to show not alone error, but injury from error. Sewell v. Price, 164 Cal. 265, 125 Pac. 407.

The judgment is affirmed.

We concur: **LANGDON, P. J.; BRITTAIN, J.**

179 Cal. 306

In re PALOMARES' ESTATE. (L. A. 5722.)

(Supreme Court of California. Nov. 20, 1918.
Rehearing Denied Dec. 20, 1918.)

1. Bastards 🔑6 — Illegitimate Child — Evidence—Sufficiency.

Evidence *held* insufficient to establish the essential element of adoption of illegitimate child by its father under Civ. Code, § 230, or under statutes in force prior to its enactment.

2. Bastards 🔑13 — Acknowledgment of Child—Statute—Retroactive Effect.

Civ. Code, § 230, as to adoption of illegitimate child by its father, does not apply to acts of adoption which occurred before its enactment.

3. Appeal and Error 🔑843(2)—Review—Matters Not Necessary to Decision.

Where finding that appellant, petitioning for letters of administration, was not a child of deceased, and therefore has no interest in estate, must stand, it is unnecessary to consider other issues, appellant not being interested in condition of estate or amount of property subject to administration.

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the Estate of Francisco Palomares, deceased. From an order denying petitions for letters of administration, Francisca Palomares de Alvarado appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Robert A. Todd, of Los Angeles, for respondent.

MELVIN, J. Appellant, Francisca Palomares de Alvarado, petitioned for letters of administration in the estate of Francisco Palomares, deceased, alleging that he had died in 1882, leaving estate in the county of Los Angeles, and that she was an illegitimate child of said Francisco Palomares, adopted by him in compliance with the provisions of section 230 of the Civil Code. The petition was dated March 9, 1917. Porfirio R. Palomares, a son of Francisco, filed opposition to the appointment of petitioner, denying the averments regarding her paternity and adoption, and alleging that by probate proceedings instituted shortly after his father's death all of the property of the estate, amounting to less than $1,500, had been assigned to the minor children, whose right to it had been unquestioned for many years. There was also a request from certain persons, as heirs of Francisco Palomares, deceased, that Porfirio Palomares be appointed administrator of the estate. All of the matters of dispute between the contesting claimants were duly tried, and the court found that Francisca Palomares de Alvarado was not a child of Francisco Palomares, and not a party in interest; that Porfirio was a child and a party in interest; but that there was no property in the estate. Accordingly both petitions for letters of administration were denied. From that order Francisca Palomares de Alvarado has appealed.

Mrs. Alvarado testified that she was born in 1862 in San Jose, now known as Pomona. She introduced in evidence a certified copy of an entry in the baptismal register of the Catholic church at San Bernardino reciting that on the 7th day of January, 1862, Francisca, daughter of Francisco Palomares and Tonsoja Valdez, had been baptized, and that Luis Palomares and Josefa Palomares were the sponsors. She further stated that she did not remember meeting Francisco Palomares until she was eight or nine years old. She said that she knew of Mr. Palomares sending money on several occasions to aid in her education; that he had given her various small sums and had called her "daughter." At that time Mr. Palomares had married, and the mother of Francisca had become the wife of Mr. Ruiz. Mrs. Alvarado testified that she never visited the house of the Palomares family after the marriage of Mr. Palomares, and that she had no recollection of ever being at the home of his parents, where, as shown by the testimony of other witnesses, he lived prior to his marriage. She stated that she had always been known by the name of Francisca Palomares until she married Mr. Alvarado. During the years when she was attending school she lived with her mother and her stepfather. She also told of an occasion when Mr. Palomares introduced her as his daughter to a Mr. Soto.

Jesus Rivera testified that Francisco Palomares acknowledged Francisca as his daughter, and on several occasions sent small sums of money for her by Rivera, who was then a boy. An old man, named Pasqual Rubidoux, testified substantially to the same effect.

A. Rubidoux, a brother of the other witness, stated on the witness stand that Francisco Palomares acknowledged Francisca as his daughter, and that in 1864 or 1865, when Francisco was unmarried and living with his parents, he used to send witness to get the little girl and bring her to the ranch where he lived. On such occasions the child would sometimes be kept overnight.

Felicidad de Ruiz, mother of Mrs. Alvarado, testified that Francisco Palomares was the father of the child Francisca; that witness had caused the little one to be baptized as Francisca Palomares (the putative father not being present at the ceremony); that Mr. Palomares had sent various small sums of money for the use of the little girl while she was at school; that Francisco Palomares had often acknowledged the girl as his child; and that before his marriage he used to send for the child to be brought to the home of his parents, where he lived. Asked how many times Francisca was there, she said "probably two or three times," and regarding the length of the visits she testified that the little girl sometimes stayed all day and sometimes she would remain overnight.

[1, 2] The foregoing was substantially all the showing in favor of acknowledgment and adoption, and in contradiction thereof there was counter testimony that when the child registered at the public school under the name of Palomares, the reputed father, on being informed of such registry, denied that she was his child. It was in testimony that on other occasions he made similar denials, and neighbors and intimate friends testified that they never knew of the little girl being at the home of Francisco Palomares' parents. But even without this testimony in contradiction of that offered on behalf of Mrs. Alvarado there was a failure to establish the essential element of adoption in accordance with section 230 of the Civil Code, even if that statute were applicable; but the Code section has absolutely no force or effect in this belated proceeding, for the reason that substantially all of the supposed acts of adoption occurred before there was a section 230 of the Civil Code, or, indeed, any code at all. All of the alleged occasions of receiving the child into the family of Francisco Palomares were before the year 1870, and section 230, Civil Code, went into effect in 1873. That section is not retroactive. Estate of Pico, 52 Cal. 84. The history of the section was reviewed in Estate of Jessup, 81 Cal. 408–420, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. In that opinion the previous statutes were also cited, and the court indicated the facts that prior to March 31, 1870, the adoption of an illegitimate child could only be accomplished by the acknowledgment of the child before a witness by a written instrument; and that from March 31, 1870, to January 1, 1873, such adoption might be by a writing or by receiving, treating, or publicly acknowledging such child as the offspring of the adopting parent. The acts of Palomares before 1873 utterly failed to measure up to the terms of either of the statutes in effect prior to that year. It follows that the court properly held that there was no adoption of the child Francisca by Mr. Palomares.

[3] Since the finding that Mrs. Alvarado was not a party in interest, because never adopted by Francisco Palomares, must stand, it is not necessary for this court to review the testimony offered upon the other issues. Not being an heir, she is not interested in the condition of the estate nor the amount of property, if any, subject to administration.

The order is affirmed.

We concur: WILBUR, J.; LORIGAN, J.

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179 Cal. 669

ROBERTS v. COLYEAR. (L. A. 4624.)

(Supreme Court of California. Feb. 6, 1919.)

1. APPEAL AND ERROR 🔑2—ORDER DENYING NEW TRIAL—STATUTE.

Appeal from order denying motion for new trial must be dismissed; notice having been filed after amendment of 1915 to Code Civ. Proc. § 963.

2. EVIDENCE 🔑383(7)—SALE UNDER TRUST DEED—EFFECT OF TRUSTEE'S DEED—PROVISIONS OF TRUST DEED.

To show against trustor or other person in possession that the trustee's grantee has succeeded to such title and right of possession as the trustor had when he made the deed of trust, trustee's deed, made pursuant to the trust deed, providing for conclusiveness of recitals in trustee's deed, as to default, notice of sale, sale, and receipt of purchase money, is competent and sufficient.

3. LANDLORD AND TENANT 🔑5(1) — CONTRACT — RELATION CREATED — INTEREST IN LAND.

Contract between R., owner of apartment house, and C., furniture dealer, declaring its purpose to be to enable each to dispose of his property, whereby C. was to put furniture in the house and manage it till disposition of the properties, *held* to vest no estate or interest in the house in C., as tenant or otherwise.

Department 1.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Oscar W. Roberts against Curtis C. Colyear. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Appeal from order dismissed and judgment affirmed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles (J. D. Taggart, of Los Angeles, of counsel), for appellant.

Goodrich & Martinson, of Los Angeles, for respondent.

SLOSS, J. [1] Judgment went for the plaintiff in this action, which was brought to recover the possession of real property in the city of Los Angles, with damages for the withholding. The defendant appeals from the judgment. An appeal attempted to be taken from the order denying his motion for a new trial must be dismissed; notice having been filed after the amendment of 1915 to section 963 of the Code of Civil Procedure.

Title to the land was originally in Frank and Anna Reiter, who had erected thereon an apartment house. The plaintiff claimed to have succeeded to the title of the Reiters by virtue of a sale made under a trust deed executed by them to secure a loan. The defendant asserted a right of possession based on a written contract between the Reiters and himself, executed and recorded before the making of the deed of trust.

This contract, after reciting that the Reiters are the owners of the apartment house then being constructed, and that the defendant is engaged in the furniture business, states the undertakings and agreements of the parties as follows: That the defendant shall supply the furniture, carpets, draperies, and other furnishings required; that, after the building is finished and ready for occupancy, the defendant "shall install a competent and reliable manager in said building for the purpose of running and operating said apartment house or hotel until said property can be leased or sold and said furniture and furnishings can be sold upon terms and conditions satisfactory to the parties hereto." There is a provision for fixing the "invoice price that the second party [Colyear] is to get for the furniture and furnishings." Then follows a clause stating that Colyear is to have the absolute control and management of the lodging house during the continuance of the agreement, but is to receive no compensation for operating the building; that the Reiters shall receive no rent, but the net receipts from the rentals of the rooms in the building shall be divided equally between the parties during the life of the agreement. If such rentals are insufficient to pay the expenses of the building, the loss is to be borne equally between the parties. Either party shall have the right to secure a tenant to purchase the furniture and to lease the building, the price to be received for the furniture to be at least equal to the "invoice price," and if any greater price is obtained, the surplus is to be equally divided between the parties. The Reiters are given the option to purchase the furniture at the invoice price at any time during the life of the agreement. It is declared that the contract shall continue in force and effect until the property is leased and the furniture sold, or the furniture purchased by the Reiters. The writing states that the agreement shall not be construed to constitute a partnership between the parties, it being their intention to make a contract for the sale of the furniture and the leasing of the real property. Finally, there is a clause to the effect that neither party shall have the right to assign the contract without the written consent of the other.

[2] Pursuant to this agreement, the defendant installed the furniture when the building was completed, and proceeded to operate the house through a manager of his selection. The trustee under the deed of trust sold the property, and the plaintiff became the purchaser at the sale. The trust deed contained the provision, common in such instruments, that recitals in the trustee's deed of default, publication of notice of sale, sale, and receipt of the purchase money shall be conclusive proof of the facts recited, as against the grantors, their heirs, and assigns, and all other persons. In proof of his allegation of ownership, the plaintiff offered in evidence a deed from the trustee containing such recitals. The defendant objected to the admission of this instrument, in the absence of independent proof that the debtors were, in fact, in default. The court overruled the objection. The ruling was correct. The trustee's deed was competent and sufficient evidence to show that the title of the Reiters had passed to the plaintiff. This was the only purpose of its introduction. It was not offered to cut off any prior rights of the defendant, if any he had. It is, no doubt, true that the provision of the trust deed declaring the effect of recitals, or the recitals when made, could not operate to affect the pre-existing interest of a third party claiming adversely to the trustors. Long v. Dollarhide, 24 Cal. 218; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172. The trustee's deed did not, by virtue of its recitals, carry to the grantee any better right or title than the trustors had when they executed the deed of trust. But the respondent does not claim any greater effect for it. The recitals are relied upon as binding the interest of the trustors. To this extent, at least, they are effective. Savings & Loan Soc. v. Deering, 66 Cal. 281, 5 Pac. 353; Carey v. Brown, 62 Cal. 373; Mersfelder v. Spring, 139 Cal. 593, 73 Pac. 452. The deed containing them is admissible in an action of ejectment, as against the grantor or other person in possession, and no further evidence is necessary to show that the plaintiff has succeeded to such title and right of possession as the trustor had when he made

his deed of trust. 3 Jones on Mortgages (7th Ed.) § 1830.

[3] The real question, then, is whether the contract between Colyear and the Reiters gave the former any estate or interest in the property itself. If he had no estate or right of possession as against the Reiters, he has no right to question the trustee's deed.

We think it clear that the contract vested in Colyear no estate or interest in the property. Certainly it did not by its terms purport to grant the premises or any interest therein. Nor did the agreement constitute a lease of the land and building. No rent is reserved, nor is any fixed or ascertainable term specified. There is not even an express stipulation that the defendant shall have possession of the premises. He is to have control and management of the house during the continuance of the agreement, but this control and management are to be exercised for the purposes contemplated by the parties, to wit, the operation, in their joint interest, of the furnished lodging house until such time as the Reiters can make a lease of the property and Colyear can make a satisfactory sale of his furniture. Until such sale and lease should be effected, the agreement of the parties was to run the apartment house on shares. They declare that it is not their intention to effect a partnership. But they were, at any rate, engaged in a joint venture. The arrangement for division of the gains and losses of operation did not make Colyear a tenant of the Reiters. Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715.

By the agreement Colyear was authorized to place his furniture in the house, and to leave it there until a sale should be effected. This was a mere personal covenant between the parties. It was not contemplated that, by giving to Colyear the privilege of placing his personal property in their building the Reiters were granting him an interest or estate, unlimited in duration, in their land. Colyear had no property right in the house, and no interest in the proceeds of any lease that might be made. His interest was simply in the furniture. The purpose of the contract, as declared by its own terms, was to enable the Reiters to dispose of their house, and Colyear to sell his furniture. Neither party acquired thereby any interest in the property of the other. The case is in no way analogous to those in which it has been held that one who has made expenditures on the faith of a license affecting the land of another may thereby acquire an irrevocable right. Stoner v. Zucker, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; Miller & Lux v. Kern County Land Co., 154 Cal. 785, 99 Pac. 179. In those cases the right claimed was in the nature of an easement, an interest in real property. Nothing of the kind appears in this case. The arrangement here made was based on personal confidence, rather than any grant or exchange of interests in property. Each party relied on the promises of the other, and the remedy for any breach was to be sought in an action for damages. The court below held rightly that the appellant had shown no right of possession.

The appeal from the order denying a new trial is dismissed.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

179 Cal. 318

FAY v. MATHEWSON. (L. A. 4590.)

(Supreme Court of California. Nov. 22, 1918. Rehearing Denied Dec. 20, 1918.)

1. SALES ⚷43(4)—HOTEL AND EQUIPMENT—RIGHT TO RELY ON REPRESENTATIONS.

Purchaser of lease, good will, and furniture, etc., of fashionable hotel, furnished from various quarters and all sorts of dealers with rare articles, was entitled to rely on seller's representations as to identity and value of property, and was not bound to inform herself, on consummation of sale, that articles she had bargained for were intact on premises.

2. APPEAL AND ERROR ⚷995 — REVIEW — PROVINCE OF THE JURY.

Conflicts in the evidence, and its weight and sufficiency, were matters which it was the jury's province to determine, not that of the Supreme Court on appeal.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Ida F. Fay against Helen Mathewson. From judgment for plaintiff and order denying new trial, defendant appeals. Judgment and order affirmed.

Oscar Lawler and James E. Degnan, both of Los Angeles, for appellant.

Edwin A. Meserve and I. Henry Harris, both of Los Angeles (Charles A. Bank, of Los Angeles, of counsel), for respondent.

RICHARDS, Judge pro tem. This is an action to recover damages for alleged fraudulent acts and misrepresentations in connection with the sale of the Hershey Arms Hotel and its equipment in Los Angeles by the defendant to the plaintiff. The complaint is in two counts, which, while in the main identical, present somewhat different phases of the same transaction. The answer denies specifically all of the allegations of the complaint which refer to any fraudulent acts or misrepresentations on the part of the defendant. The case was tried before a jury, occupying several weeks, at the conclusion of which the jury rendered its verdict in the plaintiff's favor for the sum of $22,000 damages, for which judgment was accordingly entered by the court. The defendant's motion for a new trial was denied, whereupon she has taken and presents this appeal.

The transaction out of which this action arose may be briefly stated as follows: On May 6, 1913, the defendant gave to the plaintiff a written option to purchase all of the right, title, and interest of the defendant in the lease of the premises occupied by the Hershey Arms Hotel, together with the good will of its business and all of the furniture and equipment located in said hotel, except sundry articles belonging to guests of the hotel and also certain pieces of furniture, bric-a-brac, etc., which were to be enumerated on a list to be attached to said option, for the purchase price of $75,000, of which the sum of $25,000 was to be paid in cash at the time of the exercise of the option, $5,000 within 90 days thereafter, and the balance in three equal yearly payments. The list of furniture, etc., to be excepted from the terms of the option, was not attached thereto, as stated therein, but was furnished by the defendant within a few days after the option had been signed. The option was to be exercised on or before May 14, 1913, but this time was extended through delays on the part of the defendant in procuring the consent of the owner of the premises to a transfer of the lease, and through various other causes, until July 17, 1913, when the transaction was consummated in accordance with the terms of said option, and the plaintiff entered into possession of the premises. Within a short time thereafter, according to the averments of the plaintiff's complaint, she discovered that the defendant had, between the dates of the giving of said option and of its exercise, and without the plaintiff's knowledge or consent, removed large and valuable portions of the furniture and equipment of said hotel other than the articles specified in the option as excepted from its terms and had replaced some of such abstracted furniture and equipment with other articles of a cheaper and inferior grade, thereby causing a diminution in the value of the furniture and equipment in said hotel at the time of the plaintiff's exercise of her option and purchase thereof, of $26,893.89. The plaintiff also alleged that between the time of the giving of said option and its exercise the defendant had assured said plaintiff that none of the furniture or equipment of said hotel had been or would be removed or changed in any way during said time, with the exception of the said listed articles, which assurances the plaintiff had believed and relied upon in consummating the transaction, all of which representations the plaintiff alleged to have been false and made knowingly with intent to deceive and defraud. All of these averments the defendant denied.

Upon the trial of the cause a large amount of evidence was presented on both sides in relation to these averments and denials. The transcript on appeal, consisting of two large volumes, is in the main made up of this evidence, and the extended briefs of counsel are practically wholly devoted to recitals of this evidence and to discussions pro and con as to its weight, sufficiency, and effect. It would serve no useful purpose to attempt to review or discuss with anything of detail this mass of evidence or the comments of counsel thereon. It will be sufficient to say that we have examined the record with considerable care, and that from such examination we are satisfied that there is ample evidence to sustain the plaintiff's contention that between the date of the giving of the option in question and the consummation of the sale the defendant caused to be surreptitiously removed from the premises large amounts of rare and valuable furniture and bric-a-brac other than the articles specifically excepted from the terms of the option, and that in many cases other and cheaper articles were substituted for those so removed, with intent to deceive and defraud the plaintiff, and also that the defendant made the misrepresentations and indulged in the concealments to which the plaintiff and her witnesses testified, and that there is also ample evidence to justify the finding of the jury that by these acts and concealments the plaintiff was damaged to the extent of their verdict.

[1, 2] As to the defendant's contention that the parties were dealing at arm's length in the transaction, and that it was the plaintiff's duty to have informed herself at the time of the consummation of the transaction as to the identity and value of the furniture and equipment of the premises as compared with that existing when the option was given, we think the evidence abundantly shows that this would have been impossible, or at least extremely difficult, considering the vast variety and peculiar quality as to their sources and value of the furniture, equipment, and bric-a-brac in this large hotel, collected, as these had been, by the defendant from various quarters of the world and from all sorts of dealers in such rare and artistic articles as in the main constituted the most unique and valuable portion of the furniture and fittings of the ultra fashionable and exclusive hotel; and that therefore, in view of the defendant's intimate and in a sense exclusive information and knowledge as to the sources and value of this vast and varied assortment of articles constituting the furnishing and equipment of her hotel, and also in view of the very limited opportunity, and it may be said purposely limited opportunity, afforded the plaintiff to make such an investigation as would have led to a discov-

ery of the truth respecting these matters, she was entitled to rely upon the defendant's representations and assurances as to the identity and value of the property she was about to purchase. There are other phases of the transaction which are discussed in the briefs, but we do not deem it necessary to refer to them further than to say that they arise out of conflicts in the evidence and of the divergent views of counsel as to the weight and sufficiency of the evidence, all of which matters it was the province of the jury to determine. The appellant, in addition to her discussion of the evidence in the case, asserts that the court erred in giving or refusing certain instructions cited in her briefs. We have examined each of these instructions in the light of the whole body of the instructions, and we are satisfied that upon the whole the court instructed the jury fairly and fully as to the various legal phases of the case, and that no material prejudice was suffered by the defendant through any action of the court in relation to the instructions which she criticizes. We have also examined the record as to the alleged errors of the court in its rulings upon the admission or rejection of evidence. The defendant supports her criticism of these rulings with little argument and no authority. We do not discover in any of them any substantial or sufficient error to warrant a reversal of the case.

Finding no reversible error in this record, the judgment and order are affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

180 Cal. 238

WAITE v. WAITE. (L. A. 5992.)

(Supreme Court of California. April 17, 1919.)

Appeal and Error 🔑1161—Confession of Error—Reversal.

Where respondent confesses error and asks that judgment appealed from be reversed, and the point made for reversal in appellant's brief appears to be well based and to require reversal, judgment will be reversed.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Johnnie Waite against Thomas Waite. From the judgment rendered, defendant appeals. Reversed.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for appellant.

Chas. S. Darden, of Los Angeles, for respondent.

PER CURIAM. The respondent herein confesses error, and asks that the interlocutory judgment appealed from be reversed for the reason set forth in appellant's opening brief.

The point made for reversal in the appellant's opening brief appears to be well based and requires a reversal. The plaintiff should be allowed to amend her complaint in the lower court.

The judgment appealed from is reversed.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, LAWLOR, MELVIN, and LENNON, JJ., concur.

180 Cal. 298

RANDALL v. ALLEN et al. (Sac. 2588.)

(Supreme Court of California. May 2, 1919.)

1. Vendor and Purchaser 🔑233—Rights of Second Purchaser Without Notice—Recordation of Deed.

By statute, where the owner of land executes two conflicting instruments of conveyance, both for valuable consideration, the right of the second purchaser for value whose instrument is first recorded is superior, unless the second purchaser had notice of the existence of the rights of the first.

2. Vendor and Purchaser 🔑244—Possession as Notice—Sufficiency of Evidence.

In suit to foreclose by the mortgagee of a purchaser of land from a company which already had contracted to sell to others, who failed to record the contract, evidence *held* not to sustain finding that the mortgagee had no constructive notice of the first purchasers' claim through their possession.

3. Vendor and Purchaser 🔑232(8)—Successive Sales—Possession as Notice.

Not every kind of possession in the first purchaser of land will constitute notice of his claim as against a second purchaser; for instance, if the land is part of a larger tract, all uninclosed, and one not the owner enters the particular piece under color of title and cultivates in the same manner as the adjoining portions of the tract, there is a possession adverse to the owner which will ripen into title in time, but will not constitute, in relation to a prospective purchaser, notice of latent equities or of rights under an unrecorded instrument.

4. Appeal and Error 🔑768—Review—Statements in Briefs.

The Supreme Court cannot consider statements of fact in the briefs not sustained by the record in reaching its decision.

5. Vendor and Purchaser 🔑232(8)—Successive Sales—Possession as Notice.

Possession of land by a purchaser who has not recorded his conveyance, in order to establish notice of equities as against a second purchaser, must be open, notorious, exclusive, and visible, and not consistent with the record title.

In Bank.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Suit by Frances E. Randall against E. E. Allen and I. N. Allen, and another. From decree for plaintiff, defendants Allen appeal. Reversed.

T. E. Clark, of Visalia, for appellants.

Stahl & Sagles, of Los Angeles, and Williams & Rutan and A. W. Rutan, all of Santa Ana, for respondent.

OLNEY, J. On January 14, 1911, a corporation, by name the Eucalyptus Timber Company, being the owner of a certain quarter section of land in Kings county, contracted in writing to sell the south half of it to the appellants, I. N. and E. E. Allen. The purchase price was $4,800, of which $1,600 was paid at the time, $1,600 was to be paid November 1, 1912, and the remaining $1,600 November 1, 1913. The contract provided that the purchaser might take immediate possession.

The Allens neglected to record their contract, and by deed dated July 21, 1911, the Eucalyptus Timber Company conveyed the entire quarter section to one John S. Cornell, who in turn, and practically at the same time, mortgaged the property to the respondent Frances E. Randall for $4,000 to secure a loan for that amount made by her to Cornell. There is no reference in the mortgage, and, so far as appears, no reference in the deed by the Eucalyptus Company to Cornell to the prior contract of sale to the Allens of a part of the land.

Cornell was the assistant secretary of the Eucalpytus Timber Company, and as such had executed on its behalf the contract of sale to the Allens. He must have known of its existence. There is no clear explanation in the record of his conduct and that of the Eucalyptus Company in conveying and mortgaging the property without reference to the outstanding contract of sale. For the purposes of this appeal, however, we may take the view most favorable to the appellants and assume that the Eucalyptus Company and Cornell were guilty of the gross fraud of attempting to realize twice on the same piece of property. There is, however, no evidence that the respondent Mrs. Randall was a party to this fraud or that she did not make the loan on the property in the utmost innocence.

[1] The mortgage to Mrs. Randall is dated July 21, 1911. Its execution is acknowledged August 12, 1911, and it was recorded August 14, 1911, at which last date the contract of sale to the Allens was still unrecorded. The deed by the Eucalyptus Company to Cornell was also recorded either then or immediately prior. So far we have the simple and familiar case of the owner of real property executing two conflicting instruments affecting it, both for a valuable consideration and in favor of an innocent party, the latter of which instruments in date of execution is recorded before the former. The statutory rule in such cases is that the right of the second purchaser for value, whose instrument is first recorded, is superior, unless the second purchaser had notice of the existence of the rights of the first purchaser.

The mortgage debt was not paid when it became due, and Mrs. Randall brought this suit to foreclose her lien, making the Allens parties defendant. They answered, claiming their contract to be superior to the mortgage, and in particular alleging that immediately upon the making of the contract they had gone into the possession and occupation of the land and had continued in such possession and occupation ever since. The cause went to trial, and a decree of foreclosure against the Allens followed; the lower court finding that Mrs. Randall had neither actual nor constructive notice of the rights of the Allens at the time she took her mortgage. From this decree the Allens appeal.

It is apparent from the foregoing facts that the all-important and controlling point in the case was that of the possession of the Allens. There is nothing to substantiate a claim that Mrs. Randall had any knowledge of their unrecorded contract or any notice other than constructive notice by reason of their alleged possession. If they had such possession as would constitute or be presumptive evidence of constructive notice, their contract would be superior to the mortgage; otherwise it would not. Although this question as to the possession of the Allens was the controlling issue, yet we have the rather remarkable situation that the only evidence on the point in a transcript of 134 pages is the following two bits of testimony, the first by E. E. Allen, and the second by I. N. Allen:

> "Q. How long was it after that that you took possession of that land? A. Why, right away.
>
> "Q. Right away? A. Right away.
>
> "Q. And have you been in possession of the land ever since? A. Yes, sir.
>
> "Q. Occupying and cultivating it?
>
> "Mr. Williams: Well, let him—
>
> "A. Yes, sir.
>
> "The Court: Yes; he had better state what he has been doing with it; that's the better way.
>
> "Mr. Clark: Q. You are in possession of the land at the present time and living on it? A. Yes, sir."

Again:

> "Q. Well, with reference to the time when the contract of the Eucalyptus Timber Company was made with you selling you the land, when did you enter into possession of that land? A. Right away afterwards; within a few days; in the same month.
>
> "Q. Been in possession of it ever since? A. Had possession of it ever since."

The trial court found, as we have stated, that Mrs. Randall did not have notice, and the foregoing being the only evidence on this point, the ultimate question for our decision is whether or not that finding can be sustained in view of this evidence.

[2] With considerable hesitation we have reached the conclusion that the finding cannot be sustained. It is not every kind of possession that is sufficient to constitute or establish notice. The testimony is very meager and unsatisfactory. Yet it would seem, standing by itself as it does, uncontradicted and unmodified, to have in it enough to show a possession of the requisite character. Epitomizing it, it is to the effect that the Allens, upon receiving their contract of purchase, took possession of the land, cultivated it, and have occupied and possessed it ever since. The statement that they were living on the property "at the present time" is immaterial. The critical time is not the present, but the time when Mrs. Randall took her mortgage. But the statement that the Allens were "occupying" the property, giving to that word its usual meaning, and we can hardly presume that it was used in any other sense in the testimony would seem to be sufficient to characterize the possession, particularly when coupled with the statement as to cultivation. Actual occupancy of the land, possessio pedis, has always been held, in the absence of qualifying circumstances, to be possession of a character sufficient to constitute or establish notice. We conclude, therefore, that the finding in question is not justified in the face of this evidence as the only evidence on the point, and that the judgment must be reversed. We are the more willing to reach this conclusion because it will give the parties an opportunity to put the facts fully before the court on a new trial so that a decision may be reached with some certainty that it accords with the actual facts of the case—something that is not possible in the present state of the record.

[3] It may be well for the guidance of the parties and court on a new trial to say something further as to the character of the possession that must be shown in order to subordinate Mrs. Randall's mortgage to the unrecorded contract of the Allens. As we have said, it is not every kind of possession that will constitute or establish notice. Possession which, if adverse to the owner, would ripen into title by virtue of the statute of limitations, may not be at all sufficient to constitute notice to the purchaser of the record title for value. If, for instance, the land is part of a larger tract, all of which is uninclosed, and one not the owner enters upon the particular piece under color of title and cultivates it in the same manner as the adjoining portions of the tract, there is a possession adverse to the real owner which if continued for the statutory period will ripen into title. But such possession will not constitute notice to a prospective purchaser of latent equities or of rights claimed under some unrecorded instrument. The reason for the difference lies in the difference of situation. The owner of the land, seeing the land cultivated, knows or should know whether or not he cultivated it, and, knowing that he did not, should be at once aware that some one is using and enjoying his property adversely. But to a prospective purchaser from the record owner of the whole tract there is nothing to indicate any difference in the possession of the particular piece from that of the balance of the tract.

[4] We have used the foregoing illustration because Mrs. Randall's counsel contend in their briefs that the foregoing are the facts in this case. We, of course, cannot consider statements of fact in the briefs, not sustained by the record, in arriving at a decision. We can consider them, however, to point the discussion.

A case presenting almost exactly the above facts, except that the strong factor in favor of the record purchaser that the land was part of the larger uninclosed tract was not present, is Cox v. Devinney, 65 N. J. Law, 389, 47 Atl. 569, wherein it was held the record purchaser was not charged with notice by a possession of the character indicated. The court states the reasons for the decision as follows:

> "While the general rule is that possession of land is notice to a purchaser of the possessor's right therein, nevertheless such possession, to be effectual, as notice, must be not only exclusive and uninterrupted; it must also be open, notorious, and visible; i. e., it must indicate the occupant. The fact that lands are under cultivation does not, of itself, suggest that any one other than the reputed owner of the premises is in possession of them. In order to charge a purchaser with notice, the occupation must be of a character which would put a prudent person upon inquiry; it must indicate that someone other than he who appears by the record to be the owner has rights in the premises. Coleman v. Barklew, 3 Dutcher [27 N. J. Law] 357."

With the general principle of Cox v. Devinney (putting upon the statement that the possession "must indicate the occupant" the meaning which was undoubtedly intended, that it must indicate an occupant other than the record owner, not that it must indicate who such occupant is), the decisions of this state are in accord. Havens v. Dale, 18 Cal. 359; Fair v. Stevenot, 29 Cal. 486; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167, supra; Taylor v. Central Pac. R. R. Co., 67 Cal. 620; Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193, supra; Emeric v. Alvarado, 90 Cal. 471, 27 Pac. 356; Schumacker v. Truman, 134 Cal. 432, 66 Pac. 591.

[5] They may be summed up as holding that possession in order to be sufficient to

establish notice must be open, notorious, exclusive, and visible, and not consistent with the record title. This is likewise the general rule in this country upon the point. 1 Jones on Mort. §§ 591, 593. Underlying these requirements is the idea that the circumstances relied on to establish constructive notice, whether they be possession or something else, must be such that a prudent man would be put upon inquiry.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LENNON, J.; LAWLOR, J.

40 Cal. App. 498

FERNALD v. EATON & SMITH.

(Civ. 2579.)

(District Court of Appeal, First District, Division 1, California. March 29, 1919.)

1. Municipal Corporations 🔑809(1)—Injuries in Street from Excavation—Negligence.

It was the duty of one laying a conduit line under permit issued by board of public works to take such precautions with respect to the excavation as to avoid danger to users of the street, and where no substantial barrier was maintained around the excavation, as required by Ordinance of the City of San Francisco No. 860, approved June 26, 1903, the excavator was negligent.

2. Municipal Corporations 🔑800(1)—Injuries on Street from Excavation—Proximate Cause.

Negligence of excavator of street to lay conduit line under permit issued by the board of public works of the city *held* the proximate cause of injury to a boy who fell into the excavation in crossing the street while going to meet his father.

3. Trial 🔑260(8)—Instructions—Due Care of Child.

In an action for injuries to a boy when he fell into an excavation in the street, instructions *held* to cover sufficiently the subject of the boy's due care, rendering it unnecessary to instruct the jury in the particular terms proposed by defendant.

4. Damages 🔑96—Personal Injuries.

In an action for injuries to a boy from falling into an excavation in a city street made by defendant in laying a conduit under permit, there is no definite measure of damages prescribed by law, but the amount is left to the sound discretion of the jury, considering all the circumstances.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John Fernald, a minor, by his guardian ad litem, against Eaton & Smith, a copartnership. From judgment for plaintiff, defendant appeals. Affirmed.

M. E. Van Dine, of San Francisco, for appellant.

Theodore A. Bell, of San Francisco (R. H. Morrow, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an appeal by defendant from an adverse judgment in an action for personal injuries sustained by plaintiff, a boy eight years of age, by falling into an excavation made by the defendant in Buchanan street, between Union and Green streets, in San Francisco; its motion for a new trial having been denied.

From the evidence introduced by the plaintiff it appears that just before the accident the plaintiff had been playing in the street near his home; that at about 6:30 o'clock he ran down the west side of Buchanan street to meet his father, returning home from work, and that upon reaching a point about the middle of the block he deflected his course and proceeded to cross the street, and while doing so fell into an unguarded excavation, sustaining the injuries complained of. The excavation had that day been made by the employés of the defendant in the digging of a trench for the purpose of laying a conduit line under a permit issued by the board of public works of the municipality.

[1] From a careful review of the record, it clearly appears that the evidence supports the verdict of the jury that the defendant was chargeable with negligence. In the first place, this negligence may be predicated upon its remissness in observing the terms of an ordinance of the city providing that—

> "Every person, firm or corporation by whom, or under whose immediate direction or authority, either as principal, contractor or employer, any portion of any public street may be made dangerous, must erect, and so long as the danger may continue, maintain around that portion of such street so made dangerous a good and substantial barrier and cause to be maintained at both ends of such barrier, during every night, from sunset to daylight, a lighted lantern." Ordinance No. 868, approved June 26, 1903.

Moreover, without regard to this ordinance, the plaintiff's evidence established negligence on the part of the defendant in disturbing the normal condition of the street and leaving it in a condition unsafe for persons using it. Upon digging the trench, it was the plain duty of the defendant to take such precautions with respect to the excavation made as to avoid danger to users of the street, but the evidence shows that it failed to maintain a substantial barrier around at least that part of the excavation into which the plaintiff fell, which omission of itself under the law established negligence on the part of the defendant.

[2] It is equally apparent, it seems to us, that this negligence was the proximate cause of the injury.

[3] In its instructions to the jury the court gave the following, among others:

> "The question as to whether or not the plaintiff himself was guilty of negligence is one of fact to be determined by the jury from all the evidence in the case, taking into consideration the age and capacity of the plaintiff and all the other facts and circumstances appearing in the evidence. * * * You are further instructed that the law requires of a child suing for personal injury care and prudence equal to its capacity, and if you find from the evidence in this case that the plaintiff was a boy of ordinary intelligence and understanding for one of his years, and was aware that it was dangerous to play around an excavation of the character described by the testimony in this case, and knowing that fact and the hazards and dangers thereof, if any [and] in consequence, and did so continue to play, and was injured as a result, then your verdict will be for the defendant."

These instructions sufficiently covered this particular subject, rendering it unnecessary to instruct the jury thereon in the particular terms proposed by the defendant.

[4] Neither do we think that the damages assessed by the jury were excessive. The law prescribes no definite measure in such a case, but leaves the amount of damages to the sound discretion of the jury, taking into consideration all the circumstances attending the occurrence of the injury. In the present case such injury was quite severe, and we think the amount awarded to the plaintiff was not unreasonable.

The court fairly and fully instructed the jury on every phase of the case.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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40 Cal. App. 503

MARTINEZ v. YANCEY. (Civ. 2471.)

(District Court of Appeal, Second District, Division 1, California. March 31, 1919.)

LANDLORD AND TENANT ⚿22(4)—QUANTUM MERUIT—BREACH OF PROMISE TO LEASE.

Where plaintiff, pursuant to oral offer made by defendant to lease him a tract of land for five years at a rental of one-half of the crop, entered upon and continued in possession until October of the first year, when defendant refused to execute a lease, but stated that plaintiff could take one-half of the crop as compensation, plaintiff's remedy, if any, was not an action in quantum meruit for work done, but for breach of promise to make lease, in which case the measure of damages under Civ. Code, § 3300, would be the amount which would compensate plaintiff for detriment proximately caused, or which would likely result from breach.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Atanacio Martinez against M. D. Yancey. From judgment for defendant, plaintiff appeals. Affirmed.

Allan B. Campbell, Henry R. Holsinger, and Campbell & Holsinger, all of Bakersfield, for appellant.

Edward F. Brittan, of Bakersfield, for respondent.

SHAW, J. Action in quantum meruit for work and labor alleged to have been performed by plaintiff for defendant at his special instance and request.

Judgment, from which plaintiff appeals, followed the granting of defendant's motion for nonsuit made at the close of plaintiff's evidence, which evidence tended to prove that in January, 1915, plaintiff, upon an oral offer made by defendant to lease to him a tract of land for a term of five years at a rental of one-half the crops produced thereon, entered upon and continued in possession thereof until October 12, 1915, at which time defendant refused to execute a written lease of the property. Thereupon plaintiff demanded payment for the work performed during the time he was in possession, to which defendant replied that as compensation he was entitled to and could take one-half of the crops produced during the year.

Appellant insists upon a reversal under the well-recognized rule that where one engaged in the performance of services under a contract is, by the wrongful act of the other party thereto, prevented from completing the work called for, he may treat the contract as at an end, and recover in quantum meruit for such part performance. Hart v. Buckley, 164 Cal. 160, 128 Pac. 29. As stated by Greenleaf on Evidence, vol. 2, § 104, one may avail himself of an action upon quantum meruit, "where the contract, though partly performed, has been either abandoned by mutual consent, or rescinded and extinct by some act on the part of the defendant." It thus appears the rule is predicated upon the existence of a contract pursuant to the terms of which and prior to the extinguishment thereof the work has been done. In the instant case, however, plaintiff was not in possession of the property under and by virtue of a lease for five years or any lease other than for one year, as to which there was no repudiation or interference with his rights by defendant. Since concededly defendant never made a contract leasing the property to plaintiff for five years, there could be nothing done thereunder by plaintiff pursuant to its terms.

The wrong done plaintiff was in the refusal on the part of defendant to execute the lease in accordance with his oral promise, in reliance upon which plaintiff entered upon the property and farmed it for one season. Plaintiff's remedy (if any existed), was not an action in quantum meruit for work done thereunder, since, as we have seen, there was no contract under which he could have performed any work, but for a breach of the oral promise made by defendant to make the lease, in which case the measure of damages, as provided by section 3300 of the Civil Code, is the amount which would compensate him for the detriment proximately caused by such breach, or which would be likely to result therefrom. This was the theory upon which the trial court granted the motion for nonsuit, and, in doing so it did not err.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 419

IMPERIAL GAS ENGINE CO. v. AUTERI. (Civ. 2099.)

(District Court of Appeal, First District, Division 1, California. March 24, 1919.)

1. SALES 🔑179(4)—SALE OF MACHINERY FOR PARTICULAR PURPOSE—DEFENSE TO ACTION FOR PRICE—FAILURE OF CONSIDERATION.

Where machinery is bought for a particular purpose, and proves by trial not to be adapted, but the purchaser retains it, an action for the price cannot be defeated on the plea of failure of consideration unless the evidence shows the machinery was valueless for any purpose.

2. SALES 🔑359(2)—DEFECT IN ENGINE—SUFFICIENCY OF EVIDENCE.

In action for the price of a gasoline marine engine sold to a fisherman, evidence *held* sufficient to sustain the trial court's finding that the engine was so defective as to be wholly valueless for any purpose.

3. SALES 🔑168½(8)—ACTION FOR PRICE—DEFENSE OF FAILURE OF CONSIDERATION.

Where the seller of a gasoline marine engine to a fisherman never furnished and installed equipment as required by the contract, and the buyer's efforts in retaining the engine and using it were directed merely toward enforcing the proper fulfillment of the agreement, he was not precluded from defending an action for the price on the ground of total failure of consideration.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Imperial Gas Engine Company against Joe Auteri. Judgment for defendant, and plaintiff appeals. Affirmed.

I. F. Chapman, of San Francisco, for appellant.

Leon E. Prescott, of San Francisco, for respondent.

WASTE, P. J. Plaintiff brought suit against defendant to recover the sum of $335 alleged to be due as the final payment for one eight horse power gasoline engine which plaintiff had installed in defendant's boat. Defendant had judgment, and plaintiff appeals.

Defendant, who is a fisherman by trade, desired to purchase a gasoline engine for a boat used in his business. He negotiated with plaintiff, and a contract was made for the sale by plaintiff and purchase by defendant of "One 8 H. P. (actual brake test) Imperial S/C gasoline engine," together with certain equipment. By the terms of the contract the engine was "guaranteed against defective material and workmanship for the period of one year." The terms of the sale were: $25 on placing of the order; $200 within three days from date of the contract; and the balance of $335 "on successful trial trip." Defendant made the first two payments as required by the contract, and the engine was installed by plaintiff in the boat.

During the negotiation leading to the making of the contract, the question arose concerning a suitable magneto as part of the equipment and its cost. The written contract merely specified a "magneto," without further description.

After the engine was installed in the boat it was given a trial trip lasting one hour and a half. It had been previously tested in the shops of the plaintiff. Defendant did not make the final payment due under the contract. After various offers looking to a settlement of the matter, including a proposal on the part of defendant to pay a sum of money, less than the balance due, and to allow plaintiff to take back the engine and all of its parts, defendant, in writing, rescinded the contract and offered to return to plaintiff company all the property delivered by it to defendant, and demanded return to him of the $225 paid on account of the contract. Plaintiff brought this action.

Defendant first set up in his answer failure of consideration of the contract, by reason of plaintiff's not having delivered a magneto of the value of $65. He alleged that the magneto actually installed with the engine was secondhand and of the value of about $3.50 and no more. Before the trial he amended his answer, setting out that the engine, pump, and other accessories were defectively and improperly made, and of defective and inferior material, and that they were not usable, were of no value, and that thereby he was damaged in a sum in excess of the amount claimed by plaintiff.

Plaintiff's witnesses testified that the trial trip was satisfactory, and that defendant was pleased with it and did not make any objection; that the engine was properly installed, and, "so far as they knew, the engine was in first-class running order and condition."

Defendant testified that on the day the boat was launched he informed plaintiff that the engine was defective. It stopped running the next day. After two or three days the pump leaked, water was thrown all over the engine and on the igniter, which caused the engine to frequently stop, leaving defendant on one occasion in a perilous position at sea. Defendant also testified that he made many and almost continuous complaints to plaintiff about the condition of the engine.

There is a conflict of testimony concerning the nature of these complaints. Plaintiff's witnesses testified that the contention between the parties was concerning the installation of the magneto as part of the equipment, and not over the improper installation of, workmanship, or materials in the engine. The president of the plaintiff company, however, testified, when asked if there ever had been any demand made by defendant on the firm to repair the engine, that he "thought something of that kind occurred." The vice president and secretary of the plaintiff company testified that he had "not seen the engine since it left the shop, but we have had lots of complaints from Mr. Auteri in the last six months or so." Correspondence passing between the attorneys of the respective parties does indicate that the question of the magneto entered largely into the complaints; it appearing that the one installed was a secondhand magneto, apparently taken from an automobile, whereas defendant claimed that he was to have been furnished a new one. It sufficiently appears, however, from all the testimony, including the correspondence, that from the first trial of the engine in the boat defendant informed plaintiff that it was defective and not suitable for any purpose.

A number of experts and several fishermen, who were familiar with gasoline engines and the use which defendant made of his boat testified, as a result of their examination and knowledge, concerning the defects of the engine installed therein. The substance of their testimony was that the pump on the engine was set out of line. The material in it was defective, which caused the bearings to wear, resulting in the leak hereinbefore referred to. Water fell on the flywheel and was thrown on the engine in the crank pit. It was liable to get on the igniter and cause the engine to stop. The pump knocked. The reverse gear handle was loose. The babbits were loose in the main bearing on the crank shaft. The mechanical experts testified that these defects would not manifest themselves in the time consumed by the so-called trial trip, but would show as soon as the parts commenced to wear. The experts also testified that these defects made it impossible and dangerous to use the engine for the purpose required by defendant, and that it was not a workable or usable engine.

The court found that the engine pump and accessories were defective in make, materials, and workmanship, and would not work, and that defendant was thereby prevented from using his boat for fishing and was damaged as alleged in the answer.

Plaintiff's principal contention upon this appeal is that defendant could not retain the engine after a knowledge of the defects and defeat the action for the purchase price upon the plea of failure of consideration, and in support thereof cites the following:

> "Where machinery is bought for a certain purpose, and after its reception it proves, upon trial, not to be adapted to the purpose, but the purchaser nevertheless retains it, an action for the price cannot be defeated upon a plea of total failure of consideration, unless the evidence shows that the machinery was wholly valueless for any purpose." **Hardee v. Carter**, 94 Ga. 482, 19 S. E. 715.

[1, 2] This is, no doubt, a correct statement of the law, but we think the testimony was sufficient to support the finding of the trial court, the substance of which was that the engine was so defective as to be wholly valueless for any purpose. Appellant contends that there was an unreasonable delay on the part of defendant in the premises; that his use of the engine for a period of more than two months, during which period he knew of its defects, operated as an election to accept the engine and precluded him from claiming that it was not of the character provided in the contract.

> "The rule is elementary as to the respective rights of the parties under an executory contract for the sale of personal property. As to the purchaser he is bound to accept the property, provided it conforms to the terms of the contract, or, if not according to the contract, he may reject or refuse to accept it. Although the property may not be of the quality or description contracted for, he may nevertheless, if he so elect, waive the defect, and acceptance of the property offered constitutes such a waiver. When personal property is tendered or delivered to a purchaser in fulfillment of a contract for the purchase thereof, the duty devolves upon him to make an examination of the property tendered or delivered for the purpose of determining whether it fills the contract, and if from such examination he finds it does not, he must promptly reject it. The duty of inspection for the purpose of determining whether the property complies with the contract must be exercised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case." Jackson v. Porter Land & Water Co., 151 Cal. 39, 90 Pac. 125.

[3] From the record in this case it clearly appears that plaintiff never furnished and installed an engine and equipment as required by the contract with defendant, and that

defendant's efforts were directed toward enforcing the proper fulfillment of the agreement. Without again referring to the testimony in the case at bar, we are of the opinion that every point made by appellant in support of its appeal must be decided adversely to it, on the authority of Sherman v. Ayers, 20 Cal. App. 733, 130 Pac. 163, which was in many ways identical with the case presented here.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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40 Cal. App. 379

CRYSTAL PIER CO. v. SCHNEIDER et al.
(Civ. 2087.)

(District Court of Appeal, Second District, Divison 2, California. March 21, 1919.)

1. Corporations 🔑619 — Forfeiture of Charter—Powers and Duties of Directors.

Under St. 1907, p. 746, § 10a, providing that on forfeiture of a corporate charter the directors then in office "are deemed to be trustees of the corporation and stockholders, * * * and have full powers to settle the affairs of the corporation," the title to all property that formerly belonged to the dead corporation is vested in those who were its stockholders at the time of its demise, the directors having power in trust, with right of possession of the property, to deal with and dispose of the property and settle the affairs of the corporation.

2. Trusts 🔑134, 191(1)—Title of Trustee —"Powers in Trust"—Distinguished from "Trust."

In every true trust legal title vests in the trustee, while powers in trust differ in that the legal title is vested, not in the trustee, but in a third person; but the donee of power in trust can convey the title and dispose of the property to or for the beneficiary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trust; Power in Trust.]

3. Corporations 🔑619 — Forfeiture of Charter—Powers of Directors.

Under St. 1907, p. 746, § 10a, the directors of a corporation which has forfeited its charter may execute the power of settling the affairs of the corporation without the interposition of any court.

4. Corporations 🔑619 — Forfeiture of Charter—Powers of Directors.

Under St. 1907, p. 746, § 10a, the directors of a corporation which has forfeited its charter have the power to sell the corporate assets under the power "to settle the affairs of the corporation."

5. Corporations 🔑619 — Forfeiture of Charter—Sales of Assets by Directors.

Under St. 1907, p. 746, § 10a, in the absence of fraud or collusion, the courts will not interfere with a sale by the directors of the assets of a corporation which has forfeited its charter, the directors having latitudinous discretion.

6. Powers 🔑35 — Powers of Sale — Confirmation by Court.

In the absence of fraud, collusion, or abuse of discretion, the donee of a power of sale under an instrument executed by a private person may exercise it without the interposition of any court whatever, confirmation by the court being unnecessary.

7. Corporations 🔑619 — Forfeiture of Charter—Sales of Assets by Directors.

Under St. 1907, p. 746, § 10a, directors of a corporation, which has forfeited its charter, have power to sell a lease and to transfer the right to all moneys unpaid thereon, thereby vesting in the purchaser the right to sue for the recovery of all rents due and unpaid.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Crystal Pier Company, a corporation, against William Schneider and Jacob Fieber. From a judgment in favor of defendants, plaintiff appeals. Reversed.

J. W. Swanwick and Swanwick & Donnelly, all of Los Angeles, for appellant.

Davis & Rush, of Los Angeles, for respondent Schneider.

J. T. Jones and Jones & Weller, all of Los Angeles, for respondent Fieber.

FINLAYSON, P. J. This is an appeal from the judgment following an order sustaining a demurrer to the complaint. The action was to recover rents alleged to be due from defendants as lessees under a written lease executed to them by one McDonald, as lessor.

The case as made by the complaint, in so far as is necessary to an understanding of the question presented, is as follows: McDonald, the original lessor, transferred the lease and the property therein described to the Hollister Avenue Pier Company, a California corporation. Thereafter the Hollister Avenue Pier Company forfeited its charter for nonpayment of the state license tax. Thereafter the persons who, at the date of the forfeiture, were the directors in office of the defunct corporation, as trustees of the corporation and its stockholders, "for the purpose of settling the affairs of said corporation, and for the benefit of the creditors and stockholders thereof, granted, conveyed and assigned to plaintiff * * * all interest in or to the lease hereinbefore set forth and the moneys unpaid thereon."

No brief has been filed on behalf of respondents. We are informed, however, by appellant's brief that the demurrer was sustained upon the theory that the assignment to plaintiff by the trustees of the defunct corporation transferred no right that plaintiff can assert in this action.

[1] The amendment of 1907 to the act of 1905 (St. 1905, p. 493; Stats. 1907, p. 746, § 10a) provides that upon the forfeiture of a corporate charter the directors then in office "are deemed to be trustees of the corporation and stockholders, * * * and have full power to settle the affairs of the corporation."

The title to property owned by a corporation at the date of its demise does not pass to the directors who become trustees to settle its affairs. The corporation having ceased to exist, it no longer is capable of holding title or possession. The property formerly owned by it belongs to the persons who were its stockholders at the time it ceased to be a corporation. The directors who, upon the dissolution, become trustees for the corporation and stockholders, receive by the forfeiture only what the statute gives them, and that is a power over the property, not the title, and the right of possession, for without the right of possession they could not settle the corporate affairs. Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161. After forfeiture of the charter the situation, then, is this: The title to all property that formerly belonged to the dead corporation is vested in those who were its stockholders at the time of its demise; the trustees to settle the affairs of the corporation have in their possession property belonging to those who were stockholders at the date of the dissolution; they are bound to settle the affairs of the former owner, the defunct corporation; they have all the power to deal with and dispose of the property that is necessary to accomplish that object.

[2, 3] The "trustees," as the directors in office at the date of the forfeiture are designated by the statute, are the donees of a power in trust. Though the statute refers to the directors in office as "trustees," they are not trustees of a "trust," in any true sense of the term. In every true trust the legal title is vested in the trustee. Powers in trust differ from trusts in this, that in the case of such powers the legal title is vested, not in the trustee, but in a third person, but the donee of the power in trust can convey the title and dispose of the property to or for the beneficiaries. Pom. Eq. vol. 3, § 1002. The statute makes the persons whom it refers to as "trustees of the corporation and stockholders" the donees of a power "to settle the affairs of the corporation." They are trustees only in the sense that the donees of a power to be executed for the benefit of another, though they have no title, legal or equitable, hold the power in trust to be executed in the interest of the beneficiaries. For reasons presently to be stated, they may, as donees of such power in trust, execute the power without the interposition of any court.

[4, 5] Since the "affairs" of a defunct corporation, frequently exceedingly complex and multifarious, can seldom be settled without a sale or other disposition of at least some of the corporate assets, a power of sale necessarily is implied in the legislative grant of the power "to settle the affairs of the corporation." This power of sale should be exercised whenever necessary to serve the interests of the stockholders or creditors, though, as donees of such power, the persons referred to by the statute as "trustees" are vested with latitudinous discretion in determining whether a sale or other disposition of the corporate assets should be made—a discretion with which, in the absence of fraud or collusion, the courts will not interfere.

[6] The general rule is that, in the absence of fraud, collusion, or abuse of discretion, the donee of a power of sale under an instrument executed by a private person, as, for example, an executor to whom his testator has donated such a power, may exercise it without the interposition of any court whatever. No license or authority from, nor, in the absence of statutory requirement, confirmation by, any court is necessary. The hand of the donee of a power of sale under an instrument executed by a private individual may be arrested by the courts only when he fraudulently intends to sell in breach of his trust. 31 Cyc. 1183; Matthews v. Capshaw, 109 Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854; Feaster v. Fagan, 135 Iowa, 633, 113 N. W. 479; Rice v. Coleman, 87 S. C. 342, 69 S. E. 516, Ann. Cas. 1912B, 1016; Sharp v. Loupe, 120 Cal. 89, 52 Pac. 134, 586.

Subject to the universally recognized rule of construction that, in interpreting legislative grants, it should be held that nothing passes but what is granted, expressly or by necessary implication, in clear and explicit terms, we know of no reason why a legislative grant of a power of sale for the benefit of the stockholders and creditors of a dead corporation, any more than the donation of a power of sale by a private individual, should be subject to supervision by the courts, in the absence of some statute expressly providing therefor. As the court said in Rossi v. Caire, supra, speaking of the act that makes the directors in office trustees to settle the affairs of the dead corporation: "The obvious purpose of this statute * * * is, as was said in the Havemeyer Case [84 Cal. 362, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192], above cited, 'to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the time of dissolution' [84 Cal. 365, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192], and to render it unnecessary and improper for a court to intervene in their proceedings, or to supervise the sale in any particular, unless they are guilty of 'neglect of duty or abuse of power' [84 Cal. 367, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192]."

[7] For these reasons we hold that the "trustees" for the defunct Hollister Avenue Pier Company had the power to sell the lease and to transfer the right to all moneys unpaid thereon—the transfer of a chose in action—thereby vesting in appellant the right to sue for the recovery of all rents due and unpaid.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

40 Cal. App. 521

CAVASSO v. DOWNEY. (Civ. 2646.)

(District Court of Appeal, First District, Division 1, California. April 1, 1919.)

SET-OFF AND COUNTERCLAIM ⚷41 — CROSS-COMPLAINT — BREACH OF CONTRACT WITH ONE OTHER THAN DEFENDANT.

Where the partnership between plaintiff and defendant ceased when they organized a corporation to carry on their business, and the transaction whereby plaintiff got entirely out of the business was one for the purchase by defendant of plaintiff's interest in the company as represented by his stock, plaintiff's violation of the clause of the agreement whereby he bound himself not to compete with the company was a matter which could not be made the subject of a cross-complaint by defendant when sued by plaintiff on the notes given for his stock.

Appeal from Superior Court, Alameda County; Wm. M. Conley, Judge.

Action by I. L. Cavasso against J. C. Downey. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward R. Eliassen, of Oakland, for appellant.

M. J. Rutherford, of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $1,000, with interest and costs of suit, in an action to recover upon a promissory note executed by the defendant to the plaintiff for said sum. The defendant in his answer admitted the execution of the note, but denied that the same had not been paid. He further averred that the consideration of the note had failed. He then proceeded to aver that the said plaintiff and himself had for some time prior to the making of said note been engaged in business as partners under the firm name of Downey-Cavasso Glass & Paint Company, doing business in the city of Oakland; that on or about October 31, 1914, the plaintiff had sold all of his right, title, and interest in said business and the good will thereof to the defendant upon the express understanding and agreement that the said plaintiff would not engage in any business in competition with the said defendant within the city of Oakland for the period of five years; that the making of such agreement was part consideration for the purchase by the defendant of the plaintiff's interest in said firm and for the execution of said promissory note as a portion of the purchase price thereof; that in violation of said agreement the said plaintiff did engage in the same kind of business within said city of Oakland in competition with the said defendant, which acts on his part were fraudulent, and worked a failure of consideration for the note sued upon in this action. The defendant also presents the same facts in a cross-complaint, wherein he prays for an injunction preventing the plaintiff from continuing in business in competition with the cross-complainant, and for a decree requiring said plaintiff to deliver up said note for cancellation. The defendant has also a so-called cross-complaint for the recovery from plaintiff of the sum of $603.98 upon an assigned claim.

Upon the trial of the cause evidence was presented before the court showing that for some time prior to the 13th day of January, 1913, the plaintiff and the defendant had been copartners conducting a glass and paint business in the city of Oakland under the firm name of Downey-Cavasso Glass & Paint Company, but that on or about the last-named date a corporation had been formed by them with the same name, and to which corporation they proceeded to transfer their and each of their interest in said business and in all of the properties thereof, each receiving therefor 380 shares of the capital stock of said corporation; that said corporation took over said business, and from time to time during the next year and a half or more held occasional directors' meetings in respect to the affairs of the business; that in the month of October, 1914, the plaintiff and the defendant entered into a written agreement by the terms of which it was recited that the parties thereto were stockholders in the aforesaid corporation, and that defendant was desirous of buying and the plaintiff of selling all of the latter's interest in the business thereof. It was therefore agreed that the defendant was to pay the sum of $6,000 for all of the interest of the plaintiff in the said corporation and business, "the said interest being represented by 380 shares of the capital stock of said corporation," which the plaintiff agreed for said consideration to transfer to the defendant. The note in question was a part of said consideration. The closing clause in said agreement reads as follows:

> "It is further agreed by and between the parties hereto that the said party of the second part (plaintiff herein) will not engage in any business in competition with the Downey-Cavasso Glass & Paint Company for a period of five years from the date hereof."

It further appeared upon the trial that a short time after the execution of said agreement the plaintiff did engage in business in the city of Oakland and in direct competition with said Downey-Cavasso Glass & Paint Company. The trial court decided upon the whole evidence presented that the copartnership which had previously existed between the parties had been merged in the corporation formed in the month of January, 1913, and that the relation of copartners in respect to the business then taken over by such corporation did not continue thereafter, and that the transaction between the parties in October, 1914, was one in which the defendant purchased the stock of the plaintiff in said corporation, giving, among other things, the note in question as a part of the consideration therefor. We are satisfied from a reading of the record that the evidence fully justifies the findings of the court in this regard. The court further found that the plaintiff did embark in business in the city of Oakland in competition with the said corporation, but not in competition with the defendant, who since the organization of said corporation had not been engaged in such business on his own account. The court also upon sufficient evidence found against the defendant on his cross-complaint, and accordingly rendered judgment in the plaintiff's favor.

We find no error in the court's conclusions with respect to these matters. The evidence, as we have seen, justified the finding of the trial court that the partnership between the parties hereto ceased when the corporation was organized, and also justifies the finding that the transaction between the parties was one for the purchase by the defendant of the plaintiff's interest in said corporation as represented by the 380 shares of stock held by him therein. If these findings be upheld, it follows necessarily that the plaintiff's violation of the clause in said agreement by which he bound himself not to engage in business in competition with the Downey-Cavasso Glass & Paint Company, a corporation, was a matter which could not be made the subject of a cross-complaint by the defendant in this action. This conclusion assumes the validity of the clause in question as an agreement in restraint of trade. It is urged by the respondent that this part of the agreement, not being by its terms limited as to the territory embraced in its operation, is void as contrary to the provisions of sections 1673 and 1674 of the Civil Code, citing Callahan v. Donnolly, 45 Cal. 152, 13 Am. Rep. 172, as authority for such contention. We do not, however, deem it necessary to dispose of this contention in view of our conclusions upon the other phases of the case.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 355

RANSOME–CRUMMEY CO. v. WOOD et al.

(Civ. 2835.)

(District Court of Appeal, First District, Division 1, California. March 20, 1919. Rehearing Denied April 17, 1919.)

1. Dismissal and Nonsuit ⚷57—Defects—Delay in Service or Return of Process.

Where plaintiff failed to cause summons with proof of service thereof to be returned within three years after commencement of the action, the court, on defendant's motion, properly dismissed the case, under Code Civ. Proc. § 581a, and this it could do on its own motion and without notice to either of the parties.

2. Courts ⚷50—Departments—Transfer—Notice.

A case or proceeding can be assigned or transferred for trial by a judge of the superior court to any one or more of the several departments of such court, and no notice of such transfer is required.

3. Municipal Corporations ⚷566—Special Assessments—Actions.

Under Vrooman Act, § 12, as amended by St. 1913, pp. 408, 409, § 4, the time within which a summons must be returned in street assessment lien cases is governed by the Codes and laws of the state.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by the Ransome-Crummey Company against Louis E. Wood and others. From an order dismissing the action, plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

Fry & Jenkins, of San Jose, for respondents.

WASTE, P. J. Plaintiff appeals from an order dismissing the action.

On the 10th day of June, 1914, plaintiff commenced an action against defendants by filing in the superior court of Santa Clara county its verified complaint to foreclose a certain street assessment lien. Summons was duly issued on the same day. No further proceedings were had in the cause until on

June 8, 1917, when an amended complaint was filed. Thereafter, on the 26th day of June, 1917, the summons was filed in the action, together with an affidavit showing service thereof upon the defendant Louis E. Wood "on the ——— day of June, 1917."

On the same day, June 26th, there was filed on behalf of said defendant Louis E. Wood a notice of motion for an order dismissing the cause upon the ground that the summons in the action was not served or return thereon made within three years after the commencement thereof. The motion was noticed to be heard on the 29th day of June, at 10 a. m. of said day, or as soon as counsel could be heard (three days after its filing), and time of notice was shortened to one day by order of the judge of the court. On the same day the motion was filed, June 26th, the notice of motion and order shortening time were served on the attorney for plaintiff by deposit in the post office in San Jose; the office of plaintiff's attorney being in San Francisco.

The motion to dismiss was based on the affidavit of the defendant and the records in the case. According to the former, the defendant was not served with the summons until on the 25th day of June, 1917, and at no other time was any pleading or paper in the action ever served on him.

On the day, and at the time noticed, June 29th, the motion was regularly on the calender of department one of the superior court of Santa Clara county, and was transferred to department three of said court, where, after due hearing, the court granted the motion and dismissed the action upon the grounds specified in the notice. Notice of the court's action was given to plaintiff by mail. It took no steps to have the order dismissing the action set aside, but contents itself with an appeal therefrom.

On the appeal it is contended that due notice of the motion to dismiss the action was not given appellant (plaintiff) in the court below; that the place where the motion was heard (department 3 of the said superior court) was not the place specified in the notice of motion; and that the time within which a summons must be returned in street assessment lien cases is governed by the provisions of the Vrooman Act (St. 1885, p. 147), which is incorporated as part and parcel of the freeholders' charter of the city of San Jose, and not by the provisions of the general law.

[1] We see nothing of merit in any of the points made. The failure of the plaintiff to cause the summons, with proof of service thereof, to be returned within three years after the commencement of the action, deprived the court of jurisdiction to take any other action than to dismiss the case. Section 581a, Code Civ. Proc.; Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080; Modoc Land, etc., Co. v. Superior Court, 128 Cal. 255, 60 Pac. 848; Davis v. Hart, 123 Cal. 384, 55 Pac. 1060; Bellingham Bay L. Co. v. Western A. Co., 35 Cal. App. 517-519, 170 Pac. 632. Such action "must be dismissed by the court * * * on its own motion." Section 581a, supra. The court can take such action without notice to either of the parties. On the record plaintiff was not entitled to notice.

[2] There is no merit in appellant's point as to the transfer of the case from one department of the trial court to another. The judges of the superior court in a particular county, for the more convenient dispatch of business or for any reason they may deem necessary, may make, assign, or transfer cases for trial to any one or more of the several departments of such court. Bell v. Peck, 104 Cal. 38, 37 Pac. 766. Appellant refers to no rule of court providing for any notice of such transfer, and none is required by the statute. Bell v. Peck, supra; Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798; Eltzroth v. Ryan, 91 Cal. 587, 27 Pac. 932.

[3] Appellant fails to point out wherein the Vrooman Act conflicts with or creates any procedure governing the service of summons or the disposition of suits thereunder different from that provided by the Codes of the state. The act itself provides to the contrary. The right to institute suit to recover any assessment remaining unpaid, and to have a lien therefor adjudged against the premises assessed and the land sold thereunder, is given by section 12 of that act. It provides, in part:

> "Suit may be brought in the superior court within whose jurisdiction the city is in which said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands the owners of which cannot, with due diligence, be found, the service of summons in each of such actions may be had in such manner as is prescribed in the Codes and laws of this state. * * * In all suits now pending, or hereafter brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this act, and also, when not in conflict herewith, by the Codes of this state." Stats. 1913, pp. 408, 409, § 4.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

40 Cal. App. 447

WHITE v. THOMPSON et al. (Civ. 2630.)

(District Court of Appeal, First District, Division 1, California. March 26, 1919. Rehearing Denied by Supreme Court May 22, 1919.)

1. Account Stated 🔑11—Impeachment.

While a suit to open, surcharge, or falsify an account is one proper for equitable jurisdiction, yet the rule seems to be established that a stated account need not be impeached by a direct action brought for that purpose, but may be impeached for fraud and mistake, either at law or in equity, whenever it is brought forward as a defense.

2. Account Stated 🔑11—Omitted Items—Action.

An action in assumpsit will lie to recover for items of indebtedness omitted by mistake on a settlement of an account, if there is no other objection.

3. Account Stated 🔑8—Items Not in Contemplation of Parties.

An account stated does not bar a recovery for items not within the contemplation of the parties when settlement was made, nor for such as were left open for further considerations.

4. Account Stated 🔑11—Mistake.

Where an account has been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake may be corrected, and the rights of the parties readjusted as to such mistake.

5. Account Stated 🔑19(2) — Action on Omitted Items—Evidence.

In an action in assumpsit on an item of an account which was omitted by mistake in an accounting, admission in evidence of the details of the accounting was proper.

6. Assignments 🔑24(3) — Causes of Action.

A cause of action on an item omitted by mistake on settlement of an account is not unassignable as action for fraud, but assignable under Civ. Code, § 954.

7. Payment 🔑65(6)—Action for Price—Burden of Proof.

In an action for the price of goods, wares, or merchandise, the burden of proving payment is on the defendant.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by H. R. White against E. O. Thompson and others. Judgment for defendants, and plaintiff appeals. Reversed.

Morrison, Dunne & Brobeck, of San Francisco, for appellant.

Everts & Ewing, of Fresno, for respondents.

WASTE, P. J. Plaintiff appeals from the judgment of nonsuit and dismissal.

From the bill of exceptions the following facts appear:

The defendants, copartners, on or about June 20, 1915, ordered from the Santa Cruz Portland Cement Company a carload of cement of the value of $820.70, which is the subject-matter of the action, and agreed to pay for the same within a reasonable time after it was delivered to them. The cement company shipped the cement to the defendants at Visalia, as the consignees. On the 28th of June of the same year defendants wrote to the cement company, stating that they had delivered the cement to W. H. Worswick, Jr., and requested the cement company to give the defendants credit for the sale price of the cement, and forward the invoice covering it to said Worswick at Visalia. Believing that an arrangement had been made between Worswick and the defendants whereby Worswick had agreed to pay for the cement, and induced by this belief, the cement company gave Thompson Bros. credit for the cement, and the charge was then made by it against Worswick for the amount, which appears to have been his initial account with the company.

Some months later the defendants and the cement company had an accounting with each other, from which it appeared that there was a balance due to the defendants from the cement company in the sum of $412.57. At the request of defendants this credit balance on the books of the company was transferred to the credit of other parties, and the account was considered settled. Shortly thereafter the cement company learned for the first time that the defendants had merely loaned the cement in question to Worswick, and that it had all been returned by him to the defendants, and that there had never been any agreement between defendants and Worswick for the payment by him to the company.

Immediately upon ascertaining these facts, the cement company canceled the credit theretofore entered on its books in favor of defendants, likewise canceled the charge it had entered against Worswick, and re-entered the amount of $820.70 on its account against the defendant. After attempting to collect the amount, which defendants refused to pay, the cement company assigned and set over to the plaintiff the account, and plaintiff instituted this action. The complaint is in five counts, the first four being common counts, and the fifth setting out the facts substantially as they appear from the evidence. At the conclusion of plaintiff's case, from which the foregoing facts appeared, the court granted defendants' motion for a nonsuit, and plaintiff appeals. The action of the trial court in sustaining defendants' motion for a nonsuit is the sole assignment of error on appeal.

The action of the trial court in granting the nonsuit appears to have been based upon the contention of the defendants at the trial, the respondents here, that the evidence showed an account stated between the cement company and defendants existing on and after October 20, 1915, that, said account having been based on cross-items and settled by payment, it could be reopened and corrected only by an equitable action to surcharge, falsify, or correct, the account, and on the further ground that any claim based upon such an account stated was not assignable. It appears to us that the action at bar is merely a legal action in assumpsit to recover an item of indebtedness owing from defendants, to plaintiff's assignor, which was entirely omitted in the negotiation leading to the account stated.

[1] "While a suit to open, surcharge, or falsify an account is one proper for equitable jurisdiction, yet the rule seems to be established that a stated account need not be impeached by a direct suit brought for that purpose. It may be impeached for fraud or mistake either at law or in equity whenever it is brought forward as a defense or cause of action." 1 Corpus Juris, 715.

[2-4] An action in assumpsit will lie to recover for items of indebtedness omitted by mistake on a settlement of an account, if there is no other objection. Sage v. Hawley, 16 Conn. 106, 41 Am. Dec. 128; Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463; Harman & Crockett v Maddy Bros., 57 W. Va. 66, 49 S. E. 1009.

An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made (Clarke v. Kelsey, 41 Neb. 766, 60 N. W. 138; Lawler v. Jennings, 18 Utah, 35, 55 Pac. 60), nor for those omitted by mistake, nor for such as were left open for further consideration (Waldron v. Evans, 1 Dak. 11, 46 N. W. 607). Parties to an account stated, signed by them, are not concluded by the presumption that it was a final settlement of all valid debts, debits, and credits, as to matters which were not contemplated by them, or which were not included in the settlement, though they existed at the time. Treacy v. Powers, 112 Minn. 226, 127 N. W. 936. Where an account has been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake may be corrected and the rights of the parties readjusted as to such mistake. Carpenter v. Kent, 101 N. Y. 591, 5 N. E. 787.

[5] The action of the trial court in admitting evidence of the details of the transaction between the cement company and defendants was proper. In such actions the court may allow evidence of omissions and errors therein and find in accordance with the developed facts. Adams v. Gerig, 25 Cal. App. 638, 145 Pac. 106; and cases cited. See, also, McLelland v. East San Mateo Land Co., 166 Cal. 736, 137 Pac. 1145.

[6] Respondent takes the ground that the case at bar is a suit to surcharge, falsify, and correct an account stated, and that a cause of action for fraud is not assignable. As we view the action, it is rather one in assumpsit to recover on an existing obligation, which was omitted from the negotiations of the parties leading to the settlement of the account, and which remained an existing legal obligation, upon which the parties had an assignable cause of action.

The assignment by the cement company to plaintiff was of its account with, and claim and cause of action in the sum of $820.70 against, defendants. The claim of the cement company against the defendants was the legal right to collect, and reduce to possession, its claim for $820.70. This was a property right which had an existing value. By reason of the assignment, therefore, plaintiff acquired a substantial thing in action arising out of the obligation resting on the defendants to pay the cement company the amount due thereon, and one capable of being transferred by the owner. Section 954, Civ. Code.

[7] Respondent makes the point on appeal that it does not appear from the evidence that the amount sued for was not paid to the assignee; the only proof being the testimony of the auditor of the cement company:

> "Our books show that there is still due, owing and unpaid by Thompson Bros. the sum of $820.70 on the two cars referred to."

The plaintiff was not required to prove negative allegations. The burden of proof of payment was on the defendants. Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127.

The defendants' motion for nonsuit and dismissal should have been overruled.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

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180 Cal. 335

THROOP et al. v. WEAVER. (L. A. 4887.)

(Supreme Court of California. May 7, 1919.)

1. **Judgment** 🔑248 — **Variance from Pleading—Action on Note.**

Where a cross-complaint does not mention by name the payee or payees described in the note, which plaintiffs are seeking to cancel, and which defendant is cross-complaining to recover on, there is no variance between such cross-complaint and the judgment, which describes payees of the note as "defendant W. C. W. and M. B. W.," whereas there is only one defendant.

2. **Appeal and Error** 🔑934(2)—**Presumption—Finding of Court Below—Identity of Note.**

The appellate court must assume, in favor of the regularity of the judgment, that the note therein described is the one in regard to which the parties litigated.

3. **Appeal and Error** 🔑194(4)—**Reservation of Grounds of Review—Waiver of Objection.**

Where plaintiffs joined issue on the cross-complaint, and went to trial without demurrer or objection, they cannot raise the point that the cross-complaint does not state a cause of action, in that the cause of action pleaded is not a proper matter for a cross-complaint.

4. **Appeal and Error** 🔑1154—**Judgment Against One Not a Party—Modification.**

Where a plaintiff was not made a party to the cross-complaint, but judgment thereon was entered against her, trial court will be directed to modify the judgment by eliminating her from its effect.

Department 2.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Mary E. Throop and others against W. C. Weaver. From judgment for defendant on his cross-complaint, plaintiffs appeal. Amended and affirmed.

Fleming, Graham & Graham, John L. Fleming, and W. S. Knott, all of Los Angeles, for appellants.

Sheldon Borden and George H. Moore, both of Los Angeles, for respondent.

MELVIN, J. Appeal by plaintiffs from the judgment.

Plaintiffs sued in equity to cancel a certain note which they alleged in their complaint they executed and delivered to the defendant on or about the 21st day of April, 1915. They averred that the principal amount was $1,060, bearing interest at 7 per cent. per annum, and becoming due on or before July 1, 1916. They alleged that the note was in negotiable form and, upon information and belief, averred that at the time of beginning of the action it was still in the possession and under the control of defendant. They also averred that said note and interest had been paid in full by plaintiffs; that defendant refused to surrender possession thereof; and they prayed for judgment that the note be canceled and surrendered to them.

Defendant answered, admitting the execution and delivery of the note, but denying that any part of it had been paid. Defendant also set up by way of cross-complaint a claim against the plaintiffs for a certain merchandise alleged to have been converted by them, and prayed judgment against the plaintiffs for $600. Plaintiffs did not demur to the cross-complaint, but answered, putting in issue the allegations thereof, and the cause was thereupon tried.

The court found that the promissory note described in paragraph 1 of the complaint, and not denied by the defendant, had not been paid in full or otherwise by the plaintiffs or any other person, and that no part of the interest had been paid. Upon the cross-complaint judgment was given in favor of the cross-complainant for the sum of $64, with interest thereon at the legal rate, and the equitable relief demanded in plaintiffs' bill was denied.

[1, 2] In the judgment the description of the note agrees in every particular with that given in the complaint, except that the payees are described as defendant, W. C. Weaver and Mary B. Weaver. Upon this supposed variance appellants argue that the promissory note described in the judgment is not the one referred to in any of the pleadings or in the findings of the court. This is an unworthy and frivolous contention. In the first place the complaint does not mention by name the payee or payees described in the note. Therefore, there is no necessary variance between the pleading and the judgment. Secondly, none of the testimony appears in the transcript, and it is elementary that this court must assume in favor of the regularity of the judgment that the note therein described is the one in regard to which the parties litigated.

[3] Appellants also make the point that the cross-complaint does not state a cause of action; their criticism really being that the cause of action pleaded is not a proper matter for cross-complaint. Conceding this to be true, they cannot here raise the point as they joined issue upon said cross-complaint and went to trial without demurrer or objection.

[4] Appellants also assert that the findings are outside of the issues in this respect, that while Mary E. Throop was not made a party to the cross-complaint, judgment thereon was entered against her. This contention is correct, but the objection to the judgment may

be obviated by adding the words "except Mary E. Throop" after the word "plaintiffs," in the fourth line from the end of the said judgment, and by inserting the words "against plaintiffs" after the word "taxed," in the second line from the end of said judgment. The trial court is therefore directed to amend the judgment so that the closing paragraph will be as follows:

> "It is further ordered, adjudged, and decreed that the said plaintiffs take nothing from the defendant, W. C. Weaver, and that the defendant, W. C. Weaver, have and recover of and from said plaintiffs, except Mary E. Throop, the sum of $68.73, together with said defendant's costs of suit herein incurred and expended, hereby taxed against plaintiffs at the sum of $44."

As so amended, the judgment is affirmed, with the costs of this appeal taxed against the plaintiffs Charles B. Throop and Richard A. Throop.

We concur: WILBUR, J.; LENNON, J.

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180 Cal. 309

BAKER v. SMITH-BOOTH-USHER CO.

(L. A. 4926.)

(Supreme Court of California. May 6, 1919.)

1. SALES 🔑441(3)—BREACH OF WARRANTY—EVIDENCE.

In action by purchaser of pump for breach of warranty, *held*, under the evidence, that the pump failed because the well in which it was installed supplied large quantities of substances other than water, so that defendant seller was not liable for damages.

2. APPEAL AND ERROR 🔑761—SPECIFICATION OF ERROR—SUFFICIENCY.

In the absence of a more specific argument, in the brief than that the rulings of the court assigned as error at law, commencing with folio 930, are clearly erroneous, but, as exceptions are numerous and testimony of witnesses must necessarily be read, further discussion will be refrained from, the court on appeal will not pass upon appellant's contention.

3. APPEAL AND ERROR 🔑1032(1)—PREJUDICIAL ERROR—WHO MUST SHOW.

The burden is upon appellant to show prejudicial error.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Emma G. Baker against the Smith-Booth-Usher Company. Judgment for defendants on their cross-complaint, and plaintiff, who was denied all relief, appeals. Affirmed.

E. B. Coil, of Los Angeles, for appellant.

Hiatt & Selby and Edward M. Selby, all of Los Angeles, for respondent.

WILBUR, J. Plaintiff purchased a pump from the defendant for $2,865, and paid $500 on account of the purchase price. The pump was installed by the defendant in a well dug by the plaintiff. Plaintiff claims that the pump failed to comply with both express and implied warranties, and brought this suit to recover from the defendant the amount of $500 theretofore paid by her on account of the purchase price and $700 expended by her in connection with the installation of the pump. The defendant, after denying the breach of warranty and by way of cross-complaint, sought to recover the balance of the purchase price of the pump. Judgment was rendered for the defendant for the balance of the purchase price and certain additional sums expended by the defendant in connection with the erection of the pump, and plaintiff was denied all relief. Plaintiff appeals from the judgment.

[1] The main question in the case is whether the pump failed because of imperfections in the well and in the water supply or in the pump. It was expressly agreed in the written contract for the purchase and installation of the pump:

> That the respondent should not "be held liable for damage or any trouble caused by reason of well not being straight, caving in, giving up sand, gravel, chips or any substance other than clear water, or should the purchaser fail to develop from the well or wells the quantity of water required by the above-specified plant within suction distance from the location of the pump."

The trial court found as a fact:

> That the well furnished by the plaintiff "did not give or furnish any supply of clear water whatever; that said well furnished by plaintiff did supply and give up large and excessive quantities of sand, gravel, clay, and substances other than clear water; that all damage to said machinery and trouble with or in the operation of said machinery was due to the large and extensive quantities of sand, gravel, clay, and substances other than clear water furnished and given up by said well; * * * that said defendant did replace all parts of said machinery claimed by said plaintiff to be defective and which were returned to defendant; that it is not true that any trouble in the operation of said plant was due to any fault in said machinery."

Appellant apparently contends that there was no substantial evidence to support this finding. There was a great deal of testimony as to the amount of sand in the water, and one of the respondent's witnesses testified that, while the load which the pump was designed to carry was 8,924 pounds, the actual load imposed upon it because of the presence of sand in large quantities in the water was 24,669 pounds. There was ample evidence to support this finding. There was also a finding that part of the trouble resulted from the fact that the well furnished by the plaintiff was not straight. This is supported by evidence that the couplings of the pump rod were worn almost through on one side and that a light lowered into the well disappeared after passing a point about 70 feet from the surface. It is claimed, however, that by reason of the fact that the respondent tested the well for straightness by lowering the three joints of pipe into said well before the machinery and pump was installed respondent waived the requirement that the well should be straight. Even if this be true, in view of the evidence and the finding of the court upon the issue concerning sand in the well and the finding that the difficulty with the pump arose from such facts, such waiver would be without avail to the appellant.

[2] Appellant stated in her brief:

> "We feel that the several rulings of the court assigned as errors at law complained of, commencing with folio 930, are clearly erroneous, in view of the testimony offered in connection therewith. But, as these objections are numerous and cannot well be specifically pointed out without repeating at too great length the testimony of the several witnesses, which, as we have said before, must necessarily be carefully read, we have refrained from further discussion, but insist upon the consideration of same. Particular attention is directed to errors of the court in sustaining objections to questions asked of plaintiff's witness W. H. Robinson, who qualified as an expert."

[3] These specifications relate to rulings of the court upon the introduction of testimony. In the absence of more specific argument in the brief, we are not called upon to pass upon the appellant's contention. The burden is upon appellant to show prejudicial error. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567; Thomas v. Hacker, 178 Pac. 855.

The judgment is affirmed.

We concur: MELVIN, J.; LENNON, J.

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180 Cal. 307

In re YOUNGBLOOD et al.

Appeal of LOMONACO.

(L. A. 5578.)

(Supreme Court of California. May 6, 1919.)

Costs 🔑260(4)—Appointment of Guardian for Minors—Frivolous Appeal.

Where a father, divorced from his deceased wife on the ground of extreme cruelty toward her and his children, was denied guardianship of such children after his wife's decease on the ground of his unfitness, the brother of the children's deceased mother being appointed guardian, and after appointment of the uncle the father assaulted him with a knife in court, such father's appeal from order appointing uncle and denying letters of guardianship to himself is frivolous, and the uncle will have judgment therefor.

Department 2.

Appeal from Superior Court, Los Angeles County; Frederick W. Hauser, Judge.

In the matter of the estate and guardianship of Joseph Youngblood, Eileen Lomonaco, and Francis Lomonaco, minors. From an order appointing J. A. Suraco, a brother of the deceased mother of the children, their guardian, and denying a petition by Frank Lomonaco, father of Eileen and Francis, for letters of guardianship, he appeals. Affirmed.

Fred W. Morrison and W. W. Butler, both of Los Angeles, for appellant.

Ingall W. Bull and Harold Larson, both of Los Angeles, for respondent.

WILBUR, J. This is an appeal by Frank Lomonaco, the father of Eileen Lomonaco and Francis Lomonaco, from an order appointing J. A. Suraco, a brother of the deceased mother of said children, their guardian, and denying appellant's petition for letters of guardianship. It appears from the evidence that Frank Lomonaco and the mother of said children were divorced by final decree June 20, 1913, upon the ground of extreme cruelty of the appellant toward his wife and toward his children. It was therein adjudicated that the appellant was not a fit and proper person to have the custody of his children. Their custody was awarded to the wife, with the privilege on the part of the appellant to visit his children once a week on Sunday; he being ordered to pay $25 a month for the support of said children. Appellant only visited his children once, and, although able so to do, failed and refused to pay the $25 a month for their support, paying altogether only $117 for their support. The mother of the children married Joseph Youngblood, and in March, 1917, died leaving an estate which, under the terms of the will, goes to Eileen and Francis Lomonaco and Joseph A. Youngblood, a child born to her by her second husband. In said will she appointed Joseph Youngblood, her second husband, guardian of her children.

Upon the trial of the guardianship proceedings, at which time the petition of the father appellant herein, and also of the stepfather, Joseph Youngblood, were considered, the court orally announced its conclusion that the father was not a fit and proper person to have the custody of his children, and announced that letters of guardianship would issue to the uncle, Joseph Suraco, who had not formally applied for such letters. The court thereupon adjourned, and immediately upon the judge leaving the courtroom appellant made an assault upon Joseph Suraco with a fruit knife; one cut extending almost the entire length of the left side of Suraco's face, another cut across his forehead, and another through the right side of his nose. He also attempted to stab Mrs. Suraco, the wife of Joseph Suraco, in the back. The court thereupon reopened the case and took testimony showing the nature and character of this assault.

We are at a loss to understand why the appellant seeks to have this court reverse the finding of the trial court that he is not a fit and proper custodian of his children, when he has himself so amply confirmed that decision by his own conduct immediately after the conclusion of the court had been announced. There is no merit in the appeal. The effect of this appeal has been to cause the guardian to become unnecessarily liable for attorney's fees.

The judgment is affirmed; respondent to have judgment for $100 for frivolous appeal.

We concur: LENNON, J.; MELVIN, J.

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180 Cal. 304

In re SEAY'S ESTATE.

MARSH et al. v. SEAY et al.

(L. A. 6017.)

(Supreme Court of California. May 6, 1919.)

1. WILLS 🔑865(4)—CONSTRUCTION—DISPOSITION OF RESIDUE.

Under will specifying that when all devisees and legatees were fully paid, residue should be divided among certain nephews and nieces, and if there were not enough assets to pay bequests, payment should be pro rata, the next clause declaring that all nephews and nieces were worthy, and that testator was mindful of all, where there was an excess of the estate over amounts bequeathed, the nephews and nieces mentioned by name did not take the whole of the residuary estate, which went to heirs at law, in view of testator's intention to divide equally.

2. WILLS 🔑491—INTERPRETATION—QUESTION OF LAW.

The interpretation of a will is a matter of law, to be determined from the language used and the facts and circumstances in proof.

3. WILLS 🔑384—PROBATE—APPEAL—HARMLESS ERROR.

Error in admitting the rough draft of a will found in the same envelope with that offered for probate *held* harmless, the language used in the will and the facts and circumstances in proof being sufficient to make possible a proper interpretation of the will offered.

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition to probate the will of A. J. Seay by James A. Marsh and another, wherein Ralph M. Seay and Ida Thurman objected to a judgment of partial distribution, and appeal. Affirmed.

Neighbours, Hoag & Burke, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

WILBUR, J. The controversy in this case arises upon partial distribution and involves a determination of the meaning of the following clause in the will, dated November 28, 1902:

> "When all the devisees and legatees are fully paid what has been bequeathed to them the residue of my estate, if any, shall be divided as follows: To Ida Dowler $2,500.00, to Nannie Marsh, Jas. A. Marsh, $2,000.00, five hundred of which to be used to pay for dress, expenses and dues to the Military Order of the Loyal Legion of the U. S. Mo. Commandery. To Maud Woodruff if married $100, if single $500—Minnie Carhart $100 (one hundred dollars). Sue E. Sanders $1,000.00 G. E. Marsh, $500.00 Ralph M. Seay upon the sole condition that he has entirely quit drinking for at least one year, $2,500.00, otherwise nothing except what has heretofore been given. Earl Seay if married $2,000, if single $1,000—W. J. Seay if he shall be married $1,000, Lulu V. Sigler $2,500.00. If there are not enough assets to pay the above bequests, and yield funds to carry out and pay the trusts herein created, then they shall be paid pro rata."

Appellants claim that by this clause of the will it was intended to dispose of the remainder of the estate, and that inasmuch as the estate is worth $300,000 more than is otherwise disposed of by the will, this excess amount should be distributed among those mentioned in the above clause in proportion to the respective amounts they were to receive by said clause. The testator declared in the next clauses in his will:

> "I will make my gifts without regard to the disposition of my property here made, which shall not be considered as advancements. I expect also to make some charitable and public donations which will consume more or less of my estate. I intend to do something for poor children in the way of an industrial school or orphans' home, and to contribute to a public library. But the town and the public must take hold and contribute."

The opening clause of the will contains the following recital:

> "Having seventeen nieces and nephews all of whom are worthy—all of whom have heretofore received financial help from me in proportion to their needs the prodigal and unfortunate receiving more than the rest, and many of them being more or less needy. In making

the following disposition of my property I am yet mindful of what I have done for them and they for me, and of their present and prospective needs."

[1] The trial court held that the remainder of the estate, after paying all legacies specified in the will, consisted of $300,000, and that as to such excess the will made no disposition, and distributed said amount equally to the 16 surviving nieces and nephews of the deceased. Any other construction would lead to a vast disproportion in the amounts received by the nieces and nephews, although the deceased declared that "all of whom are worthy." The construction contended for by appellants would increase the total legacies mentioned to the nieces and nephews in the clause under consideration from $11,700 to $311,700, while the remaining nieces and nephews get amounts ranging from $1,000 to $2,500. Two facts are patent from the will: First, the intention of the testator during his lifetime to dispose of all property, not devised or bequeathed in the will by gift and advancements; second, that the testator regarded his nephews and nieces with equal affection, and considered them equally entitled to his bounty, but not equally needy. There is no indication that these nieces and nephews in the clause under consideration were to be specially favored. On the contrary the amounts bequeathed them were to be abated pro rata if the estate was insufficient to pay the same in full, while the other legacies were to be paid in full. It is plain that the testator failed to make any provision for the contingency of there being an excess over the amounts therein bequeathed, and that such excess must be distributed to the heirs at law.

[2, 3] It is claimed that the trial court erred in admitting in evidence a so-called rough draft of a will which was found in the same envelope with the will that was offered for probate and some oral evidence in connection therewith. This will was received over the objections of appellants, but with the understanding that the court would reconsider its admissibility on a motion to strike out, the court expressing a doubt as to its admissibility. Subsequently all the oral evidence was stricken out. It does not appear from the briefs whether or not a motion was made to strike out this draft of a will. However that may be, the interpretation of the will is a matter of law, to be determined from the language used in the will, and the facts and circumstances in proof in the case, and upon the record we can determine the proper interpretation without reference to such rough draft of a will. Hence the error in admitting the rough draft was harmless.

The judgment is affirmed.

We concur: MELVIN, J.; LENNON, J.

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180 Cal. 331

STRONG v. SULLIVAN. (L. A. 4903.)

(Supreme Court of California. May 7, 1919.)

1. NUISANCE ⚷80—OBSTRUCTION IN FRONT OF PROPERTY — INJUNCTION—LICENSING BY CITY.

The owner of premises leased to a restaurant keeper was entitled to injunctive relief against defendant, who, at night, under license from the city, maintained a portable lunch wagon directly in front of the owner's premises so as to obstruct and interfere with ingress and egress; such wagon despite the license by the city constituted a public nuisance which might be enjoined.

2. NUISANCE ⚷73 — ENJOINING — LACHES—CONTINUING CHARACTER OF NUISANCE.

Where the proprietor of a portable lunch wagon under license from the city obstructed at night the street in front of leased restaurant premises for more than four years, thus committing a public nuisance, the owner of the premises was not barred from injunctive relief either by the statute of limitations or by laches; the nuisance having been continuing and committed daily, and no right arising from prescription.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Frank R. Strong against J. Sullivan. From judgment for defendant, plaintiff appeals. Reversed.

Fredericks & Hanna, of Los Angeles, for appellant.

Francis P. Harrington, of Los Angeles, for respondent.

MELVIN, J. Plaintiff appeals from a judgment whereby he was denied injunctive relief against defendant, who each night between the hours of 6 p. m. and 2 a. m. (approximately) maintains and transacts a restaurant business upon a public street of the city of Los Angeles, in the vicinity of plaintiff's building.

The findings clearly disclose the facts, while the findings, conclusions of law, and judgment set forth the theory upon which the learned chancellor acted. Plaintiff has owned for many years the property at the southwest corner of Seventh street and Central avenue, two public streets of the city of Los Angeles. Upon this property is a two-story building occupied by tenants, the upper floors being devoted to hotel purposes and the lower to business pursuits of various kinds. One of the tenants on the ground floor, occupying a room facing on Seventh street, conducts a restaurant.

Among the findings are the following:

"That for a period of more than 4 years last past, defendant, J. Sullivan, and his predeces-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sor, have on every evening, at about the hour of 6 o'clock p. m., brought a portable lunch wagon and lunch counter to that portion of Seventh street directly in front of the premises of the plaintiff, and a few feet east of that portion of the building occupied by a restaurant and café; that said defendant has kept and maintained said portable lunch wagon and lunch counter at said point until about the hour of 2 o'clock a. m. the next morning; * * * that it is true that said lunch counter and lunch wagon obstructs the free use of the public street in front of the plaintiff's premises; that it is true that it interferes with the right of ingress and egress of plaintiff and of his tenants to and from his premises; that it is true that said lunch wagon and lunch counter occupies a portion of the public street, and it occupies the same under a license from the city of Los Angeles held by defendant J. Sullivan; that it is true that it does not pay any rent for the space so occupied; that it is true that said lunch wagon and lunch counter does enter into direct competition with a tenant of the plaintiff engaged in the restaurant business, who is compelled to pay rent to the plaintiff."

At the trial the defendant introduced in evidence a certain license of the city of Los Angeles granting him permission to transact "the business of Lunch Wagon" in conformity with the provisions of ordinance No. 20000 (New Series). He also presented a permit issued by the health commissioner of the city to conduct a lunch wagon at No. 1244 East Seventh street. This purports to be under the provisions of "Ordinance No. 25035 (New Series)"; but, as the terms of that bylaw are not set forth in the record, we shall assume that the permit merely indicates that the place described and the manner of conducting the business are not dangerous to public health.

Ordinance No. 20000 (New Series) is a license ordinance of the usual type providing for licensing, regulating, and carrying on certain professions, trades, callings, and occupations. Section 76 of said ordinance fixes the amount of license which must be paid by those engaged in the business of selling certain enumerated articles "or edibles of any description from wagons, hand carts, stands, trays or baskets, upon the public streets."

[1] Obviously, the court refused relief to plaintiff under the belief that a license under the ordinance above cited was a permission from the city to defendant to establish a nightly "stand" or place of business in any public street without regard to the surrounding conditions. This view was erroneous, and we are of the opinion that the ordinance and the license introduced in evidence failed to sustain the finding that the business was conducted at that place under license and the conclusion that plaintiff was therefore not entitled to the relief for which he prayed. The finding that defendant's wagon obstructed the ingress and egress of plaintiff and his tenants to and from his property and interfered with the free use of the public street in front of his building was equivalent to a holding that defendant was maintaining a public nuisance which was especially injurious to plaintiff and which, therefore, might be enjoined at his suit, because any injury to the use of the street which impairs plaintiff's private easements in the street in front of and adjacent to his lot amounts to an injury giving plaintiff, as an abutting owner, the right to maintain an action for damages or for an injunction. The rights of such an owner and his remedies are learnedly discussed by Mr. Justice Shaw in the opinion in Williams v. Los Angeles Ry. Co., 150 Cal. 592, 89 Pac. 330. It is true that in the case cited it was held that the refusal to grant an injunction pendente lite must be upheld, because the court was charged with discretion to determine preliminarily whether or not the detriment to plaintiff came within the rule de minimis. In the case at bar, however, there was no holding of negligible damage, but the court's action was based entirely upon the supposed efficacy of the license from the city. Therefore the Williams Case is authority which sustains plaintiff's theory. Essentially the same doctrine is declared in McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085; 28 Cyc. 902; 20 Ruling Case Law, 460 (Nuisances, § 77).

The power of municipalities to grant privileges for the use of streets is discussed in 28 Cyc. at page 870 et seq. After discussing the general rule, the text contains illustrations, some of which are stated on pages 872, 873, as follows:

> "And a municipality has no power to grant to an abutting owner the right to so construct this building as to encroach on the street, nor to use the streets for stands or booths for business purposes, nor to use a street for the erection of private scales; nor has the municipality the power to grant the right to use a part of a street for hack stands, or to authorize awnings obstructing the public use of the way."

It is clear that upon the principles announced above the plaintiff was entitled to the relief demanded.

[2] Nor does the finding that the street in front of plaintiff's property had been used every night by defendant and his predecessor for more than four years amount either to a finding of laches or of the operation of the statute of limitations against plaintiff. This nuisance was not of a permanent character, but was a continuing one. It involved no permanent structure, but was committed daily by the bringing of defendant's ambulatory café in front of plaintiff's building. No lapse of time can legalize a public nuisance and a prescriptive right cannot be maintained against a public nuisance where the action is brought by a citizen who has suffered special injury in consequence there-

of. Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149. No right by prescription may be acquired to obstruct a sidewalk. Ex parte Taylor, 87 Cal. 91, 25 Pac. 258. Nor to maintain any other sort of nuisance. Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851. In 29 Cyc. p. 1261, the rule with reference to an action for damages for nuisance is thus correctly stated:

> "Where the nuisance is of a permanent character, the period runs from the time when the injury was done or the structure complained of erected; but, where the nuisance is a continuing one, an action for injuries from the continuance may be brought after the lapse of more than the statutory period since the creation of the nuisance."

We are convinced that plaintiff was not prevented, either by the statute of limitations or by laches, under the probative facts found, from maintaining his action.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.

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180 Cal. 326

KELLNER v. TRAVELERS' INS. CO., HARTFORD, CONN. (L. A. 4953.)

(Supreme Court of California. May 7, 1919.)

1. Appeal and Error 🔑1056(1)—Harmless Error—Exclusion of Evidence.

In an action on an accident policy, plaintiff claiming death was caused by fall from tripping over a rug, a ruling of the court denying formal admission of the rug and a place on the files of the court could not have been prejudicial, where the whole theory of the defense was that the fall was a fact, but that other causes existing at the time contributed to the death.

2. Trial 🔑232(4) — Argument — Instructions.

In an action on an accident policy for death, where doctor testified, "They said he stumbled over a rug," court did not err in instructing the jury to pay no attention to plaintiff's counsel's understanding that members of deceased's family had said to the doctor in the presence of the deceased that the latter had stumbled over a rug, where there was no other evidence to show that the statement made to the doctor was in the presence of deceased.

3. Insurance 🔑665(5) — Accident Insurance—Cause of Death—Evidence.

In an action on an accident policy for death, evidence *held* to warrant a finding that death resulted wholly or partly from pathological condition of deceased.

4. Insurance 🔑454—Accident Insurance.

In an action on an accident policy, under which insurer was not responsible for the result of injuries resulting wholly or partly from disease in any form, the court properly refused to instruct that, if the jury believed a fall was the "sole and only direct cause" of death, they must find for plaintiff, notwithstanding a further belief that deceased had a hernia, provided they should further find that deceased "would not have died at the time, under the circumstances, and in the manner he did die had it not been for said accident and fall," as under such a policy it is not true that every accident which shortens an insured's life may be the basis for recovery.

5. Insurance 🔑646(6) — Accident Insurance—Cause of Death—Burden of Proof.

In an action on an accident policy under which insurer was not responsible for the result of injuries resulting wholly or partly from disease in any form, the absence of disease contributing to death was as much a part of the plaintiff's case as an affirmative showing of the occurrence of an accident producing injury and of death following such injury, although insurer alleged in its answer that deceased was at the time of the accident in a diseased condition, and that disease proximately contributed to his death.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Mary W. Kellner against the Travelers' Insurance Company, Hartford, Conn. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Hindman, of Los Angeles, for appellant.

O'Melveny, Stevens & Millikin, and Walter K. Tuller, all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued to recover for the death of her husband under a policy of accident insurance issued by defendant. Trial by jury resulted in a judgment for defendant, and plaintiff appeals therefrom.

The policy contained a provision that defendant would pay $10,000 for death of the assured "resulting from bodily injuries, effected directly and independently of all other causes, through external, violent, and accidental means." There was a further stipulation that, if any loss should be caused by hernia, the company would pay one-half of the amount. There was another provision in the policy as follows:

> "This insurance shall not cover injuries, fatal or nonfatal, resulting wholly or partly from * * * disease in any form."

The complaint contained an averment that on a specified day Mr. Kellner's feet accidentally slipped from under him, causing him to fall violently to the floor of a room in his home, and that the accident and fall, "independent of all other causes," produced the death of Ernest F. Kellner.

Regarding the fall, Mrs. Kellner testified, in part, as follows:

> "I was writing letters that Mr. Kellner dictated to me, and he said he wanted to do a

little writing for himself, and he took the ink bottle and writing materials and went into another room, where the light was better for him, to do some writing for himself, and as he went in there he fell, stumbled on the rug and fell. I was in the room that he left, but when I heard the fall I started; when I got into the other room he was just getting up. I found the things on the floor, and the ink on the floor, and of course I first wanted to see his clothes, and wipe the ink from his clothes, but there was none on his clothes, but it was all over the floor and on the rug."

[1] The rug was offered in evidence and refused a place on the files of the court, but counsel was permitted to exhibit it to the jury and to ask Mrs. Kellner questions about it. As respondent offered no testimony regarding the fall, we cannot say that the ruling of the court denying formal admission of the rug was prejudicially erroneous. The whole theory of the defense was that the fall was a fact, but that other causes existing at that time contributed to Mr. Kellner's death.

[2] Dr. Thomas, while on the stand, testified: "They said he stumbled over a rug." By the word "they" he doubtless meant members of the family of the patient. During the argument counsel for plaintiff sought to tell the jury that members of Mr. Kellner's family had said to Dr. Thomas in the presence of Mr. Kellner that the latter had stumbled over a rug and had fallen. The court, upon objection being made, checked counsel, said there was no such testimony, and instructed the jury to pay no attention to counsel's understanding upon the subject. This is denounced as erroneous, but we find nothing in the evidence to justify the conclusion that the statement made to the doctor was in his patient's presence. The record therefore justifies the court's action.

Medical witnesses testified regarding the cause of death. The history of the case as related by Mr. Kellner's physician was, in brief, that of a man who had suffered an operation for appendicitis, followed by the development of a hernia, for the relief of which another operation was performed, after which a third operation became necessary for the removal of threads which had been used in closing the former wound. Dr. Thomas testified that his patient did not have hernia after the last-mentioned operation. Shortly before his death, however, Mr. Kellner went to the doctor's office, and the latter found "a slight bulge of the wound," but not what he would call a hernia. It was the belief of the physician, however, that there was weakness of the abdominal wall at the site of the incisions, but not a distinct hernia. The day following Mr. Kellner's fall Dr. Thomas was called to see him. The medical man found the patient in bed, very ill, vomiting, and suffering great pain. On examination of the patient's abdomen there was found considerable discoloration and protrusion, and an operation was ordered. A cut was made at the site of the former incision, and it was found that five or six feet of intestines protruded through an opening in the abdominal wall. There was discoloration, the protruding part was surrounded by dark fluid, and there were evidences of the beginning of peritonitis. Mr. Kellner died that night. Concerning the cause of death the doctor said:

> "My opinion is that the fall caused a large quantity of gut to be forced out through the weak spot in the abdominal wall, and become strangulated, and that he died as a result of that strangulation."

[3] Other medical experts gave it as their opinion that under the statement of Dr. Thomas there must have been a hernia sac existing before the time of the accident, and that the fall alone could not have produced the result observed at the time of the last operation without the previous existence of a pathological condition. We cannot say that upon such conflicting evidence the verdict and judgment were not properly based upon that part of the evidence favorable to the defendant.

[4] Appellant attacks certain rulings with reference to giving and refusing instructions. One offered by the plaintiff, if given, would have informed the jurors that, if they believed the fall was the "sole and only direct cause" of Mr. Kellner's death, they must find for the plaintiff, notwithstanding a further belief that in previous years deceased may have had a reducible hernia, provided they should further find that "said Ernest F. Kellner would not have died at the time, under the circumstances, and in the manner he did die had it not been for said accident and fall." The proposed instruction did not properly declare the law. Under the terms of the policy the defendant was not responsible for the result of injuries resulting wholly or partly from disease in any form. The last part of the offered instruction would ignore this part of the contract and make the criterion of recovery the shortening by the accident of the life of a person assured without any reference to the possible concurrence of disease in producing death.

The court correctly instructed the jury that there could be no recovery under the policy for death caused partly by disease and partly by accidental injury. The court also gave to the jury the following instruction:

> "If, however, the plaintiff in this case has established by a preponderance of the evidence not only the fact of the accidental injury, but the sufficiency thereof to cause death, independently of other causes, and the testimony in reference to pre-existing disease failed to establish such disease as indirect or contributory cause of death, then the plaintiff can recover."

This instruction correctly states the law on the subject discussed. Opposition to it is based upon the theory that any accident which shortens an insured man's life may be the basis of recovery. This is not a tenable theory. Maryland Casualty Co. v. Morrow, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. (N. S.) 1213. In the opinion in Clarke v. New Amsterdam Casualty Co., 179 Pac. 195, the Morrow Case is cited as typical of many authorities to the same effect and is approved.

[5] Plaintiff offered, and the court refused to give, an instruction the purport of which was that upon defendant rested the burden of proving that Mr. Kellner's diseased physical condition contributed to or caused his death. It is contended that, since defendant alleged in its answer that deceased was at the time of the accident in a diseased condition, and that disease proximately contributed to death, such allegation must be proven by defendant by a preponderance of evidence. Whatever may be the rule in other jurisdictions, the law is well settled in California adversely to plaintiff's contention. Rock v. Travelers' Insurance Co., 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196; Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175. The absence of disease contributing to death was as much a part of the plaintiff's case under the contract, as the affirmative showing of the occurrence of an accident producing injury and of death following such injury. Travelers' Insurance Co. v. Selden, 78 Fed. 285, 24 C. C. A. 92.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

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180 Cal. 311

HUBER v. SHEDOUDY et al. (L. A. 4908.)

(Supreme Court of California. May 6, 1919.)

1. Mortgages 🔑478—Foreclosure Action—Findings—Market Value of Property.

In mortgage foreclosure action, it was unnecessary to make findings as to market value of property, where allegations with reference thereto were directed toward appointment of a receiver, and where no receiver was appointed either pending the litigation or in foreclosure decree.

2. Mortgages 🔑478—Foreclosure Action—Attorney's Fees—Materiality of Issue.

In mortgage foreclosure action, finding on reasonableness of attorney's fees, was unnecessary, since the question as to what constitutes reasonable attorney's fees was not a material issue; the attorney's fee not being the cause of the action, but being, like costs, a mere incident to it to be fixed by chancellor in his discretion, not exceeding amount stipulated in mortgage.

3. Costs 🔑260(4) — Frivolous Appeals—What Constitutes.

Appeal by mortgagor's grantee from foreclosure decree upon ground that court failed to find upon market value of property, though no receiver was appointed, and upon reasonableness of attorney's fees, delaying foreclosure nearly three years, *held* frivolous.

4. Costs 🔑260(1)—Appeal—Frivolous Appeal.

The object of imposing a penalty for frivolous appeals is two-fold—to discourage the same, as well as to compensate to some extent for the loss which results from the delay.

5. Costs 🔑263 — Frivolous Appeal — Amount of Damages.

In determining amount of damages which should be awarded for a frivolous appeal, court should consider the facts with relation to the appeal and the effect of the delay.

6. Costs 🔑263 — Frivolous Appeal — Amount.

Where mortgagor's grantee takes frivolous appeal from foreclosure decree, though no personal judgment was rendered against him, delaying foreclosure nearly three years, and where mortgage provides for interest at 8 per cent. and judgment at 7 per cent., a penalty for frivolous appeal of 10 per cent. of the judgment, where mortgagee's loss of interest during the three years would have amounted almost thereto, would have been just.

7. Costs 🔑263 — Frivolous Appeal — Amount.

Where mortgagor's grantee takes frivolous appeal from foreclosure decree, delaying foreclosure nearly three years, and where mortgagee draws 8 per cent. and judgment merely 7 per cent. interest, court will award as penalty merely the difference between 7 and 8 per cent. on the judgment, where such is the penalty asked for by mortgagee, in view of nominal penalties imposed in recent years.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by S. V. Huber against Elias A. Shedoudy and wife, John Wollenshlager, and others. Judgment for plaintiff, and last-named defendant appeals. Affirmed, with directions.

William H. Fuller, of Los Angeles, for appellant.

Valentine & Newby, of Los Angeles, for respondent.

WILBUR, J. [1] This is an action for the foreclosure of a mortgage in the usual form. Plaintiff prayed for judgment of foreclosure, for a deficiency against the mortgagors Shedoudy, and for a receiver. No relief was asked against the appellant, save that his interest in the property be declared to be subject to the mortgage. He was a grantee of

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the mortgagor. Judgment was entered directing the sale of the property, the application of the proceeds to the payment of the plaintiff's claim, directing the balance, if any, to be paid to the appellant, and if there was a deficiency instead of a surplus, the deficiency be docketed against defendants Shedoudy. Appellant claims a reversal upon the ground that two material issues were not found upon, one relating to the value of the property, and the other relating to attorney's fees. The allegations of the complaint and of the answer with reference to the market value of the property were directed to the matter of the appointment of a receiver. As no receiver was appointed pending the litigation or in the decree of foreclosure, it was unnecessary to make findings on these issues, which thus became immaterial. With reference to the matter of attorney's fees, the complaint alleges:

> "That it was necessary to employ attorneys to foreclose said mortgage, and he has employed the firm of Valentine & Newby as his said attorneys, and incurred a liability to pay to them a reasonable attorney's fee for the prosecution of this action, and plaintiff avers upon information and belief that the sum of $1,500 is a fair and reasonable fee to be paid for such legal services."

Respondents' denial on that subject was as follows:

> "Said defendants have not sufficient information or belief to enable them to answer the allegations contained in paragraph 11 of plaintiff's complaint, and, basing their denial upon that ground, defendant denies that said plaintiff has incurred a liability to Valentine & Newby in the sum of $1,500, and denies that $1,500 is a reasonable attorney fee to be paid said Valentine & Newby for their legal services in the foreclosure of the mortgage mentioned and described in plaintiff's complaint, and denies that it was necessary to foreclose said mortgage in order for the plaintiff to receive the money alleged to be due upon the note and mortgage described in plaintiff's complaint."

Upon this subject the finding of the court was as follows:

> "That, in order to foreclose said mortgage, it was necessary for plaintiff to employ attorneys, and he did employ the firm of Valentine & Newby as his said attorneys, and the court finds that the sum of $890 is a reasonable amount to be allowed to plaintiff as attorneys' fees in this action."

[2] Appellant contends that this finding is insufficient for the reason that it fails to find upon the proposition that plaintiff had "incurred a liability" to pay a reasonable attorney's fee. The complaint alleges the employment of Valentine & Newby to foreclose the mortgage, that it was necessary to so employ them, and that a reasonable fee for said services was $1,500. The answer admits the employment, and by the form of denial that $1,499.99 is a reasonable fee to be paid them for their services. The court, however, only allowed $890. However, the issue as to attorney's fees is not a material issue. As it was said in Carriere v. Minturn, 5 Cal. 435:

> "The only difference between this case and that of Gronfier v. Minturn [5 Cal. 492], decided at this term, consists of the point made by appellants that there is no allegation in the declaration that 5 per cent. was reasonable counsel fees. Such an averment was unnecessary. The counsel fees stipulated to be paid were not the cause of the action, but, like the costs, a mere incident to it, and may be fixed by the chancellor, at his discretion, not exceeding the amount stipulated."

This case and various subsequent cases on the same subject were cited and the rule was again stated in McNamara v. Oakland Building & Loan Association, 131 Cal. 336, 63 Pac. 670, as follows:

> "The mortgage in terms provides in case of foreclosure the mortgagor shall pay reasonable attorney's fees, 'and the payment of such costs and expenses and attorney's fees by the mortgagor is secured hereby.' The cross-complaint contains an averment setting forth the provisions of the mortgage and alleging that the attorney's fees therein provided for were secured thereby and the prayer asks for reasonable attorney's fees. There is no allegation that the sum claimed is reasonable, nor is there any finding of the fact, and therefore it is claimed defendant is not entitled to attorney's fees. It is found that plaintiff executed the mortgage, which is equivalent to a finding that he agreed to pay a reasonable attorney's fee for the mortgage so provided. The averment that the fee claimed was a reasonable amount is not necessary (Carriere v. Minturn, 5 Cal. 435); the attorney's fee was not the cause of action, but an incident to it (Mulcahy v. Buckley, 100 Cal. 484 [35 Pac. 144], affirming Carriere v. Minturn, supra.) See, also, Brooks v. Forington, 117 Cal. 219 [48 Pac. 1073]. Prescott v. Grady, 91 Cal. 518 [27 Pac. 755], does not overrule or conflict with Carriere v. Minturn, supra. As an averment was unnecessary, so also was a finding. The conclusion of law that defendant was entitled to recover attorney's fees rested upon the provisions of the mortgage, and the court could determine what amount would be reasonable without hearing any testimony thereon. Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 234 [39 Pac. 758]; Clancy v. Plover, 107 Cal. 272 [40 Pac. 394]; Edwards v. Grand, 121 Cal. 254 [53 Pac. 796]."

See, also, Monroe v. Fohl, 72 Cal. 571, 14 Pac. 514; Bank v. Holt, 87 Cal. 158, 25 Pac. 272; White v. Allatt, 87 Cal. 245, 248, 25 Pac. 420; Bank v. Duncan, 133 Cal. 254, 256, 65 Pac. 469; Thrasher v. Moran, 146 Cal. 683, 684, 81 Pac. 32; Patton v. Pepper Hotel Co., 153 Cal. 460, 96 Pac. 296.

[3] We have cited the foregoing authorities to show how utterly frivolous appellant's contentions are in view of the previous decisions of this court. Owing to the crowded condition of the calendar of this court, a de-

lay of nearly three years has resulted from this appeal. Section 957 of the Code of Civil Procedure provides that, "when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just." This language was adopted from Practice Act 1851 (St. 1851, p. 106) § 345, and that, in turn, from the New York Code, § 330. A similar provision was contained in the original Judiciary Act adopted by Congress September 24, 1789 (1 Stat. 73, c. 20), and subsequently continued in effect by the act of Congress March 3, 1803 (2 Stat. 244, c. 40), and by Revised Statutes U. S. § 1010 (U. S. Comp. St. § 1671). The federal statute in question, however, applied to all affirmances, in which it was provided:

> "The court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

The application of this rule is discussed in West Wisconsin Ry. Co. v. Foley, 94 U. S. 100, 24 L. Ed. 71, wherein it appeared that, after several revisions of the rules of the Supreme Court at the December term of 1870, the court adopted the following rule:

> "In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent., in addition to interest, shall be awarded upon the amount of the judgment."

In that case it was held that the court might award damages for a frivolous appeal in an amount less than 10 per cent. in addition to interest. It will thus be seen that the Supreme Court of the United States adopted as the ordinary measure of damages for a frivolous appeal, under a statute authorizing them to give just damages for delay, 10 per cent. upon the amount of the judgment. The practice in this court in imposing damages for a frivolous appeal has not been uniform. In Flynn v. Travers, 1 Cal. Unrep. 27, decided in 1857, 20 per cent. damages were awarded. This penalty was also imposed in Heney v. Alpers, 2 Cal. Unrep. 164; Nickerson v. Cal. Stage Co., 10 Cal. 520; Shain v. Belvin, 79 Cal. 262, 21 Pac. 747, by Department 1 in 1889, and Williams v. Hall, 79 Cal. 606, 21 Pac. 965; in bank. See, also, Cary v. Osio & Randall, referred to in McMillian v. Vischer, 14 Cal. 232, where a penalty of 20 per cent., amounting to $2,698.53, was imposed. In De Witt v. Porter, 13 Cal. 172, the penalty imposed was 15 per cent., and in the second California Report the penalty imposed was usually 10 per cent., although the delay was sometimes only a few months. Buckley v. Stebbins, 2 Cal. 149; Russell v. Williams, 2 Cal. 158; Bates v. Visher, 2 Cal. 355; Pacheco v. Bemal, 2 Cal. 150. The amount of 10 per cent. as damages for a frivolous appeal is fixed in some states by statute; in others by rule of court. Hawkins v. Jones, 21 Or. 502, 28 Pac. 548; Popp v. L. & N. R. R. Co., 101 Ky. 157, 40 S. W. 254; August Gast Bank Note & Lith. Co. v. Fennimore Ass'n, 84 Mo. App. 228; Lanclos v. Robertson, 5 La. 41; Limberger v. Engle (Tex. Civ. App.) 47 S. W. 1025. This same amount was allowed in Sirmans v. Folsom, etc., Co., 18 Ga. App. 586, 89 S. E. 1103. See, also, N. Y. Code Civ. Proc. §§ 3251, 3254. The later practice in this court has been to impose a nominal penalty of from $25 to $100 for a frivolous appeal. Henehan v. Hart, 127 Cal. 656, 60 Pac. 426; Estate of Snowball, 156 Cal. 235, 104 Pac. 446.

[4] The object of imposing a penalty for frivolous appeal is twofold—to discourage the same, as well as to compensate to some extent for the loss which results from delay. West Wis. Ry. Co. v. Foley, supra, 94 U. S. 103, 24 L. Ed. 71. In view of the crowded condition of our calendar and the fact that many novel constitutional and statutory questions have arisen in this state by reason of the great volume of legislative and constitutional amendments since 1911, it is important that appeals that are merely frivolous be discouraged. We may, perhaps, express our views by adopting the language of the Supreme Court of the United States on that subject in Whitney v. Cook, 99 U. S. 607, 25 L. Ed. 446:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

[5-7] In determining the amount of damages which should be awarded in this case for a frivolous appeal, we should consider the facts with relation thereto and the effect of the delay. Respondent claims, and we may assume, that the effect of this appeal has been to delay the foreclosure sale. The judgment was entered June 27, 1916. The appellant is not bound to pay the judgment or any part thereof. As to him the effect of the judgment was merely to subject his interest in the premises to the foreclosure. The mortgage provided for interest at the rate of 8 per cent., compounded quarterly. The judgment draws interest at the rate of 7 per cent. The difference between the amount of interest allowed by law and that by the mortgage for the three-year period of delay secured by this appeal is $2,173.76. The difference between simple interest at 7 and 8 per cent. will be $720. If the sale had occurred within the usual time after the decree, the appellant would have been re-

quired to pay 1 per cent. a month during the redemption period of one year in order to redeem. In view of the fact that the amount of interest lost by the respondent by reason of this appeal would be nearly 10 per cent. of the amount of the judgment, and that respondent has been required to employ an attorney to represent him on this appeal, it obviously would not be unjust to assess damages amounting to 10 per cent. on the principal sum for this frivolous appeal, namely, $2,600. Respondent, however, in his brief and on oral argument has only asked for a penalty equivalent to the difference between 7 and 8 per cent. on the amount of the judgment, and in view of the further fact that in recent years purely nominal penalties have been imposed for frivolous appeals, the penalty fixed in this case will be $720. It is hoped, however, that before other frivolous appeals now pending, if any, are brought to the attention of the court, some disposition thereof will be made by the parties which will obviate the necessity of placing such cases upon the calendar, thus depriving meritorious appeals of their opportunity to be heard, and obviating the necessity of imposing penalties therein.

The judgment is affirmed, with directions to enter a judgment in favor of respondent and against appellant for the sum of $720, with costs of appeal.

We concur: LENNON, J.; MELVIN, J.

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180 Cal. 318

ARCADE REALTY CO. v. BANK OF COMMERCE. (S. F. 8070.)

(Supreme Court of California. May 7, 1919.)

1. Principal and Agent 🔑109(4) — Authority to Indorse Negotiable Paper.

Authority to collect money does not imply authority to indorse negotiable paper received in payment.

2. Principal and Agent 🔑109(4) — Authority to Indorse Negotiable Paper—Presumption.

The authority of an agent to indorse negotiable paper is a very responsible power, and not lightly to be presumed or implied.

3. Principal and Agent 🔑109(4) — Authority to Indorse Negotiable Paper.

Where a principal gave agent making collections authority to deposit all rents collected by him in his personal account for the purpose of remitting the same by his personal check, the authority carried with it power to indorse for deposit checks made payable to principal, where such were collected.

4. Principal and Agent 🔑123(9) — Authority of Agent to Indorse Checks—Sufficiency of Evidence.

Evidence *held* sufficient to sustain a finding that an agent making collections was authorized to make indorsements upon checks collected by him.

Melvin, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Action by the Arcade Realty Company against the Bank of Commerce. Judgment for defendant, and the plaintiff appeals. Affirmed.

Ostrander, Clark & Carey, of Oakland, for appellant.

Gibson & Woolner, of Oakland, and Henshaw, Black & Goldberg, of San Francisco, for respondent.

WILBUR, J. [1, 2] This action was brought by the Arcade Realty Company against the defendant bank to recover $2,650 paid by defendant upon checks drawn in favor of the Arcade Realty Company by C. W. Phillips upon the defendant bank. Phillips assigned his claims thereon against the bank to the plaintiff. The question involved in the case is the authority of one A. W. Clement to indorse such checks on behalf of the plaintiff. Judgment was rendered in favor of the defendant, upholding the authority of Clement to make such indorsements, and plaintiff appeals. Clement was the appellant's agent for the collection of the rents from its tenants in appellant's business block in Oakland. Appellant relies upon the well-settled rule that authority to collect does not imply authority to indorse negotiable paper received in payment, and upon the further well-established rule that the authority of an agent to indorse negotiable paper is a very responsible power, not lightly to be presumed or implied. There is no doubt as to the correctness of these rules. See Daniel on Negotiable Instruments (6th Ed.) §§ 292, 293, 294, 296; Hamilton N. Bank v. Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Lonier v. Ann Arbor Sav. Bank, 162 Mich. 541, 127 N. W. 685; National Fence Machine Co. v. Highleyman, 71 Kan. 347, 80 Pac. 568; Jackson v. Nat. Bank of McMinnville, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, 36 Am. St. Rep. 81; Tiedeman on Commercial Paper, § 77; Jackson Paper Mfg. Co. v. Com. Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113. As these rules are conceded to be correct, and as there is no evidence of an express authorization to Clement to indorse these checks, it will be necessary to state the facts more in detail for the purpose of disclosing the scope of

Clement's agency. It will appear therefrom that the agent was given and exercised far more power than a mere collector. Clement, as the agent of appellant, for some years had collected the rents from the tenants of appellant's building, had deposited the moneys or checks received, in his own bank account, to his personal credit, and had remitted such rentals to appellant in San Francisco, by a check drawn against such personal account. The rents of the Hotel Arcade, however, were paid by Phillips direct to appellant by his personal check until February, 1912. Phillips' rental was $1,000 monthly under a ten-year lease. Phillips, however, failed to pay promptly under this arrangement, and in order to facilitate collection the appellant directed Clement to collect such rentals. Beginning February 26, 1912, Clement collected a check in favor of the Arcade Realty Company, and mailed the same to appellant. Thereafter Clement collected the 64 checks in issue at intervals until May 29, 1913. Each check was indorsed by him as follows: "Arcade Realty Company by A. W. Clement, Agent, A. W. Clement"—and deposited in his personal account either in the Union Savings Bank of Oakland, or the Oakland Bank of Savings, Oakland. The checks were paid by the respondent, the drawee bank, in due course through the clearing house. Clement remitted these rents and others collected by him for rent by his personal check as formerly, together with his accounts of rentals collected. In June, 1913, appellant discovered that Clement had remitted $2,650, the amount involved here, less than he had collected up to that date. Nevertheless the appellant did nothing more about the matter than to instruct Clement thereafter to remit the Phillips checks direct to it, a direction which Clement carried out. On Clement's death about seven months later, the appellant discovered that Clement, during the period when he was depositing the Phillips rent to his account, had been making the indorsements in question, for such purpose. In addition to Clement's authority to collect rents, the correspondence shows that he was authorized to act as the general agent of the appellant for leasing, care, and repair of the building. It should be observed that we are not dealing with a general authority to indorse negotiable paper, but rather with the power necessary to deposit checks on local banks in another local bank for collection through the clearing house, for the purpose of transmitting the proceeds to the principal in a nearby city. The appellant, on receiving from month to month the personal check of its agent in satisfaction of rentals collected, must have been aware of the fact that Clement was depositing all rents in his own personal account, and thus by implication must have approved such deposit. The conclusion cannot be escaped in this case that the authority of the agent included the power to deposit money or paper collected to his own account. That is exactly what was done with the checks here in question. They were deposited to his own account, and the indorsements were made solely for the purpose of accomplishing such deposit. It may well be that indorsements for any purpose would have been unauthorized. But when the principal permitted its agent to deposit the collections to his personal account, to be transmitted by his personal check, it is a fair, if not in fact a necessary, inference that he had the authority to make such indorsements as were necessary to do this. Rents in large amounts are not habitually paid in money, but by check. The principal could hardly have assumed that such paper was all drawn to the order of the agent. The tenants would not naturally so draw their checks, but to the order of the landlord. The appellant receiving all its rentals by the agent's personal check cannot claim that it did not know that its tenants were paying by checks to its order. It should have presumed that they were doing so in some instances at least, and, this being so, the appellant should have known that the agent was indorsing such checks for deposit. Furthermore, it was immaterial to appellant, as long as it permitted its agent to deposit the rents in his own account, whether the rents were paid by check to the appellant's order, as was the case with the checks in question, or by check to the agent's order, where no question of indorsement could have arisen. In fact checks to the order of the agent would have given him a far greater measure of control over the fund than checks to the order of the appellant, and yet the appellant either permitted the latter, or else assumed that the paper was drawn to its own order, and that the agent was indorsing it for deposit. The point is that the principal either tacitly or expressly authorized the agent to deposit his collections to his own account, and the conversion by Clement, discovered in June, 1913, was not accomplished by the indorsements in question by which the funds were deposited in the agent's personal account, but by the agent's failure to remit from his account moneys of his principal which he had so deposited by authority. The authority to indorse for deposit in a local bank may reasonably be inferred in such a case, where it would be wholly unreasonable to infer authority to indorse for sale or discount a foreign bill of exchange. There is a most substantial difference between the various kinds of paper and the various purposes of indorsement.

[3] The test for ascertaining the question of the agent's authority to indorse negotiable paper is stated in Jackson Paper Mfg. Co. v. Com. Bank, supra, to be this: Can the agent perform the duties of his agency without the exercise of such authority? "In other words," says the court, "the power of an

agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent." Conceding the correctness of this rule, we here have evidence justifying the conclusion that the agent had authority to deposit all rents collected by him in his personal account, for the purpose of remitting the same to his principal by his personal check. This authority carried with it the power essential to that course of business, namely, the indorsement for deposit of checks made payable to the principal where such were collected. Civ. Code, § 2319, subd. 1. The case of Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 N. W. 236, 50 L. R. A. (N. S.) 74, cited by appellant, is somewhat similar in its facts, but differs in the essential particular that in that case the agent was expressly directed by the principal not to indorse or deposit checks payable to them, but to remit them direct to the principal.

[4] The evidence amply justified the finding of the trial court that the agent was authorized to make the indorsements made by him for the deposit of the checks to his account, including the checks in question.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

MELVIN, J. I dissent. While there might be some force in a contention that after the discovery of the conversion of some of the rents by Clement, the plaintiff by retaining him as agent would be estopped to object to the method by which he obtained the money, I cannot bring myself to approve of the doctrine announced by the majority of the court that when a principal employs an agent to collect and transmit rentals he thereby clothes such agent with authority to indorse checks. Some of the statements in the prevailing opinion are so extraordinary that with all due respect to the learned author I must unwillingly review them and dissent from them. For example, this language is used:

> "The appellant on receiving from month to month the personal check of its agent in satisfaction of rentals collected, must have been aware of the fact that Clement was depositing all rents in his own personal account, and thus by implication must have approved such deposit. The conclusion cannot be escaped in this case that the authority of the agent included the power to deposit money or paper collected to his own account."

Of course the principal supposed that Clement was depositing rents to his own credit, as he was transmitting the money by personal check. That had been the usual course of business; but how did such a supposition bind the principal to the further and extraordinary implication that the collector was clothed with the high authority to indorse his principal's name? There were three ordinary methods by which the tenant might pay the agent. These were: (1) By actual cash; (2) by check payable to the agent's order; and (3) by check payable to the landlord's order. If by either of the first two methods Clement had collected the money, undoubtedly he might have deposited the cash or the check to his own account, and any subsequent conversion of the funds would have caused loss to his principal. If by the third method the tenant had paid, under the terms of Clement's agency as a collector, he could honestly do but one thing. He could transmit the check itself to the payee. When he indorsed the first check he was guilty of a conversion, not of money, but of his principal's check. If he had left the country the next day can any one question the fact that the Arcade Realty Company could have compelled the tenant to pay the rent? Or could any one doubt that the bank which without any inquiry or investigation had recognized Clement's authority to indorse for the payee could be compelled to reimburse its depositor Phillips? How then did a persistence in wrongdoing sanctify Clement's acts into those of an agent clothed with the power to do those very acts? It is true that much of the money thus obtained was paid to the Arcade Realty Company, but such acts of restitution did not excuse the bank for its astounding lack of ordinary prudence. If the officers of the bank had made the slightest inquiry the plaintiff would have been warned, of course, that its collector was assuming the right to indorse checks made payable to its order.

Continuing the argument, the opinion contains the following language:

> "But when the principal permitted its agent to deposit the collections to his personal account, to be transmitted by his personal check, it is a fair, if not in fact a necessary, inference that he had the authority to make such indorsements as were necessary to do this."

I fail to follow this reasoning. Because the principal permitted his agent to collect money and to transmit it, by no means does it follow that the agency went to the extent of allowing him to accept and to convert something else.

"Rents in large amounts are not habitually paid in money, but by check," says the learned author of the opinion. Undoubtedly that is true, but the next two sentences in my opinion declare an absolute non sequitur. They are as follows:

> "The principal could hardly have assumed that such paper was all drawn to the order of the agent. The tenants would not naturally so draw their checks, but to the order of the landlord."

Why could not the principal assume that the checks, if any, were all drawn to the order of the agent? The agent had authority to collect. Why should the principal think that the tenants would not take the convenient method of paying him directly in money or checks? In my opinion the power to indorse was no more involved in the power to collect than would have been an authorization to use a club in compelling Phillips to pay if Clement had employed that method of persuasion. Why would the tenants naturally draw their checks to the order of the landlord? There is no law of statutory origin or of commercial usage which justifies such reasoning. I venture to assert that a large proportion of the rentals of business and residence property in large cities is paid directly to real estate agents, and not to owners of the realty.

Continuing, the learned author of the opinion uses the following language:

> "The appellant receiving all its rentals by the agent's personal check cannot claim that it did not know that its tenants were paying by checks to its order. It should have presumed that they were doing so in some instances at least; and, this being so, the appellant should have known that the agent was indorsing such checks for deposit."

Why should a principal be bound to assume that a trusted agent was going outside of his agency? I cannot, although I have tried, see the force of such reasoning. Again I assert that there is no such rule of law or commercial usage. Does the average tenant of an apartment house know the name of his landlord? I venture to say he does not. And even if he does, he deals entirely with the agent. True, Phillips knew who his landlord was, but he also knew that the Arcade Realty Company had empowered Clement to collect, and the landlord, having given him that notice, was thoroughly justified, it seems to me, in assuming that the payments were being made to the agent either in money or in checks which the latter might honestly indorse.

If Phillips, either because he did not trust Clement or for any other reason, chose to pay directly by check drawn in the landlord's favor, he was entitled to the protection afforded by the fact that his banker was bound to pay only the payee or an authorized agent, and it is to be remembered that plaintiff herein has succeeded to Phillips' rights. If the bank had done its duty Clement could never have been in a position to convert the checks and thereby injure either Phillips or the realty company. Concededly, if Clement had been getting the moneys in an authorized way he could have converted them more easily. But this does not prove that he was authorized to indorse the corporation's name. We are dealing with a matter of implied agency and I solemnly believe the rule announced in the prevailing opinion is illogical and will be productive of much harm. It will gladden the hearts of careless bankers and make them think that they are no longer held to a high degree of care in protecting their depositors from spoliation.

In the prevailing opinion the majority of the justices approve the test for ascertaining an agent's authority to indorse negotiable paper as set forth in Jackson Paper Manufacturing Co. v. Commercial National Bank, 199 Ill. 151-156, 65 N. E. 136, 138 (59 L. R. A. 657, 93 Am. St. Rep. 113), in which Mr. Chief Justice Magruder used the following language:

> "The weight of authority seems to be in favor of the contention of appellant that authority to indorse commercial paper can only be implied where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent."

Applying this test to the case at bar, it seems to me that power of indorsement was not a necessary implication from the agency. All Clement needed to do, under the terms of his agency, was to mail each check of this sort, or carry it, or send it by messenger, to his principal.

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40 Cal. App. 598

POZZI v. ALPINE EVAPORATED CREAM CO. (Civ. 2775.)

(District Court of Appeal, First District, Division 2, California. April 8, 1919. Rehearing Denied by Supreme Court June 5, 1919.)

APPEAL AND ERROR ⚷1002—ASSIGNMENTS—UNWARRANTED APPEAL.

Where the evidence was clearly conflicting, but ample to justify jury's verdict, appellate court cannot interfere.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Angelo Pozzi against the Alpine Evaporated Cream Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

Zabala & Sargent, of Salinas, for appellant.
C. F. Lacey, of Salinas, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment in favor of plaintiff for $3,577.60, alleged to be due as the purchase price of milk delivered by plaintiff and his assignors to the defendant company. There was no dispute about either the delivery or the value of the milk. As a defense, defendant contended that plaintiff and his assignors had entered into oral agreements to deliver to defendant all milk produced at their dairies for a period of one year in consideration of the payment of the highest market price therefor by the defendant to them; that the plaintiff and his assignors delivered milk for a period approximately three months only and then refused to deliver longer. Defendant alleged that, by reason of the failure of plaintiff and his assignors to deliver according to their alleged contracts, defendant has been damaged in the sum of $3,000, and defendant filed a counterclaim asking for that amount. Appellant admits that the only question in the case is: Did the plaintiff and his assignors agree to ship the milk produced on their several dairies to defendant for a period of one year? It then contends that the verdict is contrary to the evidence. From an examination of the evidence it appears that it was clearly conflicting, and that there was ample evidence to justify the verdict of the jury. Under such circumstances, and in the absence of a single assignment of error occurring at the trial, it would seem that the rule of law is sufficiently clear and well established to make an appeal to this court an unnecessary and unwarranted proceeding.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

(40 Cal. App. 600)

McGINN v. VAN NESS et al. (Civ. 2662.)[*]

(District Court of Appeal, First District, Division 1, California. April 8, 1919.)

1. Appeal and Error 🔑179(1)—Issues in Lower Court—Sufficiency of Answer.

In action to foreclose lien for street work, contention that it was not shown that board of public works had properly apportioned street assessments as directed by ordinance cannot be sustained, where complaint alleged such fact and no issue was raised thereon; defendant's answer not containing a sufficient denial of the averment.

2. Municipal Corporations 🔑465—Street Assessments—Defective Apportionment—Validity.

That a street assessment was defective for lack of proper apportionment as directed by the ordinance would not render the assessment void upon its face, being at most an irregularity, which could have been corrected upon appeal to the proper board in the manner provided by the ordinance.

3. Municipal Corporations 🔑562(1) — Street Assessments—Errors Not Judicial —Necessity of First Appealing to Board.

It is only such errors in a street assessment as are jurisdictional, and which appear upon the face of the assessment, that may be taken advantage of upon trial of an action to enforce a street improvement lien, without an appeal having been first taken to the board.

4. Municipal Corporations 🔑485(3) — Street Assessments—Recording—Collective Indorsement.

In action to enforce a lien for street work, defendant's contention that the record shows that the warrant, assessment, and diagram were not properly recorded as required by the terms of the ordinance is not warranted, where the record shows they were indorsed as having been duly recorded on the day of their filing for record, the fair intendment from this showing being that indorsement was made upon the originals, where it should appear, and the fact that such indorsement was collective as to all three documents is too technical to deserve consideration.

5. Municipal Corporations 🔑485(3) — Street Improvements — Formalities—Validity of Warrant.

In an action by a warrant holder to enforce a lien for street improvements, the insufficient authentication of the return of assessment and warrant, and failure of the secretary of the board to attach his signature to the record, does not render the lien invalid, or prejudice the holder of the warrant, in view of the ordinance provision that no assessment or proceedings prior to assessment shall be held invalid for informality or defect, where the resolution of intention was actually published, which ordinance provision was warranted by San Francisco City Charter, art. 6, c. 2, § 33.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George W. McGinn against T. C. Van Ness, Jr., and others. Judgment for plaintiff, and defendants, except D. L. Bienfield, appeal. Affirmed.

Wm. H. Chapman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellants.

Fabius T. Finch, of San Francisco, for respondent.

RICHARDS, J. This is an action to foreclose a lien for street work under a public contract affecting the property of the defendants. The assessment was made under the procedure provided by Ordinance No. 2439, New Series, of the city and county of San Francisco, approved September 4, 1913, under and by virtue of the power given to the supervisors of that municipality by section 33, chapter 2, of article 6 of its charter. The trial court decreed a foreclosure of said lien, and from such decree the defendants have prosecuted this appeal.

The first point insisted upon by the appellants is that of the insufficiency of the complaint as tested by a general demurrer, but in view of the fact that the appellants concede

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[*] Rehearing denied in Supreme Court 183 Pac. 950.

in their opening brief that the complaint herein as amended is substantially in the same form as the complaint in the case of Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225, and that the Supreme Court in that case disposed of practically every point herein urged as to the insufficiency of the complaint adversely to the appellants, it is not necessary to further consider this phase of the case.

[1] The next contention of the appellants requiring consideration is the claim that the board of public works is not shown to have properly apportioned the assessment as directed by the ordinance. The complaint in that behalf alleges that the board of public works "duly and regularly made an assessment to cover the sum due for the work performed and specified in conformity with the provisions of the charter of San Francisco and in accordance with the provisions of Ordinance No. 2439." We do not find any sufficient denial of this averment to raise an issue involving the point urged in the appellants' contention, and we regard the averment of the defendants' answer relied upon by them as ineffectual to present such issue. Beckett v. Morse, 4 Cal. App. 232, 87 Pac. 408.

[2, 3] But even if it were to be assumed that the assessment was defective in the respect claimed, it was not such a defect as, in our opinion, would render the assessment void upon its face, but was at most only an irregularity which could and doubtless would have been corrected upon an appeal to the proper board under section 21 of the ordinance in question. It is only such errors as are jurisdictional and which appear upon the face of the assessment that may be taken advantage of upon the trial without an appeal having been first made to the board. Chase v. Trout, 146 Cal. 357, 80 Pac. 81; Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; McLaughlin v. Knobloch, 161 Cal. 676, 120 Pac. 27; Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.

[4] The next contention of the appellants is that the record shows that the warrant, assessment, and diagram were not properly recorded as required by the terms of the ordinance. In thus stating the condition of the record, we think counsel for the appellants are in error. The record shows that the warrant, assessment and diagram were indorsed as having been duly recorded on the same day on which they were filed for record. The fair intendment from this showing is that this indorsement was made upon the originals where it should appear. The fact that such indorsement was collective as to all three of these documents, and not made upon each separately, is too technical to deserve consideration.

[5] The case of Bienfield v. Van Ness, supra, seems to dispose of the objections of the appellants as to the sufficient authentication of the return of the assessment and warrant, also to hold that the failure of the secretary of the board to attach his signature to the record does not render the lien invalid nor prejudice the holder of the warrant. In that case, also, practically all of the other objections which the appellants herein make to the sufficiency of this assessment and the lien sought to be foreclosed in this action are held to have been rendered unavailing by the following provision of the ordinance, namely:

> "No assessment, warrant, diagram or affidavit of demand and nonpayment after issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality or other defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improvement posted as in this ordinance provided." Bienfield v. Van Ness, supra; Chase v. Trout, supra.

This disposes of every material point urged by the appellants upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

40 Cal. App. 524

RAUER'S LAW & COLLECTION CO., Inc., v. SHERIDAN PROCTOR CO. et al.

(Civ. 2200.)

(District Court of Appeal, First District, Division 1, California. April 2, 1919.)

1. JUDGMENT 🔑882—TENDER OF AMOUNT—DEPOSIT IN COURT.

Depositing amount of judgment with clerk of court, and notifying judgment creditor that the same was there subject to his demand, did not constitute a legal tender.

2. TENDER 🔑12(2)—SUFFICIENCY OF TENDER.

Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount.

3. JUDGMENT 🔑622(1)—RES JUDICATA—MATTERS OF COUNTERCLAIM.

A matter pleaded by way of counterclaim in a former action cannot be held to have been adjudicated, where it appears from the record that the counterclaim did not exist at the time, but that it matured some months later, and it is apparent that it was not pressed, for the reason that it was not an existing demand, under Code Civ. Proc. § 438, subd. 2.

4. JUDGMENT 🔑951(1)—RES JUDICATA—BURDEN OF PROOF.

In order to debar a defendant's right to recover on the ground that the matter was adjudicated in a former case, it was necessary for plaintiff to show that the matter had been theretofore adjudicated.

Appeal from Superior Court of City and County of San Francisco; E. P. Shortall, Judge.

Action by the Rauer's Law & Collection Company, Incorporated, against the Sheridan Proctor Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

William Tomsky, of San Francisco, for appellant.

W. H. Barrows and Martin Uldall, both of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment rendered in its favor for the sum of $49.32. The action was brought to recover $312.50 as the agreed price of certain personal property sold and delivered by the plaintiff's assignor, the Eastern Outfitting Company, to the defendant, Sheridan Proctor Company. In its answer, said defendant admitted the indebtedness pleaded in the complaint, but set up as a counterclaim a judgment in its favor against the plaintiff's assignor of $15, and a demand for $247, the price of storage of certain furniture.

[1, 2] The appeal presents but two questions. As to the first of these it appears that prior to the commencement of this action the plaintiff, in an attempt to satisfy a former judgment of $15 in favor of the defendant, deposited that sum with the clerk of the court, notifying the defendant that the same was there subject to its demand. Such a deposit and notice alone certainly did not constitute a legal tender, and, even if it had, it would have been unavailing, for the reason that a small sum for interest upon the judgment had accrued, which was not included in the amount deposited. Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount. 38 Cyc. 137.

[3, 4] Respecting the other point, plaintiff asserts that the claim for storage constituting defendant's second cause of counterclaim had been adjudicated in a former action. It is true that this matter was pleaded by the defendant by way of a counterclaim in a former action between it and the plaintiff's assignor; but it also appears from the record that such counterclaim did not exist at the time that action was commenced, but that it matured some months later. It is apparent that it was not pressed in the first action for the simple reason that it was not an existing demand at the time the action was commenced (Code Civ.Proc. § 438, subd. 2; Wood v. Brush, 72 Cal. 224, 13 Pac. 627; McGuire v. Edsall, 14 Mont. 359, 36 Pac. 453), and therefore was not adjudicated in that case. Moreover, no evidence was introduced by the plaintiff in the present action that the subject of the defendant's counterclaim was res adjudicata; the only reference to it occurring in the cross-examination of a witness. In order to debar defendant's right to recover in this action on its counterclaim, it was necessary for the plaintiff to show that the matter had been theretofore adjudicated, which, as we have said, was not done.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

40 Cal. App. 491

THOMAS v. NEWMARK GRAIN CO. et al. (Civ. 2330.)

(District Court of Appeal, Second District, Division 1, California. March 28, 1919.)

CORPORATIONS ⚿513(4) — COMPLAINT ON DRAFT — SUFFICIENCY — AUTHORITY OF AGENT.

Complaint against a grain company and the agent in charge of its business in a county on a draft of the company executed by the agent stated no cause of action, where it embodied no allegation showing that the agent's authority as the person in charge of the company's business included authority to execute such a writing, despite allegations the agent was in charge of the business in the county and as such agent executed the draft.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by L. J. Thomas against the Newmark Grain Company and F. A. Wolz. From judgment for plaintiff, defendant Grain Company appeals. Reversed.

A. M. Norton, of Los Angeles, and Childers & Bruce, of El Centro, for appellant.

Galen Nichols and E. R. Simon, both of El Centro, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff, presented on the judgment roll alone.

We think that the appellant is right in its claim that the complaint in the case failed to state facts sufficient to constitute a cause of action. It was first alleged that the appellant is a corporation organized under the laws of California and having and maintaining a place of business in the city of El Centro, county of Imperial. These allegations followed:

> "That defendant F. A. Wolz is, and was during all the times mentioned in this complaint, the duly authorized and accredited and acting agent of the defendant Newmark Grain Company. That said F. A. Wolz is, and was at all times mentioned in this complaint, in charge of the business of the defendant Newmark Grain Company, in the county of Imperial, and is, and was, in charge of the place of business of

the said defendant in the city of El Centro, county of Imperial, state of California. That on the 9th day of June, 1915, for a valuable consideration, the said F. A. Wolz, as such agent at El Centro, said county and state, made and executed a certain draft in words and figures as follows: 'El Centro 6/9/15 A No. 197 Newmark Grain Co., Incorporated, 447 So. Los Angeles St., Los Angeles, Cal. Pay to the order of L. J. Thomas $600.00 six hundred & no/100 dollars. 18627 18627 F. A. Wolz'—and thereupon delivered said draft to the plaintiff herein."

The fourth paragraph of the complaint alleged that the "draft" was presented for payment to appellant, and payment refused, and that no part thereof had been paid. The written instrument set out in the complaint appears to have been executed by Wolz alone. Therefore it was both necessary, in order to charge appellant, that it be made to appear that the instrument was executed on its behalf, and that Wolz possessed authority to execute the same. While it is stated that Wolz was "in charge of the business of defendant Newmark Grain Company in the county of Imperial," and that "as such agent at El Centro" he made and executed the draft, there is no allegation showing that his authority as the person in charge of the defendant's business, whatever it might have been, included authority to execute a writing such as that sued upon. We think that such allegation was essential to show liability against this appellant. The instrument appears to be in form a bill of exchange, but in effect answering to a promissory note, as defined in section 3245, Civil Code.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

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40 Cal. App. 469

FARRISEE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 2944.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1919.)

1. Justices of the Peace ⟹162(1)—Appeal to Superior Court—Statutes.

Appellant from justice court, in giving notice of appeal and filing undertaking, having fully complied with Code Civ. Proc. §§ 974, 978, the justice was divested of all jurisdiction, other than, as required by section 977, and subject to the payment of his fees, to transmit the record to the clerk of the superior court for further proceedings; the jurisdiction of the superior court attaching on perfecting of the appeal by filing of the undertaking, and being open to divestment only by order of dismissal, or some other order of the superior court itself.

2. Justices of the Peace ⟹139—Appeal to Superior Court—Second Appeal.

Where a first appeal from justice court to the superior court was perfected, it effected a transfer of the case to the superior court, and there was nothing in the justice court which could be made the subject of a second appeal, and the proceeding, since there was nothing on which it could operate, was a nullity.

3. Justices of the Peace ⟹159(6)—Appeal to Superior Court — Failure of Sureties to Justify—Statute.

Though Code Civ. Proc. § 978a, provides that, where exception to the sufficiency of the sureties on an undertaking on appeal from a justice court is interposed, they must justify within five days, otherwise the appeal must be regarded as if no undertaking had been given, the matter does not ipso facto affect the appeal, perfecting of which has vested jurisdiction of the case in the superior court, but merely gives respondent the right to move for its dismissal on the ground it has become ineffectual.

Petition for certiorari by Anna Farrisee against the Superior Court of the State of California in and for the County of Los Angeles, and Grant Jackson and Fred H. Taft, Judges thereof. Order of superior court annulled.

Louis N. Whealton, of Long Beach, for petitioner.

Charles M. Ackerman, of Los Angeles, for respondents.

SHAW, J. Certiorari. The question presented is the power of the superior court to proceed with the trial of an action pending therein on appeal from a judgment rendered by a justice's court, after denying a motion to dismiss the same made upon the ground that the superior court is without jurisdiction to try the case, for the reason that the sureties upon the undertaking failed to qualify within five days after exceptions interposed to their sufficiency, and that a second notice of appeal and undertaking thereon, filed before the expiration of the time within which the sureties might have qualified and while the first appeal was operative, was a nullity.

[1-3] An appeal from a justice's court is taken by filing a notice thereof with the justice and serving a copy thereof upon the adverse party (section 974, Code Civ. Proc.), but it "is not effectual for any purpose, unless an undertaking be filed" (section 978, Code Civ. Proc.). This implies that it is effectual if the undertaking required be filed. Appellant, in giving the notice and filing the undertaking, having fully complied with the provisions of the Code, the justice was divested of all jurisdiction in the matter, other than, as required by section 977, Code of Civil Procedure, and subject to the payment of his fees, to transmit the record to the clerk of the

superior court for further proceedings. "The jurisdiction of the superior court attached upon the perfecting of the appeal by the filing of the undertaking, and having once attached could be divested only by an order of dismissal or some other act of that court." Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296. The first appeal having been perfected, it ipso facto effected a transfer of the case to the superior court; hence there was nothing in the justice's court which could be made the subject of the second appeal (Brown v. Plummer, 70 Cal. 337, 11 Pac. 631; Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006), and the proceeding, since there was nothing upon which it could operate was, therefore, a nullity. While section 978a, Code of Civil Procedure, provides that, where an exception to the sufficiency of the sureties is interposed, they must justify within five days thereafter, otherwise the appeal must be regarded as if no such undertaking had been given, this does not, ipso facto, affect the appeal, the perfecting of which has vested jurisdiction of the case in the superior court; but, as said in Moffat v. Greenwalt, supra, the provision is to be construed "as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal upon the ground that since it was taken it has become ineffectual." The purported appeal in the second proceeding, therefore, being a nullity, and the sureties upon the undertaking on the first appeal having, in response to exception to their sufficiency, failed to justify, it follows that, upon the conceded showing of such fact made, the court had no jurisdiction other than to make an order granting petitioner's motion.

The order denying petitioner's motion to dismiss the appeal in that certain action wherein Lewis E. Tucker is plaintiff and petitioner is defendant, now pending in the superior court of Los Angeles county, is annulled; and it is further ordered that respondent refrain and desist from any action or proceeding therein other than to make an order dismissing the appeal from the judgment rendered by the justice's court.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 462

COLYEAR v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2964.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1919.)

1. Execution 🔑414—Supplementary Proceedings—Adverse Interest in Property—Warehouseman's Lien.

In supplementary proceedings under Code Civ. Proc. § 717, court's order, under section 719, requiring warehouseman, who was not a party to the action, to deliver judgment debtor's stored goods to judgment creditor notwithstanding warehouseman's claim of lien thereon for storage charges, was unwarranted, in view of section 720, warehouseman being entitled to have his right in the property determined in an ordinary action.

2. Prohibition 🔑3(5) — Grounds—Threat to Adjudge Petitioner Guilty of Contempt.

Where court made unwarranted order in supplementary proceedings directing warehouseman claiming lien on goods to deliver them to judgment creditor, and threatens to adjudge warehouseman in contempt and commit him to jail as punishment for refusal to comply therewith, an appeal from the order will not afford speedy and adequate remedy, and prohibition to prohibit court from adjudging him in contempt will lie.

Petition for writ of prohibition by Curtis C. Colyear doing business under the firm name and style of the Colyear Van & Storage Company against the Superior Court of the State of California in and for County of Los Angeles and another. Respondent ordered to desist and refrain from enforcing certain order.

Joseph A. Adair, W. S. Baird, and Henry O. Wackerbarth, all of Los Angeles, for petitioner.

Mabel Walker Willebrandt, of Los Angeles, for respondents.

SHAW, J. Prohibition. As appears from the verified petition, to which respondent has interposed a general demurrer and an answer, A. H. Mitchell, then in the possession of certain household furniture and furnishings, did, on September 4, 1918, deliver the same to petitioner who, as a warehouseman, received the same on storage for hire and issued a nonnegotiable warehouse receipt therefor. Thereafter the sheriff of Los Angeles county, under and by virtue of an execution issued upon a judgment rendered by the superior court of Los Angeles county in an action to which petitioner was not a party, brought therein by Harry Perkins against A. H. Mitchell for the possession of the goods, made demand upon petitioner for the delivery of the same to him, with which demand petitioner refused to comply, unless he produced an order therefor from Mitchell and paid the storage charges. Thereupon an order was issued in said action by respondent, copy of which was duly served upon petitioner, requiring him to appear in said court to answer concerning said property. Upon the appearance of petitioner in response to said order, a hearing was had wherein an order was made as follows:

"Harry Perkins v. A. H. Mitchell. In the matter of the order for appearance of A. H.

Mitchell, judgment debtor, and the order for Colyear Van & Storage Company to appear and answer concerning property, which comes on now to be heard, F. Horowitz and Mabel W. Willebrandt appearing as attorneys for the plaintiff and H. O. Wackerbarth appearing for the defendant, it appearing that Colyear Van & Storage Company has the property described in the complaint, and is holding the same as the agent of defendant, it is ordered that said Colyear Van & Storage Company deliver said property to the plaintiff within 10 days."

Petitioner, claiming an interest in the property, refuses to comply with the order, by reason whereof respondent threatens to and will, unless prohibited by this court, adjudge petitioner guilty of contempt and commit him to jail as punishment therefor.

[1, 2] Petitioner was not a party to the action of Perkins v. Mitchell, and the order made, requiring him to deliver to plaintiff therein the goods in which he claimed an interest was wholly unwarranted. Counsel for respondent insists, however, that petitioner, though not a party to the action, if aggrieved by the order made, has a right to appeal therefrom, and since an appeal will afford him a plain, speedy, and adequate remedy in the ordinary course of law, prohibition will not lie. Conceding, but not holding, this to be true, a sufficient answer thereto is that petitioner is not seeking a review of the order, but seeks to have the court prohibited from making an order based thereon, which the court threatens to and will make, adjudging him guilty of contempt and committing him to jail for refusing to comply therewith, from which, if made, no appeal lies.

The order made was in a proceeding supplementary to execution, as provided by chapter 2 (of title 9 of part 2), Code of Civil Procedure. Section 717 provides that after a return of an execution against property of the judgment debtor and upon proof that any person has property of such judgment debtor, the judge may by order require such person to appear and answer concerning the same. It was under this provision of law that petitioner was required to appear and answer concerning the property. Section 719 provides that the judge upon such hearing may order any property belonging to the judgment debtor, which is in the hands of any other person, to be applied toward the satisfaction of the judgment, but with this express proviso:

"But no such order can be made as to * * * property in the hands of any other person, * * * if such person claims an interest in the property adverse to the judgment debtor."

It is perfectly clear that petitioner claimed an interest in the property adverse to Mitchell by virtue of his lien thereon as a warehouseman for the storage of the property consigned to him by one who, in so far as this record shows, was at the time of the consignment in the lawful possession thereof. The law does not authorize the trial of the rights of a third party claiming property adverse to a judgment debtor in this summary manner. He is entitled to his day in court, with an opportunity for the determination of his rights in an ordinary action, as specified in section 720, Code of Civil Procedure, which provides that, if it appears that a person having property of the judgment debtor in any case claims an interest therein adverse to such judgment debtor, the judgment creditor may maintain an action against such person for the recovery thereof; and the court may by order forbid a disposition or transfer of the property until an action can be commenced and prosecuted to judgment.

The court acted in excess of its jurisdiction in making the order requiring petitioner to deliver possession of the property to plaintiff in said action. McDowell v. Bell, 86 Cal. 615, 25 Pac. 128; High v. Bank of Commerce, 103 Cal. 525, 37 Pac. 508; Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413. Hence it follows that the violation of such order constitutes no warrant for adjudging petitioner guilty of contempt and imposing punishment therefor.

It is therefore ordered that respondent desist and refrain from any proceeding having for its purpose the enforcing of that certain order made by the superior court of Los Angeles county on March 6, 1919, in the case of Harry Perkins v. A. H. Mitchell.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 561

SCRIBANTE v. EDWARDS et al.

(Civ. 2721.)

(District Court of Appeal. First District, Division 2, California. April 4, 1919. Rehearing Denied by Supreme Court June 2, 1919.)

MECHANICS' LIENS 🔑72—EXTRA WORK ORDERED BY ARCHITECT—LIABILITY OF OWNER.

In a suit to foreclose mechanic's lien, contract to lay a concrete floor over the entire surface of a basement not less than 5 inches thick, the work to be performed under direction of the architect, *held* to bind the owner to pay for extra thickness of foundation ordered by architect in view of Civ. Code, §§ 2317, 2319, 2331, 2332, 2334, 3519, and 3521.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Q. Scribante against William Edwards and others. From the judgment rendered, defendants appeal. Affirmed.

Edgar C. Chapman, of San Francisco, for appellants.

Albert Picard, of San Francisco, for respondent.

BRITTAIN, J. The defendant owner appeals from a judgment on a mechanic's lien. As stated in the opening brief, the single point presented is upon the interpretation of the contract. No authorities are cited in the briefs. The contract was evidenced by two writings, both prepared by the architect employed by the owner, one in form an offer to do the work, and the other a formal acceptance of the offer. The work was to lay a concrete floor in the basement of an old building, under which there was a pressure of water, causing it to precolate through the old floor and to flood the basement. When the writings were prepared, the basement was flooded to a depth of about 18 inches and the old floor was covered with mud. It was impracticable, if not impossible, to ascertain the condition of the old floor, and the architect and contractor, at least, assumed it was substantially level. The offer was to pump out and to clean the basement and to do certain other work in addition to the main work of laying the concrete floor. Upon the assumption of substantial uniformity of the surface of the old floor, the contractor computed the amount of concrete which would be required to lay a floor with a foundation 5 inches thick with a surface of an additional thickness of one inch. The architect was not at that time sure whether a floor of the thickness bid upon would be sufficiently strong to stop out the percolating water, a unit price for extra thickness was fixed by a computation of the area of the basement multiplied by one inch to ascertain the number of cubic yards of concrete which would be required for each additional inch of thickness.

The clauses of the contract which are in question are the following:

> "Lay a concrete floor over the entire surface of the basement not less than five inches thick with good and proper fall to the sump at N. E. corner of the basement; * * * lay a top or finish floor one inch thick. * * * This work is to be performed under the direction of Fred Burrage Wood, architect, for the sum of one thousand and twenty-five ($1,025.00) dollars. * * * Should you desire to increase the thickness of the base or foundation floor I will furnish the materials same as in proposed floor as above and perform the labor for the sum of one hundred and twenty-five ($125.00) per inch thickness over and above the proposed five inches."

When the basement was pumped out, upon the advice of the architect, the owner, through the architect, orally instructed the contractor to increase the thickness of the foundation one inch. It was then apparent that the old floor was undulating, and that a floor of uniform thickness would not permit drainage to the sump. The contractor informed the architect that, even with the proposed additional inch of concrete, if the floor were laid so as to permit drainage, it would leave only about 3 inches of thickness over the high places in the old floor. The architect thereupon directed the foundation to be made 6 inches thick over the high places, and himself marked at more than 60 places on the walls and pillars the elevations to which the floor was to be laid. When the work was completed it was found the additional concrete over the original amount determined by computation was equivalent to 4½ inches over the entire floor, that is, the admittedly ordered inch plus 3½ inches additional which it is admitted went into the basement in filling the low spots in the original floor and in bringing the floor to the grade directed by the architect, acting for the owner.

On behalf of the appellant it is contended that under the contract as modified by the order of the additional inch of concrete the contractor was bound to lay a floor not less than 7 inches thick at the thinnest place, i. e., over the high places, on the old floor, and to lay that floor so that it would carry off the water and, further, that when the contractor discovered the condition of the floor after it had been pumped out, if the two requirements could not be fulfilled, the contractor should have refused to proceed with the work.

The contract bound the contractor to do the work under the architect's direction. The appellant by his argument admits the architect was the agent of the owner in ordering the contractor to lay the additional inch of foundation. To interpret the contract as contended for by the appellant would be to charge the contractor with the duty of determining at his peril which of the directions of the architect he was to fulfill and which he should disregard. Where the principal authorizes the agent to order work done, without notification to the contractor limiting the extent of the agent's power, the principal is bound, even though the agent exceeding his authority orders more work than the principal directed, in the absence of bad faith on the part of the contractor. Civ. Code, §§ 2317, 2319, 2331, 2334. When the attention of the architect was called to the physical impossibility of meeting the two conditions relied upon by the appellant, the architect directed the contractor to lay 7 inches of concrete on the high places and to work to grades which the architect then established. The work ordered by the architect was done satisfactorily. The work and the labor performed and the materials furnished were used in the alteration and repair of the appellant's building. Having received the benefit of the work, the owner should pay for it. Civ. Code, § 3521. The knowledge of the architect that the work was being done under his direction was notice to the owner. Civ. Code, § 2332. When the contractor told the architect what his order would require, the work might have been forbidden. Civ. Code, § 3519. There is no question presented as to the correctness of the amount for which judgment was rendered, if the interpretation of the contract by the lower court was correct. In holding the owner bound to pay for the extra work, the lower court interpreted the contract as binding the owner by the architect's order. This interpretation was correct.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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40 Cal. App. 505

ALCHIAN v. MacDONALD et al.
(Civ. 2643.)

(District Court of Appeal, First District, Division 1, California. March 31, 1919.)

1. BANKS AND BANKING ⚷139—STOPPING PAYMENT OF CHECK—EFFECT.

Ordinarily, stopping payment of check does not discharge the liability of the maker to the holder.

2. SALES ⚷128—RESCISSION BY BUYER.

Where the buyer of automobile, who gave postdated check so that he could stop payment if he did not secure clear title, redelivered the automobile to the seller and stopped payment of the check, the buyer completely rescinded the sale as effectually as if the check had been returned to him for cancellation.

3. REPLEVIN ⚷8(1)—INTEREST OR RIGHT OF POSSESSION.

Plaintiff, who at the time of commencement of his action in claim and delivery for automobile had no interest in or right of possession of the car, was not in a position to commence or maintain the action.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by A. H. Alchian against R. W. MacDonald and another. From judgment for plaintiff, the named defendant appeals. Reversed.

George G. Graham, of Fresno, for appellant.

Harry Sarkisian, of Fresno, for respondent.

WASTE, P. J. This is an action in claim and delivery for one automobile. The plaintiff had judgment, and defendant MacDonald, alone, appeals.

Defendant MacDonald was purchasing an automobile, under contract of sale, from the E. L. Peacock Auto Company of Oakland. He desired to dispose of the car without the fact becoming known to a number of parties to whom he was indebted. He proposed to defendant Haig, and the latter joined him in executing, a plan whereby this might be done; they to divide the profit over and above a specified amount. Thereupon both defendants, representing themselves as owners of the automobile, offered to sell the same to plaintiff, in consideration of the payment of the sum of $700. Upon their agreeing to perfect title in themselves plaintiff delivered, to defendant Haig, a postdated check, payable to Haig, for the amount of the purchase price, and took possession of the automobile. Both defendants signed and delivered to plaintiff a bill of sale of the car. Plaintiff's purpose in postdating his check was, he testified, "in order to find out if it (the automobile) was clean and clear, that is, so I could get clear title to it. If the title did not vest in me I intended to stop payment of the check."

On the day following the delivery of the automobile to plaintiff, defendant Haig, at the request of defendant MacDonald, and as agreed between the two, paid to the real owner of the car the balance of the purchase price, and received a bill of sale thereto, together with a transfer to himself of the policy of insurance covering the car. He delivered both of these documents to plaintiff.

A disagreement arose between defendants Haig and MacDonald over the matter. MacDonald communicated this fact to plaintiff and asked for a rescission of the sale and return of the car, offering to restore the check to plaintiff. Plaintiff prepared and MacDonald signed a document which read as follows:

> "Fresno, California, January 31, 1918.
>
> "I, the undersigned, call the sale of one Apperson roadster car, factory No. 15094 canceled to A. H. Alchian and I will send the check of $700 to him made on Samuel H. Haig, which I also consider void, and I have also taken possession of the same car.
>
> "[Signed] R. W. MacDonald."

Relying on this signed agreement, which he retained, plaintiff returned the automobile to MacDonald and promised to cancel the check, when it was restored to him. The check was not returned. The plaintiff stopped payment and subsequently brought this action.

MacDonald had in the meantime mortgaged the automobile to a third party in whose possession it was, and from whom the sheriff took it under the claim and delivery proceedings. The mortgagee made a third party claim to protect against which a bond was given. The mortgagee was not made a party to the action.

The main question to be determined on this appeal is: Was plaintiff entitled to possession of the automobile at the time of the commencement of the action? He had tentatively closed the deal by delivery of a postdated check "subject to cancellation," as he so testified, "if I did not get the car." Five days after giving the check, and eleven days before it became payable, he voluntarily prepared, and took from MacDonald, the document canceling the sale to himself, and acknowledging delivery of possession to MacDonald. With his full consent, MacDonald took entire possession of the car.

[1, 2] Ordinarily, stopping payment of a check does not discharge the liability of the maker to the holder. 7 Corpus Juris, par. 429, and cases cited. But in the present case, Haig, the holder of the check, was merely acting for, and as the agent of, MacDonald. He had entered into a scheme of misrepresentation and concealment for the purpose of assisting the latter in more readily disposing of his interest in the automobile, and became the convenient medium for the roundabout transfer of the title of the car from defendant MacDonald to the plaintiff. The plaintiff was not concerned with any agreement between the two defendants, looking to a division of the proceeds of the sale. When he redelivered the automobile to one of them, and stopped payment of the check as to both, he withdrew the entire consideration for, and worked a complete rescission of, the sale, as effectually as if the check had been returned by the defendants for cancellation.

[3] The plaintiff did not, at the time of the commencement of the action, have any interest in, or right of possession of, the automobile. He was therefore not in a position to commence or maintain it. Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684; Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750.

In view of the conclusion we have reached, we do not deem it necessary to pass upon the other points made on this appeal.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

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40 Cal. App. 487

CITY OF LOS ANGELES v. CLINE et al.
(Civ. 2768.)

(District Court of Appeal, Second District, Division 1, California. March 28, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

STATUTES ⚿85(5)—SPECIAL LAWS—CONDEMNATION PROCEEDINGS—ATTORNEY'S FEES.

St. 1911, p. 895, § 1, amending Street Opening Act 1903, § 14, so as to deprive defendants, in condemnation proceedings under such act, of attorney's fees given them, under section 6 and Code Civ. Proc. § 1255a, upon abandonment or dismissal of action, is violative of Const. art. 1, § 11, being a special law, in view of Street Opening Act 1903, § 36, and Street Opening Act March 6, 1889.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the City of Los Angeles against George T. Cline, Bettie C. Rorick, William Rorick, and others. Action dismissed on plaintiff's motion, and from judgment of dismissal awarding the two last named defendants their costs and attorney's fees, plaintiff appeals. Affirmed.

Albert Lee Stephens, City Atty., Wm. P. Mealey, and C. D. Pillsbury, Deputy City Atty., all of Los Angeles, for appellant.

Daniel M. Hunsaker, Hunsaker & Britt, Le Roy M. Edwards, and Samuel Poorman, Jr., all of Los Angeles, for respondents.

CONREY, P. J. In this action the plaintiff proceeded under the "Street Opening Act of 1903," and sought to condemn and take for street purposes certain land of the respondents. After trial and a verdict assessing the value of the land to be taken, an interlocutory judgment was entered whereby the property of the respondents was condemned to the use of the plaintiff upon the payment of the amount specified in the judgment. The compensation provided for by said judgment was not paid. Instead thereof, the city attorney, after being duly authorized thereto by the city council, moved the court for dismissal of the action, and a judgment of dismissal was entered. Thereafter, upon motion of the respondents, the court set aside the judgment of dismissal and entered a new judgment of dismissal, awarding to respondents their costs, including the sum of $850 for attorney fees. From this judgment the plaintiff appeals, and this court is called upon to determine whether or not the lower court was authorized to allow attorney fees to the respondents.

Title 7 of part 3 of the Code of Civil Procedure prescribes the general rules for the exercise of the right of eminent domain in this state. In said title 7 is contained section 1255a, which was added to that Code by act approved March 17, 1911 (St. 1911, p. 377). It provides for the right of abandonment of a condemnation proceeding and that "upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." Appellant does not challenge the constitutionality of section 1255a. That has been done in other cases, wherein the validity of the section was upheld. City of Sacramento v. Swanston, 29 Cal. App. 212, 155 Pac. 101; Silver Lake, etc., Co. v. City of Los Angeles, 32 Cal. App. 123, 162 Pac. 432. It was held that the proceeding to condemn property for a public use "is so differentiated from the ordinary actions or proceedings in a court of justice * * * as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purposes of reasonable provisions not applicable to other classes of actions."

Section 6 of the Street Opening Act of 1903 (St. 1903, p. 378) provides that the action for condemnation of land in proceedings under that act "shall, in all respects, be subject to and governed by such rules of the Code of Civil Procedure now existing, or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act." Section 14 of that act declares the time and terms upon which proceedings thereunder may be abandoned. By act approved April 12, 1911 (St. 1911, p. 895, § 1), the Legislature made the following addition to said section 14:

> "If the proceedings be abandoned or the action dismissed no attorney's fees shall be awarded the defendants or either or any of them."

Appellant contends that, by reason of this amendment, respondents are deprived of the right to attorney fees in this action, which right they otherwise could claim under section 1255a, Code of Civil Procedure. To this contention the respondents reply that said amendment of section 14 is void because it is in conflict with certain prohibitions contained in the Constitution of the state.

> "All laws of a general nature shall have a uniform operation." Const. art. 1, § 11.
>
> "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * *
>
> "Third. Regulating the practice of courts of justice. * * *
>
> "Thirty-third. In all other cases where a general law can be made applicable." Const. art. 4, § 25.

These provisions of the Constitution have been illustrated and applied in numerous decisions, to only a few of which we need briefly refer. In City of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 607, after some discussion of earlier cases the court said:

> "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

In Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 325, 88 Pac. 356, 366 (8 L. R. A. [N. S.] 682, 119 Am. St. Rep. 199), the Supreme Court again was called upon to define the differences between general laws and those which are special, and to emphasize the fact that under appropriate circumstances special rules may be made which, although applicable only to particular classes of cases, yet retain the characteristics of general laws. The court said:

> "After all, the question of classification is primarily for the Legislature. The court is not to set aside a statute merely because in its view it may have been unwise or unnecessary to apply certain rules to one class of cases. Before the act can be declared invalid on this ground, it must appear to the court that there was no reasonable basis on which the peculiar legislative provision could have been made."

The Street Opening Act of 1903 is not the only statute under which the plaintiff might have elected to open the street and condemn therefor the land of respondents. Section 36 of that act provides that said act shall in no wise affect the Street Opening Act approved March 6, 1889 (St. 1889, p. 70), or any other acts on the same subject, but is intended to provide an alternative system of proceedings for the purposes stated. As the act of 1889 is silent on the subject of allowances for attorney fees, it follows without any doubt that proceedings under that act are governed by the provisions contained in section 1255a, Code of Civil Procedure, under which, upon abandonment and dismissal of the action, attorney fees must be allowed. There is no difference between the act of 1889 and the act of 1903 upon which to base a discrimination which would deprive the defendants of the right to an allowance for attorney fees in one proceeding, although that right clearly exists in the other proceeding. Moreover, there is much force in the argument of respondents that the rule stated in section 1255a, Code of Civil Procedure, allowing attorney fees generally upon abandonment and dismissal of condemnation proceedings, should exclusively control all such cases, because equally in all such cases the defendant property owner is brought into court against his will and without any claim that he has violated any obligation due from him to the plaintiff. In this respect the situation of the defendant is precisely the same in an action to condemn land for street purposes as in an action to take his land for the use of a railroad or for any other public use.

Our conclusion is that the provision here under consideration of section 14 of the Street Opening Act of 1903, is contrary to the limitations prescribed by the Constitution, and therefore may not be enforced.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

40 Cal. App. 614

PEOPLE v. BONFANTI. (Cr. 838.)

(District Court of Appeal, First District, Division 1, California. April 9, 1919. Rehearing Denied May 9, 1919; Denied by Supreme Court June 5, 1919.)

1. Criminal Law 🔑1186(4)—Harmless Error—Allegations of Information.

In view of Const. art. 6, § 4½, a conviction of assault with intent to commit rape under Pen. Code, § 220, will not be reversed by reason of the information failing to state that the victim of the assault was not the wife of defendant; it clearly appearing on the trial that she was not his wife, but was the wife of another.

2. Criminal Law 🔑829(1)—Instructions.

It was not error to refuse requested instructions, where those given covered the law sought to be brought to the attention of the jury.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Mario Bonfanti was convicted of assault with intent to commit rape, and appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the offense of assault with intent to commit rape, and appeals from the judgment. He urges three grounds in support of his appeal, the first of which is that the information fails to state an offense within the jurisdiction of the superior court—the court in which he was tried and convicted. The defect of the information referred to is that there is no statement therein that the victim of the assault was not the wife of its perpetrator; that accordingly, for aught that appears in the information, she may have been his wife, and consequently the alleged acts of violence constitute in law a simple assault, an offense not within the jurisdiction of the superior court.

The offense that the information purported to charge is that defined by section 220 of the Penal Code, which provides that "every person who assaults another with intent to commit rape * * * is punishable by imprisonment in the state prison. * * *" Section 261 of the same Code defines rape as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator," under variant conditions set forth in said section, among which is the accomplishment of the act by means of force and without the consent of the participant. It is thereupon argued that an information charging an assault with intent to commit rape must contain the same statement with reference to the woman as in a charge of rape itself, namely, that she was not the wife of the perpetrator.

The cases of People v. Miles, 9 Cal. App. 312, 101 Pac. 525, and People v. Everett, 10 Cal. App. 12, 101 Pac. 528, are cited in support of the appellant's contention. The first of these cases was upon an information charging the same offense as in the case at bar, and the second of them was upon an information charging rape, in both of which it was held that the omission to state therein that the female concerned was not the wife of the defendant rendered the information so defective as to necessitate a reversal of the judgment.

In this connection, however, it is urged by the Attorney General that the two cases cited, having been decided prior to the adoption of an amendment to the Constitution known as section 4½ of article 6 thereof, should no longer be regarded as controlling; a new rule having been prescribed by that amendment for the guidance of appellate courts in the decision of appeals.

The new rule of decision laid down by the Constitution is couched in the following terms:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of the misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The defect in the information here pointed out is an error of pleading, and, following the mandatory direction of the Constitution, the judgment should not be reversed or a new trial granted unless that error of pleading has, in the opinion of this court, formed after an examination of the entire cause, including the evidence, resulted in a miscarriage of justice. It becomes, then, pertinent to inquire how the omission to state in the information that the woman upon whom the defendant is charged with having committed the assault was not his wife affected his trial, and to determine whether the omission pointed out affected it to such an extent as to have brought about a miscarriage of justice. An examination of the record immediately discloses that the omission in question affected the trial not at all; in fact, the trial proceeded as if the allegation were there. Its absence was not noticed by the defendant. He did not even demur to the indictment; if he had done which his cause of complaint would have been at once removed, but without his thereby gaining any apparent advantage. For the fact is that the woman was not his wife. Some of the instructions to the jury proposed by his own counsel stated the fact baldly that he was in fact charged with an assault to commit rape. It appeared at the trial that the victim of his assault was not in fact his wife, but was the wife of another man—his neighbor—and the mother of three children. It could not be contended, even by the defendant, that if the information had contained the statement that the victim of the assault was not his wife, the trial would have proceeded with one iota's difference from the course it took, or that the verdict of the jury or the judgment of the court would have been other than it was.

[1] Under these circumstances, it appears to us that there could hardly be a case to which to apply more appropriately the rule of decision laid down by the Constitution.

This rule since its adoption has been applied many times, and, we think, in cases where the error relied upon was of a less trivial character, regarded from the point of view of its consequences, than the one here. Thus in People v. Tomsky, 20 Cal. App. 672, 130 Pac. 184, the trial was had without the defendant having entered a plea of guilty or not guilty. This must be conceded to be a very substantial departure from proper and regular procedure, but it was held not to be sufficient to require a reversal of the case where the record did not show that a miscarriage of justice had resulted. In People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042, and People v. Lawlor, 21 Cal. App. 69, 131 Pac. 63, the errors upon which a reversal was sought were of improper admission of evidence or misdirection of the jury, but it was held that the constitutional rule of decision required the affirmance of the judgment; it not appearing to the appellate court after its examination of the entire cause, including the evidence, that such errors had resulted in a miscarriage of justice.

[2] Two other grounds for reversal are urged, namely, that the court refused to instruct the jury in certain specific terms as requested by the defendant, and that the evidence fails to show that the assault established thereby had for its object the raping of its victim. An examination of the instructions actually given to the jury discloses that they covered the law sought to be brought to its attention in those that were refused, although in different terms, and the examination of the evidence that we have made satisfies us that the jury was warranted in finding this question of intent against the defendant.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

40 Cal. App. 585

HAUN v. TALLY et al. (Civ. 2626.)

(District Court of Appeal, Second District, Division 1, California. April 5, 1919. On Rehearing in Supreme Court in Bank, June 5, 1919.)

1. THEATERS AND SHOWS 🔑6—RULE OF RES IPSA LOQUITUR—APPLICABILITY.

Accident due to electric fan becoming detached from the connecting motor, resulting in the fan falling and striking plaintiff patron of defendant's theater on the head, was such as to make applicable the rule of res ipsa loquitur.

2. APPEAL AND ERROR 🔑880(2) — PARTY WHO MAY CLAIM ERROR.

In action against owner of theater and employé who installed electric fan, which became loose from its motor and fell, striking plaintiff on the head, that court advised jury that presumption of negligence from happening of accident did not apply to employé *held* a matter about which owner is not in a position to complain on appeal.

3. DAMAGES 🔑216(1)—INJURY TO PATRON—INSTRUCTIONS.

In action against owner of theater and employé who installed electric fan, which became loose from its motor and fell, striking plaintiff on the head, *held* court did not err in instructing that the expenses incurred by plaintiff for services of physician and value of time lost were the subjects of direct proof, and are to be determined only on the evidence which the jury has before it.

4. TRIAL 🔑260(8) — INSTRUCTION SUFFICIENTLY COVERED BY CHARGE—REFUSAL.

There was no error of a substantial nature in refusing to give a particular instruction which narrated the several acts contained in the charging part of the complaint as constituting negligence and advising the jury that plaintiff was required to make proof thereof, where the general charge of the court as given advised the jury that the burden was upon plaintiff to sustain the allegations made.

On Rehearing in Supreme Court in Bank.

5. NEGLIGENCE 🔑138(2) — INSTRUCTIONS — PRIMA FACIE NEGLIGENCE—COUNTERVAILING EVIDENCE.

In an action for injuries from fall of fan, instruction that the prima facie case of negligence made by falling of fan "would justify a verdict in favor of plaintiff, unless the evidence in the case negatives that prima facie presumption, and establishes to your satisfaction that it was not the negligence of the defendants," was erroneous, in not requiring plaintiff's evidence to preponderate in weight over countervailing evidence.

6. APPEAL AND ERROR 🔑1064(1)—REVIEW—HARMLESS ERROR.

In action for injuries from fall of fan, instruction as to prima facie case of negligence made by falling of fan, without requiring plain-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tiff's evidence to preponderate over countervailing evidence, was harmless, in view of the evidence and the charge as a whole.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Harold W. Haun against Thomas L. Tally and another. From an adverse judgment and from an order denying his motion for new trial, defendant named appeals. Affirmed.

Delphin M. Delmas, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

JAMES, J. This appeal is taken by defendant Tally from an adverse judgment and from an order made denying his motion for a new trial.

The action was one for damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants. Tally was the owner of a theater, Darnell was his employé. On a certain day in the year 1914, Darnell, having received instructions from his employer so to do, procured and installed in one of the ventilating apertures of the theater an electrically propelled fan. On the 9th day of April of the same year plaintiff, after paying the required price of admission, was occupying a seat in the theater for the purpose of enjoying the entertainment. While he was so occupied the metal fan hereinbefore referred to became detached from the connecting motor and fell, striking the head of the plaintiff and inflicting quite a serious injury, compensation for which was assessed by the jury in this action at the sum of $3,500. The points upon which appellant Tally relies are few, and are succinctly stated in the opening brief of his counsel. They relate wholly to the matter of giving and refusal to give certain instructions to the jury. It will be necessary to preface a consideration of the contentions urged against the judgment with a statement as to some portions of the allegations of the complaint and the whole charge as given by the court to the jury. That portion of the complaint wherein the particular negligence of the appellant was referred to is as follows:

> "On information and belief plaintiff alleges that the defendants, as a part of the furnishings and fixtures of the said theater, constructed, operated, installed, and maintained, for the convenience and comfort of the patrons of the said defendant Tally, a two ventilating fan, alternating currents, of six blades. That said defendants did not exercise due care in the construction, operation, installation, and maintenance of the said fan, but constructed, operated, installed, and maintained the same in a careless and negligent manner, and in particular that the said fan was so constructed and installed, operated and maintained that the same became loosened and did fall upon the patrons of said defendant Tally, and in particular on this plaintiff; that the said fan was so maintained, installed, and operated that the pressure of the running and operating the same caused the said fan to pull away from the motor and its bearings, thereby causing the said fan to fall from its said bearings on said 9th day of April, 1914, striking and injuring the plaintiff."

The court instructed the jury generally that the burden of proving negligence in the case was upon the party alleging that negligence, and that unless the jury could find that the plaintiff had established negligence by a preponderance of the evidence the verdict should be for the defendants. It instructed the jury as to the particular negligence alleged and relied upon by the plaintiff, in the terms of that paragraph of the complaint from which we have already quoted. This instruction followed:

> "With relation to the operation, installation, and maintenance of the fan, the court instructs you it was the duty of the defendants to exercise ordinary care in the erection and installation of this appliance in the theater, and that that ordinary care is to be measured with relation, so far as this case is concerned, to the effect upon the patrons of the theater. If, therefore, you find that the fan in question fell on April 9, 1914, and injured the plaintiff while he was a patron in the theater it will be for you to determine whether or not such fall was the result of its negligent installation, operation, or maintenance. If you find that the fall was due to such maintenance, operation, or installation having been made in a negligent manner, your verdict in this case will be in favor of the plaintiff for such amount as you find from the evidence and under the instructions of the court he has suffered in the way of damages by reason of such negligence of the defendants, if you find they are negligent. The court further instructs you, gentlemen, in regard to the matter of negligence, that when a thing which causes an injury is shown to be under the management of the defendants, and the acccident is such as in the ordinary course of things does not happen if those who have the management, with proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. To apply that doctrine to the case in question, if you find that the falling of the fan in question was such a thing as does not ordinarily happen if those who have the management thereof use proper care in the management and operation thereof, it affords prima facie evidence of negligence, and would justify a verdict in favor of the plaintiff unless the evidence in the case negatives that prima facie presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants."

As to the matter of damages an instruction was given which contained the following statement:

> "The expenses incurred by him for the services of physicians and surgeons and the value of any time lost are subjects of direct proof, and are to be determined only on the evidence which the jury has before it, and must not exceed the amounts specifically claimed therefor in the complaint. The other elements of damage are from necessity left to the sound discre-

tion of the jury, but in no event must the amount of damages exceed the amount alleged, $25,000."

[1] There was no dispute as to the fact that the fan fell and injured the plaintiff in the manner described, or that it fell by reason of pulling or dropping away from its motor bearings. The fan was exclusively within the charge and control of the defendant Tally, and the occurrence of the accident was such a one as to make applicable instructions as to a presumption of negligence arising under the familiar rule of res ipsa loquitur. Counsel says that because the complaint alleged that "the pressure of the running and operating the same caused the said fan to pull away from the motor and its bearings, thereby causing the said fan to fall," the plaintiff exhibited the fact that he had knowledge of what the alleged acts of negligence consisted, and that such matters then demanded express proof, leaving no room for any presumption to be used in aid of the case of plaintiff. We do not concede that where specific acts of negligence are described, the plaintiff in making his proof will be deprived of the aid of the presumption of negligence in a proper case (respondent cites a case to the contrary, Cassady v. Old Colony Street Ry. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285); but that is not the situation here. Plaintiff alleges on information and belief that the fan was so negligently and carelessly constructed, installed, and operated as to become loose and fall, adding the further descriptive statement as to the pressure of running the fan having caused it to pull away from the motor bearings. Plaintiff did not attempt to particularize what the defects in the fan were which would permit the same when operated to become separated from the motor part of the appliance. The fan was intended to be operated, and, if properly constructed and maintained, would not have pulled away from its attachments while running. It is claimed, further, however, that by the instruction given on the question of the application of the rule of presumption of negligence the court went too far, and in effect placed the burden upon the appellant to establish nonnegligence as against the presumption by a preponderance of the evidence. It will be noted that the court in concluding that instruction stated to the jury that the prima facie case made out with the aid of the presumption "would justify a verdict in favor of the plaintiff unless the evidence in the case negatives that prima facie presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants." The argument of appellant impresses us with much force, and if we could consider the question an open one we would be inclined to agree that the instruction was improper. In giving this particular instruction the court seems to have left out of view the requirement that the evidence of the plaintiff must preponderate in weight, and that the defendant will be entitled to judgment where the countervailing evidence merely balances, but does not overcome, the case made by the plaintiff. Then, too, it might well be argued that proof to the "satisfaction" of the jury would require even more than a preponderance, and reach almost to proof beyond a reasonable doubt. We can see little difference between that instruction—referring now only to the use of the words "establishes to your satisfaction"—and one considered by the Supreme Court in Campbell v. Bradbury (Sup.) 176 Pac. 685. The language there considered is said by the court to amount to a "reasonable doubt" instruction. However that may be, the Supreme Court in a number of cases has given consideration to instructions similar to that about which complaint is here made, and has held that there was no error committed against a defendant by the giving thereof (Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171), and as to the general application of the rule (Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 143 Pac. 718; Wyatt v. Pacific Electric Ry. Co., 156 Cal. 170, 103 Pac. 892; Worden v. Central Fireproof Building Co., 172 Cal. 94, 155 Pac. 839). On the other side of the question, and in a case where the court did instruct the jury that the defendant was only required to introduce sufficient evidence "to balance such a presumption without overcoming it by preponderance of the evidence," the Supreme Court declined, and no doubt properly so, to reverse the case upon the appeal of the plaintiff. The Osgood Case, supra, however, directly meets the question which the instruction here considered proposes, by asserting that—

> "This presumption [the presumption of negligence], which the law raises from proof of certain facts, is 'satisfactory if uncontradicted' (Code Civ. Proc. § 1963); and to meet it the evidence of defendant must show to the satisfaction of the jury that defendant was 'without any negligence on its part.'"

We will there leave this question and hold that there was no error in the instruction, so holding only because we think that the decisions of the Supreme Court have foreclosed us against the exercise of any original judgment in the matter.

[2] Further complaint is made because the court advised the jury that the presumption of negligence hereinbefore referred to applied only to the appellant and not to Darnell, his employé. The evidence showed that Darnell was instructed to procure the fan and to install it, and that he followed instructions in that regard, although he was not an expert in such matters. The defendant's liability, assuming that negligence was shown in the installation or operation of the fan, cannot be questioned. That Darnell may have been improperly exculpated we think is a matter about which the appellant is not in a position here to complain.

[3] It is contended that the court erred in instructing the jury that the expenses incurred by the plaintiff for services of physicians and the value of time lost were "subjects of direct proof, and are to be determined only on the evidence which the jury has before it," in that there was left out of view the right of the jury to form its own opinion as to those elements of damage. No evidence was introduced by the defendant to contradict in any way the proof made by the plaintiff as to these matters. Strictly speaking, considering that the evidence referred to by the court would include the evidence as to the quantity of time lost by the plaintiff and the amount of services rendered by physicians and surgeons, the instruction was correct. The jury would have no right to go outside of the evidence to determine any of those things. The court's intention no doubt was to place before the jury the fact that these matters were matters of particular damage, to support which particular proof was needed, whereas, as to other general elements of damage, the sound discretion of the jury would control. The instruction is so phrased, and its language is quite clear.

[4] We do not think that there was any error of a substantial nature in the court's refusing to give a particular instruction offered by appellant which narrated the several things contained in the charging part of the complaint as constituting negligence and advised the jury that plaintiff was required to make proof thereof. The general charge of the court as given advised the jury that the burden was upon the plaintiff to sustain the allegations made.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

On Rehearing in Supreme Court in Bank.
(L. A. 4380.)

PER CURIAM. [5, 6] In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, we are not to be understood as approving the instruction discussed in the opinion to the effect that the prima facie case of negligence made by the falling of the fan "would justify a verdict in favor of the plaintiff, unless the evidence in the case negatives that prima facie presumption, and *establishes to your satisfaction that it was not the result of the negligence of the defendants.*" We think the italicized portion of this instruction was erroneous for the reason suggested in the opinion of the District Court of Appeal, namely, in leaving out the requirement that the evidence of the plaintiff must preponderate in weight, and that the defendant will be entitled to judgment where the countervailing evidence merely balances, but does not outweigh, the case made by the plaintiff. But in view of the evidence and the charge of the court taken as a whole we cannot conceive that this defect in this particular instruction in any way contributed to the verdict, and therefore are of the opinion that the error must be held to be without prejudice.

The petition for a hearing in this court is denied.

All concur, except WILBUR, J., not participating.

40 Cal. App. 332

ARGYLE DREDGING CO. v. CHAMBERS, State Controller. (Civ. 1997.)

(District Court of Appeal, Third District, California. March 19, 1919.)

1. STATUTES 🔑76(1)—SPECIAL LEGISLATION — ACT AUTHORIZING PURCHASE OF WARRANTS OF DRAINAGE DISTRICT.

Act Jan. 30, 1919, authorizing the state board of control to purchase warrants of the Sacramento and San Joaquin drainage district, issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass, is not violative of Const. art. 4, § 25, subd. 33, forbidding special laws in all cases where a general law can be made applicable.

2. STATES 🔑119—GIFT OF LOAN BY STATE—RECLAMATION DISTRICTS—"CORPORATIONS"—STATUTE.

Act Jan. 30, 1919, authorizing state board of control to purchase warrants of Sacramento and San Joaquin drainage district, issued in payment for expense of continuing construction of east levee of Sutter by-pass, is not violative of Const. art. 4, § 31, prohibiting the giving or lending of credit of the state or making a gift to any individual, municipal, or other corporation whatever; reclamation districts, and particularly the Sacramento and San Joaquin drainage district, not being in strictness "corporations" at all, but governmental agencies.

[For other definitions, see Words and Phrases, First and Second Series, Corporation.]

Application for writ of mandate by the Argyle Dredging Company against John S. Chambers, as Controller of the State of California. Demurrer to the application overruled, and peremptory writ prayed for ordered to issue.

James S. Spilman and Chas. H. Oatman, both of San Francisco, for petitioner.

John W. Carrigan, of Los Angeles, and Jas. L. Attridge, of San Jose, for respondent.

Robt. T. Devlin, of San Francisco, as amicus curiæ.

U. S. Webb, Atty. Gen., for the State.

CHIPMAN, P. J. This is an application for a writ of mandate compelling the controller to issue his warrant for the payment of plaintiff's claim. As the matter was one of emergency, and as at the argument we were fully convinced that the writ should issue, it was so ordered from the bench. By the request of all parties we will state the case and the reasons for our conclusion.

It appears from the petition as follows: That the Sacramento and San Joaquin drainage district is "a body politic and corporate created by the act of the Legislature of this state, approved December 24, 1911" (Stats. 1911, Extra Session, p. 117), as amended and supplemented by the act of May 26, 1913 (Stats. 1913, p. 252), and was further amended and supplemented by the act of June 9, 1915 (Stats. of 1915, p. 1338), which said act of 1911, as amended by said act of 1915, "is known and designated and referred to as the 'Reclamation Board Act,' as provided in section 31 of said acts as so amended and supplemented"; that the reclamation board referred to in the petition was created and exists as provided for in said Reclamation Board Act; "that the management and control of the said Sacramento and San Joaquin drainage district is by virtue of section 5 of said Reclamation Board Act vested in the said reclamation board." We quote from the petition:

"V. That pursuant to the provisions of said Reclamation Board Act the said reclamation board did, in accordance with the provisions of section 13 of said Reclamation Board Act. adopt and determine upon a certain portion or project of the plans to be carried out by said board and did designate the same by the name and number of 'Sutter-Butte By-Pass Project No. Six,' and did pass its order and resolution for the levying of an assessment in the sum of more than $10,000,000 upon the lands within said Sacramento and San Joaquin district to be benefited thereby, as might be determined in the manner provided by law, and did direct that said assessment be known and designated as 'Sutter-Butte By-Pass Assessment No. Six,' and did appoint three assessors for the purpose of making said assessment, all in the manner required and provided by said Reclamation Board Act.

"VI. That a part of the said Sutter-Butte by-pass project No. 6 so adopted and determined upon by said reclamation board is the construction of a levee along the East line of a by-pass in Sutter Basin, in Sutter county, California, known as the Sutter by-pass, the said levee being known and designated as the east levee of the Sutter by-pass.

"VII. That after the adoption of said Sutter-Butte by-pass project No. 6 the said reclamation board, acting for and on behalf of the said Sacramento and San Joaquin drainage district, entered into a contract with your petitioner for dredging work to be done by the dredger Argyle in and about the construction of the said east levee of the Sutter by-pass. That pursuant to said contract, and in the summer of 1918, your petitioner commenced work upon said east levee of the Sutter by-pass with the said dredger Argyle, which work has been prosecuted continuously ever since. That on the 1st and 2d days of February, 1919, your petitioner, pursuant to said contract, performed work upon the construction of the said east levee of the Sutter by-pass, for which work so performed on said two days your petitioner was entitled to be paid by said reclamation board for and on behalf of said Sacramento and San Joaquin drainage district the sum of $255 according to the terms of said contract.

"VIII. That thereafter the claim of your petitioner for said sum of $255 against the said Sacramento and San Joaquin drainage district, acting by and through the reclamation board, was duly presented to and allowed by the said reclamation board, and was thereafter submitted to the state board of control for its scrutiny and approval, and was thereafter approved by the said state board of control, and thereafter, and on February 20, 1919, a warrant numbered 24274, was duly drawn by the state controller upon the state treasurer in favor of your petitioner for said sum of $255, payable out of said Sutter-Butte by-pass assessment No. 6, for the amount of the said claim of your petitioner, which said warrant was thereupon and on said day by the said state controller delivered to your petitioner and was by your petitioner on February 21, 1919, presented to the state treasurer for payment, but there were no funds in the hands of the state treasurer to pay the said warrant when so presented, and the said state treasurer did thereupon register the said warrant and did indorse on said warrant the date of said presentation and the fact that it was not paid for want of funds, all as provided in and by section 15 of the said Reclamation Board Act.

"IX. That the Legislature of this state now in session passed an act, entitled 'An act authorizing the state board of control to purchase warrants of the Sacramento and San Joaquin drainage district issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass, appropriating money therefor, and providing for reimbursement to the state of such appropriation,' which said act was approved by the Governor of this state on January 30, 1919. That a copy of said act is hereunto annexed and marked Exhibit A, and is hereby referred to and made a part hereof. That said Legislature did, in section 6 of said act, declare that it deemed it necessary for the immediate preservation of the public health and safety that said act should go into immediate effect, and did in section 6 of said act set forth a statement of the facts constituting such necessity, which said section of said act was passed by each house of said Legislature upon an aye and nay vote upon a separate roll call thereon, as provided by section 1 of article 4 of the Constitution of this state. That it was further determined and declared by said Legislature in and by section 6 of said act, that said act constituted an urgency measure which under the provisions of section 1 of article 4 of the Constitution of the state of California should go into immediate effect, and that said act did go into effect immediately upon the signing and approval of the same by the Governor of this state on January 30, 1919.

"X. That on February 27, 1919, your petitioner, being then the owner and holder of said warrant for $255 payable out of the said Sutter-Butte by-pass assessment No. 6, did offer to sell said warrant at par to the state board of control, pursuant to the provisions of said last named act; and the said state board of control did thereupon and then and there accept said offer, and did purchase said warrant from your petitioner at the price of $255, being the par value thereof, and did prepare and approve a claim in favor of your petitioner for said sum of $255 in payment therefor, payable out of the appropriation of $300,000 made by said last-named act, and did present said claim to the respondent, John S. Chambers, who is and then was the controller of the state of California, and did request said respondent as such controller to draw a warrant upon the state treasurer payable out of said appropriation of $300,000 for the sum of $255 in favor of your petitioner, in payment of the purchase price of said warrant of like amount so purchased by said board of control as aforesaid. That said respondent as such state controller then and there refused and still refuses to draw said warrant as so requested by said board of control, or otherwise, or at all.

"XI. That said appropriation of $300,000 was so made by said act of January 30, 1919, there was in the state treasury, and not otherwise appropriated, a sum of much more than said sum of $300,000. That no part of said appropriation of $300,000 made by said last-named act has ever been drawn or expended, but the same remains in the state treasury subject to the provisions of said act.

"XII. That the drawing of said warrant as so requested by said state board of control is an act which the law specially enjoins upon the said respondent as such state controller as a duty resulting from his office."

A demurrer to the petition was interposed by respondent on the following grounds: (1) That the act of January 30, 1919, violates section 21 of article 1 of the Constitution of the state of California, in that it is class and special legislation; that it is giving or lending the credit of the state in violation of section 31 of article 4, and in making an allowance for compensation on a contract for services rendered under contract unauthorized by law; (2) that it cannot be ascertained from the petition who is the real party in interest; (3) that the petition does not state facts sufficient to constitute a cause for granting the writ prayed for.

The insufficiency of the facts or the failure to disclose who is the real party in interest was not seriously urged. Nor do we think either point well taken. Unless the act in question is unconstitutional, mandamus is the appropriate remedy, and the facts alleged were sufficient to justify the issuance of the writ. It clearly enough appears that petitioner is the real party in interest.

Is the act of January 30, 1919, violative of the Constitution? It becomes necessary to ascertain the nature and character of the Sacramento and San Joaquin drainage district. The validity of the Reclamation Board Act is not called in question. The constitutionality of acts of this character was established and set at rest in the case of People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207.

The origin and administrative and legislative history of the Reclamation Board Act, its nature and character, were concisely stated at the argument by Mr. Robert T. Devlin, who appeared amicus curiæ. The statement accords with our information upon the subject and we therefore take the liberty of using it. We quote from the notes written by our stenographic reporter:

"The problem of flood control has been a problem that has engaged the United States government and the state of California for more than half a century. For the last 50 years the United States government has been engaged in studying the flood condition of the Sacramento valley, for the purpose of preventing floods and increasing the navigability of the river. The state of California has been engaged in the same work. They sent for Mr. Eads, who had control of the Mississippi river, to come to California and make a report. He reported a plan for the improvement of the Sacramento river to prevent the very things that this act now before us was to do. The United States government made its report through Col. Mendel and others. In 1893 the débris commission was formed, first, to see that hydraulic mining should not be continued without permits; and, second, to take steps to restore the navigability of the river to the condition which it was in 1851 or 1852, about the time California was ceded to the Union. California again, when Governor Pardee was Governor, provided for a commission and invited three engineers to come to California, one of them being Col. Dabney, having charge of the Mississippi work. They made a report. The United States government was investigating this matter all the time, and finally there culminated what is called the Capt. Jackson report, which was made in 1911. That report was a report having for its object three things: First, the restoration of the navigability of the Sacramento river; secondly, the prevention of disastrous floods; and, thirdly, incidentally, the reclamation of private land. That report, Document 81, said that those three objects were inextricably involved, so you could not improve flood conditions and the navigability of the stream without aiding the landowner. The matter was of such importance to the state of California that Governor Johnson, in convening the Legislature in special session, made it as one of the objects to be legislated upon. He named eight or nine objects of such importance to the people that the Legislature should be convened for the purpose of considering them, and one of the objects was the consideration of the report of Capt. Jackson. "At the special session in 1911 the Legislature of this state adopted that report of Capt. Jackson as a part of the state policy and declared that part of the work should be carried out. In 1911, in pursuance of that plan, the state of California constituted the reclamation board and provided for the appointment of three commissioners and provided that all future works in California should be in conformity with that report. Two years following, the state of California created the Sacramento and San Joaquin drainage district, referred to in this petition, being a territory including the Sacramento and San Joaquin valleys determined by state engineers as being territory subject to flood control and flood injury, and provided that that board might carry on the work which is described in this petition. Subsequently, in 1917, the national Congress adopted the Jackson report and appropriated six million some odd thousand dollars for the purpose of carrying it out, to be used in conjunction with appropriations of like amounts made by the state of California, with the provision on the part of the United States government that the obligation of the United States should not exceed $1,000,000 per year. The state of California has made those appropriations, and to-day and for the last several years past, as a part of this work, the United States government and the state of California are co-operating in the lower parts of the Sacramento river in widening the river and in deepening its channel. Now, this work is all one project. This Sutter by-pass taps the river at the north, conducts the water out through two series of levees to be built, making an adjoining river or an additional river, carries it down to the Fremont weir, clear across the Sacramento river into the Yolo basin, and down to tidewater. This work is carried out exclusively by a state agency and by a state board. Capt. Jackson's report stated that, roughly speaking, the obligation resting upon the United States and the state of California and upon the landowners might be divided into three parts, so the nation would pay one-third, the state one-third, and the landowners one-third, and that the total estimated cost of the entire project would be $33,000,000, placing upon the state of California as a direct responsibility $11,000,000, upon the United States a like sum of $11,000,000, and upon the landowners $11,000,000. Owing to the fact that work progressed from time to time and a certain part of the work was done by private owners, this was reduced to a little more than $18,000,000, and upon that basis of $18,000,000 the Congress of the United States has already appropriated one-third, $6,000,000, binding the United States government to contribute over $6,000,000 to this work. * * *

"Some 25 or 30 years ago, the state of California tapped the Sacramento at Tisdale weir, by building a weir that allows the water to escape from the Sacramento river when it reaches a certain height, and that is the water that is doing the damage. By the state's action this water is taken out of the Sacramento river and thrown upon that territory on the east. For the purpose of taking care of that water, these by-passes are being constructed. If these by-passes are not constructed, this water that the state of California takes out of its own volition (nobody else has control of it) is taken out and dumped upon private land—up to some years ago, upon the lands known as 'District 1600,' now upon the lands in 'District 1.' In other words, the floods in that section are caused by the state government in taking water out of the river and dumping it on private lands. For the purpose of performing that governmental duty, the state of California is now building these by-passes. It has spent already more than $1,000,000 and has obtained the money by using its warrants, which warrants have been taken by private persons. We have now reached the point where private persons refuse to take warrants further."

It is well to recall what the Supreme Court said in People v. Sacramento Drainage District, supra, in speaking of districts of the character of the one here: Said the court:

"It is unnecessary to repeat the reasons set forth in the decisions in those cases [cases cited], by which the conclusion there reached was expressed, to the effect that such districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose. But, additionally, it may be said that the likeness of these agencies to corporations is superficial, and that the similitude—for it is no more than this—ceases, if consideration be paid to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the Legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors."

The act of 1911 created the reclamation board to consist of three members; adopted the plan of the California débris commission, empowering the board to make modifications, as a general scheme for reclamation flood control in the Sacramento valley. The act of 1913 enlarged the board to seven members, created the San Joaquin and Sacramento valley drainage district and authorized the reclamation board to go forward with the construction of the project and to levy assessments on lands in the district in aid of that purpose. The act provided that in the carrying out of the work the board should divide it into separate projects or divisions, each to be taken up separately and a separate assessment levied therefor, each such project to have a distinctive name and number and its funds to be held separately.

These assessment funds are to be collected by the county treasurers in the counties affected and by them to be deposited in the state treasury and paid out by the state treasurer on warrants drawn by the controller against the state treasurer, as directed by the reclamation board, payable out of that particular assessment in each such separate project. Warrants may be drawn against any assessment whenever it has been ordered by the reclamation board and the assessors have been appointed; these warrants may issue for work before the assessments are collected and when thus drawn may be presented to and registered by the state treasurer, who is authorized to register them and indorse them not paid for want of funds and they shall thereafter bear interest from date of registration.

As alleged in the petition, the reclamation board adopted a project, known as Sutter-Butte by-pass project No. 6 and levied an assessment for its construction, known as Sutter-Butte by-pass assessment No. 6 and appointed the assessors therefor. At this stage the controller was authorized to draw warrants for construction work against this assessment on the request of the reclamation board, in anticipation of collections on the assessment. The reclamation board was able to make contracts for work on the east levee of this by-pass, being part of the project No. 6, payable in warrants against its assessment No. 6. Arrangements were made whereby private interests cashed these warrants to a very considerable amount. This arrangement having ended and the necessity for the uninterrupted prosecution of the work being imperative the act of January 30, 1919, was passed to meet the emergency.

This act, in effect, appropriated the sum of $300,000, and authorized the state board of control to purchase at their face value (to the extent of not exceeding said amount) all warrants of said drainage district drawn by the state controller, as provided by the Reclamation Board Act and payable out of said assessment and "issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass." Section 5 of said act provides:

> "The state controller shall draw warrants upon the state treasurer, payable out of said appropriation, in such amounts and at such times and in favor of such persons as the board of control may request, and the state treasurer shall pay the same."

After the passage of this act, petitioner, Argyle Dredging Company, continued to work under contract with the reclamation board and the claim here was allowed for $255 for such work. It was duly allowed by the reclamation board and approved by the board of control, the state controller drew and issued to petitioner his warrant against the reclamation board's assessment No. 6 for $255, and it was registered by the state treasurer as not paid for want of funds. No question arises as to the regularity of the proceedings. The state board of control, however, contracted with petitioner, proceeding under the act of 1919, to purchase this warrant at its face value and requested the state controller to direct the payment out of the fund thus appropriated. This the controller refused to do and hence the action.

[1] The Constitution does not deprive the Legislature of the power to pass all special acts. It forbids special laws in all cases where a general law can be made applicable. Section 25, subd. 33, art. 4. It was said by the Supreme Court:

> "The Legislature must, in the first instance, determine whether or not a general law can be made applicable in the particular case. The court will not interfere with its judgment on the subject, unless it clearly and beyond reasonable doubt appears that it adjudged contrary to the fact." Wheeler v. Herbert, 152 Cal. 224, 232, 92 Pac. 353, 357, citing cases.

It does not appear and it is not claimed that conditions such as prevail in the Sacramento and San Joaquin drainage district exist elsewhere in the state, nor do we think that a general law could reasonably be made applicable. But as was said in People v. Mullender, 132 Cal. 217, 222, 64 Pac. 299, 301:

> "We would certainly not hold such a law invalid merely because it would, in our opinion, have been possible to frame a general law under which the same purpose could have been accomplished."

It was also there said:

> "The language of said paragraph [section 25, art. 4] plainly implies that there can or may be cases where a local or special act may be wise, salutary, and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation."

Such in our judgment is the case here.

[2] In no just sense can the act be said to violate section 31, article 4, which prohibits the giving or lending the credit of the state or making a gift to "any individual, * * * municipal or other corporation whatever." As we have seen (People v. Sac. Drainage District, supra), reclamation districts "are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose." So completely are these districts so regarded, as we are informed, that their warrants are not taxable nor is the interest payable on those warrants taxable by the United States as income; so, also, are the salaries of the officers of such districts not subject to the payment of an income tax for the reason that the government regards them as part of the state.

Much more closely is the Sacramento and San Joaquin drainage district knitted to the state and really part of it than is the ordinary drainage district. Section 7 of the Reclamation Act of 1915 declares that—

> "The state of California and the people are hereby declared to have a primary and supreme interest in having created, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels and barriers maintained herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed or subject to overflow by said streams, * * * and it shall be the duty of the reclamation board to enforce on behalf of the state of California and the people thereof the erection, maintenance, and protection of such levees * * * as will best serve the interest of the state of California. The purposes and objects of this act are to carry into effect the plans of the California débris commission with such modifications and amendments and such additional plans as have been or may hereafter be adopted by the reclamation board for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries and said levees and to vest in said reclamation board control and jurisdiction over said plans."

We then have an institution, a state agency, created by the state, under the exclusive control and management of the state, administered by officers appointed by the Governor of the state, and engaged in an enterprise of state-wide concern—the act itself providing that "the state of California and the people thereof are hereby declared to have a primary and supreme interest" in its objects and purposes.

But, aside from these considerations, we think the act of January 30, 1919, is neither more nor less than an act authorizing the state board of control to invest state money in the warrants duly and regularly issued under the act precisely as that board may now and has been since its organization authorized by law to invest state funds in United States and state bonds, municipal bonds, school district bonds, highway and irrigation district bonds. The state has simply added another class of securities in which the board of control may invest state funds. The fact that an appropriation of moneys made to meet the anticipated purchase, in this particular instance, does not affect the power of the Legislature to make the appropriation or the power of the board to make the investment. The act specifically provides for the payment of these warrants out of assessments, when collected, and when paid, the money goes back into the state treasury just as it would upon payment of any of said bonds purchased by the board of control.

In no view of the case can we see that either the Legislature or the board of control has exceeded its authority. The demurrer is overruled, and it is ordered that the peremptory writ prayed for be issued.

We concur: BURNETT, J.; HART, J.

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40 Cal. App. 479

TRULL v. INDEPENDENT ORDER OF PURITANS. (Civ. 2733.)

(District Court of Appeal, First District, Division 2, California. March 28, 1919.)

1. INSURANCE 🔑645(3) — LIFE INSURANCE—EVIDENCE.

Admission of life insurance certificate running to one "Prull" instead of deceased "Trull" is not erroneous, where defendant had received premium payments from deceased, and its answer pleaded its assumption of certificate.

2. PLEADING 🔑182 — ANSWER — FAILURE TO REPLY—EFFECT.

Where answer set forth deceased's life insurance application in full and was not denied under oath within 10 days, the application becomes admitted under direct provisions of Code Civ. Proc. § 448.

3. INSURANCE 🔑665(2) — LIFE INSURANCE—EVIDENCE.

Evidence that one "Trull" had paid premiums on life insurance certificate for many years, etc., *held* to sustain finding that certificate was in fact issued to him, although under name of "Prull."

4. INSURANCE 🔑665(3) — LIFE INSURANCE—EVIDENCE.

Evidence of defendant's medical examiner and others *held* to sustain finding that deceased was not guilty of misrepresentation in stating his health was good when making a life insurance application.

5. INSURANCE 🔑646(3) — LIFE INSURANCE—BURDEN OF PROOF.

Defendant insurance company has burden of proving that deceased misrepresented condition of his health when applying for life insurance.

6. INSURANCE 🔑686 — COMPLAINT — SUFFICIENCY.

Complaint to recover on defendant's assumption of a life insurance certificate *held* not defective for failure to fully set out deceased's application for insurance.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Catherine Trull against the Independent Order of Puritans. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. F. Fury, of Petaluma, for appellant.
Olin L. Berry, of San Francisco, for respondent.

LANGDON, P. J. The defendant appeals from a judgment on a life insurance policy issued by the Knights of Honor and assumed by the defendant.

From an examination of the entire record, it appears that in 1890 the Knights of Honor issued a policy or certificate of insurance in the name of George E. Prull, which was delivered to George E. Trull. The Knights of Honor received payments of premiums from Trull for something over 25 years; the last payment having been made in November, 1915, one month after the Knights of Honor had gone into the hands of a receiver. The acceptance indorsed on the certificate was signed "George E. Trull." On November 13, 1915, Trull made an application to the defendant for the latter organization to assume the insurance, in which the applicant recited the facts of his membership in the Knights of Honor, warranted that he was then in sound health, that he knew of no cause in connection with his physical condition that would be a bar to his securing life insurance, or would in any way shorten his life, and that any untruthful statements or violations of the laws of this order should render his certificate void. This application was accepted by the defendant, which issued to him a receipt book in the name of George E. Trull, in which it entered successive payments made to it by him monthly. Trull died in June, 1916, and the defendant refused to pay to the beneficiary, the widow of the insured, who brought this suit.

In the complaint it is alleged that the Knights of Honor issued "a certain policy of insurance in the words and figures following, to wit: [Here being set forth the original benefit certificate.]" The certificate stated that it was issued "upon evidence received from said lodge [one in San Francisco] that he has lawfully received the degree of Manhood, and is a contributor to the widows and orphans benefit fund of this order and upon condition that statements made by said member in his petition for membership, and the statements made by him to the medical examiner, be made a part of this contract, and warranted to be true, and upon condition that he complies with the laws, rules, and regulations now governing this order, or that may be hereafter enacted for its government."

The defendant demurred generally and specially, because the statements made to the medical examiner were not alleged. After the demurrer was overruled, the defendant answered, denying the issuance of the certificate and that it was as set forth in the complaint for the reason that it had no information or belief on the subject sufficient to enable it to answer thereto. There were similar denials in regard to the allegations, as to the payment of premiums and the performance of conditions by the insured under the terms of the policy, and as to the alleged financial difficulties of the Knights of Honor. The defendant set up the application of Trull to the defendant for the assumption of the insurance, and alleged on information and belief that at the time of making the latter application Trull was suffering from a disease which, it was further alleged, contributed to his death.

The appellant relies on claimed errors in rulings on evidence, insufficiency of the evidence to justify the decision, and claimed error in overruling the demurrer.

[1] The defendant's first exception was to the admission over objection of the original certificate of insurance, because it purported to run to George E. Prull instead of George E. Trull. The suit was on the contract of the defendant assuming in favor of Trull and his beneficiary the obligation of the Knights of Honor to pay on the original certificate issued to Trull, although the name was written therein as Prull. It does not appear the defendant was in any way misled. The defendant had received payments from Trull, and in its answer it set up its own assumption of the particular certificate, referring to it by number. The lower court treated the word "Prull" in the certificate as a clerical error. Under all the circumstances the certificate was properly received in evidence.

[2] The defendant offered in evidence the application for the assumption of the insurance contract by the defendant and excepted to its rejection by the court. The application was set forth in full in the answer, and was not denied under oath within 10 days. It was therefore admitted for all purposes of the case. Code Civ. Proc. § 448. The court found that it was made by Trull, and further found that the statements contained in it were not untrue. If these findings are supported, the appellant was not injured by any remarks made by the judge at the time of his ruling concerning the materiality of the evidence.

[3-5] The appellant claims the evidence was insufficient to justify the decision. The finding that the original certificate was issued to Trull is attacked. This is the same contention in regard to the clerical error by which the name was written "Prull," although both insurers received the premium payments from Trull. This finding was sustained by the evidence. The finding that the statements made in the application for assumption are true is sustained by the evidence notwithstanding the attempt on the part of the appellant to avoid the effect of the evidence of its own medical witness, the attendant physician of Mr. Trull, who testified that at the time of the application for assumption he had no reason to believe that Trull was otherwise than in good health. The burden of proving misrepresentations was on the defendant, and the only witness it produced was the physician. It not only failed to make out its defense, but supported the plaintiff's case. No other finding could properly have been made. Mickschl v. National Council, etc., 180 Pac. 27; Speegle v. Leese, 51 Cal. 415; Leviston v. Ryan, 75 Cal. 293, 17 Pac. 239; Connolly v. Hingley, 82 Cal. 643, 23 Pac. 273.

[6] Appellant's last contention is that the complaint does not state facts sufficient to constitute a cause of action. Reliance is placed on Gilmore v. Lycoming Ins. Co., 55 Cal. 123. Reference is made to Tischler v. Insurance Co., 66 Cal. 178, 4 Pac. 1169, and Schenck v. Insurance Co., 71 Cal. 28, 11 Pac. 807. After these cases were decided the Supreme Court reconsidered the matter in Cowan v. Insurance Co., 78 Cal. 181, 20 Pac. 408. A quotation from the opinion in the latter case is determinative upon the contention made by the appellant:

> "It is argued that the complaint is defective in that it does not set forth the application of the assured, which is declared to form a part of the policy. It appears clearly from the complaint that there was an application which was made a part of the policy. The contents are not stated in the complaint. But it is stated in the complaint by appending the policy to and making it a part of it that there was an application, and that that application should be considered a warranty by the assured. This stipulation of the contract is a solemn engagement by the assured that the representations made in the application at the time they were made, and when the policy became a contract, were true and correct. There are two classes of conditions usually inserted in policies, the first pointing to the time of the contract, the second to things which may occur or which may have to be performed at a time subsequent. In the former case the stipulation is called an affirmative warranty, and in the latter a promissory warranty. * * * Affirmative warranties are sometimes called warranties in præsenti. * * * A breach of an affirmative warranty consists in the falsehood of the affirmation when made, of a promissory warranty, which is in its nature executory, of the nonperformance of the stipulation. * * * In counting on a policy of insurance, we cannot see that there is any necessity of averring performance by the insured of anything warranted to be true when the policy was issued, for the reason that there was nothing to be performed. When the assured has warranted a thing to exist or a representation to be true,

at a time when the policy becomes consummated as a contract, he has done all he can do."

Further, referring to the provisions of Code of Civil Procedure, § 457, permitting the pleader to state he has performed all the conditions of the contract, the court said:

> "It is said that something material or which may be material to plaintiff's right to recover has been left out of the complaint. In reply to this we say it does not appear that anything material in the application, or which may be material to plaintiff's case, has been left out. The application is not before us, and we cannot say what is in it; therefore we cannot say that anything material is omitted. * * * As to the contention that there may be something material in the application which is omitted from the complaint, in addition to what is said above, we will further say that a demurrer to a complaint should not be sustained because there may be possibly something in an application affecting plaintiff's right to recover which is not averred in the complaint. Certainly we should not reverse a ruling of the court below overruling a demurrer on a 'perhaps.' Error should clearly appear to justify such a course."

The appellant seeks to distinguish this case from the present one because the court added:

> "In ruling against the defendant on the point above discussed, we desire to say further that we cannot see how it can receive any detriment from the lack of the suggested allegation. The policy states that the application is filed with the defendant, and in his answer defendant can set it out and aver nonperformance of anything required by it to be performed."

The reasoning applies with equal force here. The defendant assumed the obligations of the contract in its entirety. It must have been fully informed in regard to its terms. It accepted the premiums paid after the assumption. If it did not know the terms of the contract when it assumed them, it could not be heard to say, after accepting its benefits, that it had no information regarding those terms. Yet that is just what it did say in its answer.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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40 Cal. App. 371

O'NEIL v. BRODE. (Civ. 2630.)

(District Court of Appeal, Second District, Division 1, California. March 21, 1919.)

1. Municipal Corporations ⟹541 — Improvements — Parks and Playgrounds — Delinquency as to Assessment.

Under St. 1909, p. 1070, §§ 18, 19, the fact of delinquency in payment of an assessment rather than the attaching by the street superintendent of a certificate as to the fact established the jurisdiction of the board of public works of the city of Los Angeles to proceed with sale of the property for delinquency in paying its share of the expenses of a park improvement.

2. Municipal Corporations ⟹577—Parks and Playgrounds—Assessment of Expenses—Certificate of Sale—Signature by President.

Certificate of sale of property for delinquency as to assessment of proportionate part of an expense of park improvement pursuant to Acts 1909, p. 1066, executed in duplicate by the street superintendent, one copy of which was signed by the president of board of public works of city of Los Angeles by his own hand, and other was signed by a fac simile stamp signature of same officer impressed on document by assessment clerk by president's direction (the copy so signed being retained in the files of the office, and the other delivered to the purchaser), was sufficiently signed.

3. Municipal Corporations ⟹582—Parks and Playgrounds—Assessments of Expenses—Sale Deed to Purchaser—Signature by President.

The board of public works of city of Los Angeles, by resolution adopted prior to the enactment of St. 1909, p. 1066, had power to direct its president to make or sign a deed to the purchaser of land sold for delinquency as to assessment of the proportionate expense of a park improvement, though the charter of the city provides that all documents required to be signed and executed by the board shall be signed by the order of the board, or by the president, or by two members.

4. Municipal Corporations ⟹581—Parks and Playgrounds—Assessment of Expenses—Sale for Delinquency—Notice to Redeem.

Notice to redeem land from sale for delinquency as to assessment of proportionate part of expense of park improvement under St. 1909, p. 1066, given by the purchaser, referring to the improvement for which the property was sold, and stating the amount required to be paid to effect redemption, *held* valid, though stating there would be added also $3 for service of notice and making of affidavit, though the charge was unauthorized.

5. Municipal Corporations ⟹581—Parks and Playgrounds—Assessment of Expenses—Sale for Delinquency—Affidavit of Service of Notice.

Affidavit of service of notice to redeem land from sale for delinquency as to assessment of proportionate part of expense of park improvement under St. 1909, p. 1066, *held* not faulty in failing to state the name of the person on whom service was made, setting forth that the purchaser served on the owner and occupant of the property a notice, etc., the requirement of the statute.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by William J. O'Neil against A. W. Brode. Judgment for plaintiff, and defendant appeals. Reversed.

George H. Moore, of Los Angeles, for appellant.

Conner, Heath & Maxwell, of Los Angeles, for respondent.

JAMES, J. Plaintiff had judgment quieting his title to a certain parcel of land located in the city of Los Angeles, from which judgment defendant has appealed. Defendant's claim of title to the land in question was based upon a deed issued by the board of public works of the city of Los Angeles, which deed had for its foundation a sale for delinquent assessment made under the authority of an act of the Legislature approved April, 1909. Stats. 1909, p. 1066. This act authorized the acquiring of property by municipalities for purposes of public parks or public playgrounds. The trial court held with the plaintiff that there were such irregularities in the procedure adopted by the assessment officers and in the notice to redeem as given by the defendant as to invalidate the deed. It is admitted by the plaintiff that all the proceedings taken up to the time when assessments became delinquent were regular.

[1] 1. The first asserted defect consists in the failure of the board of public works to make a certificate upon the assessment roll of the fact that the assessments had become delinquent. A certificate was in fact made, but was signed, "Board of Public Works, by R. I. Follmer, Assistant Clerk." Of course, it must be conceded that there was no authority in a clerk to execute the certificate on behalf of the board; so that the real question presented is as to whether the failure of the board to make such a certificate was vital to the proceedings which followed. Section 18 of the act referred to, as relating to the making of assessments, after declaring that notice shall be given by publication of the fact that the assessment has been recorded in the office of the street superintendent (the board of public works acting in the stead of such an official under the charter of the city of Los Angeles), and that the sums assessed are due and payable within 30 days from the date of the first publication of the notice, provides that "on the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the street superintendent shall certify such fact at the foot of said assessment roll, and mark each such assessment 'Delinquent,' and add five per cent. to the amount of each delinquent assessment." The section immediately following provides that within 10 days "from the date of such delinquency" the street superintendent shall begin the publication of a list of delinquent assessments, which shall contain a description of each parcel of the property delinquent, the name of the owner as stated in the assessment roll, and the amount of the assessment, penalty, and costs due, including the cost of advertising, and shall append a notice that, unless each delinquent assessment is paid, the property upon which such assessment is a lien will be sold at public auction at a time stated in the notice. It will be noted that the act declares that the unpaid assessments, upon the expiration of 30 days from the date of publication of the notice first referred to, shall become delinquent, and that the street superintendent shall, within 10 days from the date of delinquency, begin the publication of a list of the delinquent assessments. The assessments under the express terms of the act are delinquent before the certificate is required to be made at the foot of the assessment roll. The subsequent notice to be published by which the owners are to be informed that, unless the delinquent assessments, together with penalties and costs, are paid, their property will be sold, is not required to contain the certificate so attached to the roll, and it does not appear that the making of such certificate is at all a prerequisite jurisdictional matter which must occur before the last notice to the property owner, is published. It is not contended that there was a failure of the board to mark the overdue assessments "Delinquent" as required by the act; hence upon the roll itself there would be indicated which of the assessments had not been paid and were subject to the delinquency penalty. We think it was the fact of delinquency, rather than the attaching of a certificate as to that fact, which established the jurisdiction of the board to proceed with the sale of the property. Direct authorities bearing upon this question are not many, but the reasoning of the Supreme Court in Bienfield v. Van Ness, 176 Cal. 585, at page 591, 169 Pac. 225, we think is applicable here.

[2] 2. The act further required that after making sale of property for delinquent assessment the street superintendent must execute in duplicate a certificate of sale, one copy of which is to be filed in the superintendent's office and the other delivered to the purchaser. The certificate of sale was made in duplicate, except that one copy was signed by the president of the board of public works by his own hand, and the other was signed by a fac simile stamp signature of the same officer, which was impressed upon the document by the assessment clerk. This clerk, however, testified that he stamped the signature on the duplicate at the direction of the president of the board; that the original was delivered to the purchaser, and the one signed by the rubber stamp retained in the files of the office. We think that the duplicate was sufficiently signed by the president of the board, and that for the purpose he adopted the rubber stamp as expressing his signature. That he had power to direct the attaching of the stamp by the clerk, and that

the signature in law would become his own act, we have no doubt. Williams v. McDonald, 58 Cal. 527; Pennington v. Baehr, 48 Cal. 565; Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84.

[3] 3. The deed issued to defendant as purchaser at the sale was signed by the president of the board of public works. It is claimed that its execution in that manner was unauthorized, because the charter of the city of Los Angeles provides that "all documents required to be signed or executed by the board of public works shall be signed on order of the board by the president or by two members thereof." Prior to the time when the proceedings were instituted and prior to the adoption of the act under which the same were taken, the board of public works had adopted a general resolution directing among other things, "that the president of the board of public works, or, in the absence of the president, two members thereof, be and they hereby are authorized and directed in the name of and on behalf of said board, to sign and execute all certificates of sale and all deeds of property sold for delinquent assessments for the opening and widening of streets, alleys, and other public places." It was under authority of this resolution that the president of the board made the deed which was delivered to the appellant. We think that the board had power to direct its president to make all deeds of the nature indicated in the resolution, as the act to be done was one which involved no discretion on the part of the board—was purely a ministerial function which could not be avoided. Nor do we think that the fact that this resolution was adopted before the act of the Legislature under which the proceedings were taken makes any difference. The authorization and direction given by the resolution applied to all proceedings and such acts connected therewith as might then or in the future be required to be performed as an official duty. We have given some attention to that subject in a case recently decided, the decision in which, however, is not yet final. Hayes v. Handley et al., decided March 14, 1919. [See decision of Supreme Court. 187 Pac. 952.]

[4, 5] 4. The notice to redeem as given by the appellant as purchaser sufficiently referred to the improvement for which the property was sold and stated the amount required to be paid to effect redemption. The fact that it contained the statement that there would be added also "$3 for the service of this notice and making affidavit thereto, as allowed by law," even though such charge was unauthorized, did not invalidate the notice. Simmons v. McCarthy, 118 Cal. 623, at page 627, 50 Pac. 761. The affidavit of service of the notice to redeem we do not think was faulty in failing to state the name of the person upon whom service was made. The law requires such notice to be served "upon the owner of the property and upon the occupant"; the affidavit set forth that appellant, on the 6th day of February, 1914, as purchaser, did "serve upon the owner and occupant of said property a notice," etc. It was shown by the evidence of appellant that he in fact served a notice to redeem upon the plaintiff, who was also upon the property at the time. We think the objections as raised as to the irregularities which occurred subsequent to the date of delinquency of the assessments do not show such substantial departure from the requirements of the act as to invalidate the title obtained by the appellant.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

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40 Cal. App. 645

STOCK v. STITES. (Civ. 1921.)

(District Court of Appeal, Third District, California. April 14, 1919.)

QUIETING TITLE 🔑47(2)—STREET IMPROVEMENTS—ACT TO QUIET TITLE AGAINST LIEN—FINDINGS.

In action to quiet title against lien, arising out of issuance of bond for street improvements, court's finding "that before the passing of the resolution * * * careful estimates of the cost and expenses thereof had been required to be furnished to said common council by the city engineer, * * * and special specifications therefor had been furnished by him," *held* sufficient finding of compliance with Vrooman Act, § 3, providing that city engineer shall furnish common council, if required to so do by council, "plans and specifications, and careful estimates of the cost and expenses thereof," the words "special specifications therefor" referring to and embracing "careful estimates of the cost and expenses."

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Elizabeth A. Stock against O. T. Stites. Judgment for plaintiff, and defendant appeals. Reversed.

Hoefler & Morris and L. M. Hoefler, all of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellant.

W. M. Beggs and R. C. McComish, both of San Jose, for respondent.

BUCK, Presiding Judge pro tem. This is an action to quiet title against a lien arising out of the issuance of a bond for street improvements on plaintiff's lot in the city of San Jose. Plaintiff had judgment, from which defendant appeals.

Appellant's contention in this case that the street in question had not been previously accepted has been sustained by the Supreme Court in the case of Ransome-Crummey Co. v. Bennett, 171 Pac. 304.

Also respondent's contention that the bond act under which the bond in question was issued does not apply to San Jose has been recently disposed of in appellant's favor by this court in the case of Ahlman v. Barber Asphalt Paving Co. et al., 181 Pac. 238.

Further, for the purpose of sustaining the judgment, respondent in this court contends for the first time that from a certain paragraph in defendant's answer and the finding made thereon it appears "that there was no authority in law to issue" the bonds in question. Respondent quotes as follows from the answer and finding:

> "That before the passing of the resolution * * * careful estimates of the costs and expenses thereof had been required by it to be furnished to said common council by the city engineer of said city."

Relying upon this, respondent claims that the bond issue is defective because it does not appear from defendant's answer and finding herein that there was a compliance with section 3 of the Vrooman Act (St. 1885, p. 148), which provides that—

> "Before passing any resolution for the construction of said improvements, plans, and specifications, and careful estimates of the cost and expenses thereof, shall be furnished to said city council, if required by it, by the city engineer of said city."

Respondent filed no demurrer, either special or general, attacking the foregoing allegation, and the finding was made accordingly. But it should be noted that the allegation and finding contained also the following language immediately following the language quoted and relied upon by counsel:

> "We believe that this language, in the absence of any special demurrer, possesses sufficient scope and pregnancy to supply the defect indicated by counsel. The language being as follows: '* * * And special specifications therefor had been furnished by him and had been filed in the office of the said city clerk on the 8th day of April, 1912."

The words "special specifications therefor" can be deemed to refer to and embrace the "careful estimates of the costs and expenses." And certainly a furnishing by the city engineer of specifications or a specification of "a careful estimate" is in substance and effect the furnishing by him of a statement of the estimates. The Century Dictionary gives as one of the meanings of "specification":

> "An act of specifying, or making a detailed statement, or the statement so made; a definite or formal mention of price; as, a specification of one's requirements, for example, 'all who had relatives or friends in this predicament were required to furnish a specification of them.' Prescott, Ferd. & Isa., 1, 7."

And for an example of the scope of the word "therefor," see Hutchinson v. City of Olympia, 2 Wash. T. 314, 5 Pac. 606, 607; Marcus v. Rovinsky, 95 Me. 106, 49 Atl. 420, 421.

Also the form of expression used by the pleader to convey the above idea of compliance with the statute has received a certain countenance and approval in this state from its use in the well-known California textbook, Page on California Street Law, p. 891, § 7.

Also if there had been a special demurrer it does not appear that the facts were such that the answer could not have been so amended as to obviate the objections made. Ransome-Crummey Co. v. Bennett, supra.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

40 Cal. App. 424

DAVIES v. RAMSDELL et al. (Civ. 2724.)

(District Court of Appeal. First District, Division 2, California. March 25, 1919. Rehearing Denied April 23, 1919. Denied by Supreme Court May 22, 1919.)

1. Appeal and Error 🔑256 — Questions Reviewable — Absence of Exception—Motion to Strike Pleading—Statutes—"Order Deemed Excepted to."

Since an order refusing to strike out a pleading or a portion thereof is not an order deemed excepted to under Code Civ. Proc. § 647, an exception must be taken at the time the decision is made, under section 646.

2. Mortgages 🔑364—Sale by Trustee—Purchase by Creditor—Payment.

Where the consideration for the property sold by a trustee to satisfy an indebtedness secured by it was the satisfaction of the indebtedness, it was not necessary that the creditor should actually pay for the property in gold coin.

3. Mortgages 🔑370 — Setting Aside of Trustee's Deed—Effect—Second Sale.

Where in ejectment a deed to plaintiff creditor from the trustee under deed of trust securing the indebtedness was set aside by consent, and the property again sold to plaintiff, and a second deed from the trustee made to her, the judgment was as much a part of the chain of title as was the deed, and any buyer is presumed to know that in no action could plaintiff set up title by virtue of the first deed set aside, so that defendant cannot claim, in a second action to quiet title, that the sale by the trustee deprived defendant of the benefit of competition of buyers, because nobody other than the holder of the legal title could buy without buying a lawsuit.

4. Estoppel 🔑91(1)—Consent Judgment.

Where in ejectment a deed to plaintiff creditor from the trustee under deed of trust securing the indebtedness was set aside by consent, and the property again sold to plaintiff, and a second deed from the trustee made to her, the consent judgment, with acceptance of benefits thereunder, estopped defendant to claim that the first trustee's deed was not a nullity, in contradiction of the consent judgment, but conveyed legal title, so that no title passed under the second deed.

5. Pleading 🔑9—Conclusion of Law—Title to Land.

In suit to quiet title, in view of the special allegations of the complaint, plaintiff's allegations that she had not voluntarily or involuntarily parted with any interest in the land acquired by her, and that by proceedings previously mentioned she had become and was the owner of the land, etc., *held* merely a conclusion of law arising from the facts previously alleged.

6. Pleading 🔑347—Motion for Judgment—Insufficient Denial—Conclusion—Denial as Preventing Judgment on.

In suit to quiet title, where defendant's denial that plaintiff had title was in effect a conclusion of law from the facts set out by defendant in her answer, as plaintiff's allegation that she had title was in effect a conclusion of law from the facts alleged in the complaint, and was an erroneous conclusion, it cannot avail defendant to prevent judgment against her on the pleadings.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Glennie Davies against Lucie C. Ramsdell and others. Judgment for plaintiff, and defendants appeal. Affirmed. See, also, 183 Pac. 702.

C. D. Dethlefsen, of Oakland, and Peck, Bunker & Cole, of San Francisco, for appellants.

Ralph R. Eltse and Elston, Clark & Nichols, all of Berkeley, for respondent.

LANGDON, P. J. This is an appeal from a judgment for plaintiff in a suit to quiet title to certain real property in the county of Alameda. Defendant filed a motion to strike out parts of the complaint, which motion was denied; also a demurrer to the complaint, which was overruled; defendant then answered, and judgment was given for the plaintiff upon a motion for judgment on the pleadings.

Instead of filing the ordinary short form of complaint to quiet title, plaintiff set up in the complaint in detail that the defendant executed a note and trust deed to evidence and secure a loan of $5,000, made by the plaintiff to the defendant; that the defendant had defaulted in payments and the trustee had sold the property to satisfy the debt; that the sale was postponed under an arrangement between the plaintiff and defendant, and a dispute arose as to this arrangement; that it was claimed by the defendant that proper notice of the sale had not been given. It was further alleged that the plaintiff had sued the defendant in another action in which these facts were involved, and which was terminated by a judgment entered upon a stipulation that the trustee's deed be set aside, and that immediately after the entry of such judgment, the plaintiff requested the trustee to again advertise the property for sale, because of the default of the defendant, and after notice, the property was again sold to the plaintiff, and a second deed from the trustee made to her. It was also alleged in the complaint that the defendant disputes the ownership of the plaintiff, and claims that she is entitled to hold the property and to refuse to pay the indebtedness; that these claims are made in bad faith and fraudulently, for the sole purpose of harassing and annoying the plaintiff and exacting from the plaintiff a sum of money to get rid of such claims; that the defendant is insolvent, and retains possession of the premises; that the defendant has failed to pay taxes and street assessments; that the rental value of the property is $50 per month, and that a receiver should be appointed. Plaintiff prayed for a judgment that the defendant is estopped and barred by the judgment set up in the complaint; that the plaintiff is the owner of the real property; that defendant has no interest in the same; that defendant be enjoined from asserting any claim thereto, and that the plaintiff be awarded possession; and that, pending a final judgment, a receiver should be appointed.

In the answer, the defendant claimed to be the owner of the property in possession, and entitled to the possession. Defendant alleged that she made the note and trust deed; that for the purpose of defrauding her, the plaintiff entered into a conspiracy with the Berkeley Bank of Savings & Trust Company, named as trustee in the deed of trust, in pursuance of which the trustee sold the property to the plaintiff and executed a deed therefor, but that plaintiff paid no money to the trustee in support of her bid; that the plaintiff commenced the action, and the defendant answered and cross-complained, as stated in the complaint; that the judgment was entered thereon (the judgment being set up in the answer); that the value of the property is upwards of $10,000; that the defendant is not insolvent; that the defendant had declared a homestead on the property; that in pursuance of the alleged conspiracy, the second sale by the trustee took place and the property was sold to the plaintiff for $5,749.71; that the defendant had demanded the surrender of the canceled note, which had been refused; that the trustee knew that the plaintiff was the only person who could bid at the sale, because of the then condition of the title, the trustee having been so advised by the defendant; that the second trust deed was made in pursuance of the alleged conspiracy; that the trustee had no power to sell, and denies plaintiff's allegation that she is the owner of the property.

[1] The motion to strike out was directed to all of the recitals of the complaint claimed by the defendant to be a mere deraignment of title. The refusal to grant this motion is assigned by the appellant here as error. It does not appear from the transcript that exception was taken to the ruling refusing to strike out. It will be presumed that counsel acquiesced in the ruling, and the objection cannot be urged on appeal. "The exception must be taken at the time the decision is made" (Code Civ. Proc. § 646) in all cases except those specified in § 647, Code of Civil Procedure. An order refusing to strike out a pleading, or a portion thereof, is not an order deemed excepted to under section 647, Code of Civil Procedure. Ganceart v. Henry, 98 Cal. 281, 283, 33 Pac. 92.

[2, 3] The second objection of appellant is that the court erred in overruling the defendant's demurrer to the complaint. It is urged that the complaint is defective in not showing that an amount of money equal to that bid by the creditor at the sale was actually paid to the trustee, and that the trustee had divested itself of title by the first sale, and therefore had no power to make a second sale. In regard to the first objection, it appears from the complaint that the property was sold for the purpose of satisfying the indebtedness secured by it, and that the property was "struck off and sold" to the owner and holder of said indebtedness "for said sum." The consideration for the property was the satisfaction of the indebtedness, and it was not necessary that the plaintiff should actually pay for the property in gold coin. As to the second objection, it will be necessary for us to consider for a moment the judgment in the ejectment suit between the same parties, which judgment is set out in the complaint herein. It is admitted on this appeal that in the ejectment suit the plaintiff there, who is also the plaintiff and respondent here, relied upon the first trustee's deed, and defendant denied the efficacy of that deed to pass title, whereupon the parties stipulated that the first trustee's deed was a nullity, and upon the stipulation, judgment was entered as between those parties to that effect. Upon the present suit to quiet title, the plaintiff relies upon a second trustee's deed, and the defendant says, notwithstanding the former judgment, no title passed under the second deed, because the original trustee conveyed title under the first deed, and in support of this position argues two points: (1) That despite the prior judgment that the deed was a nullity, as a matter of fact it conveyed legal title to the grantee named; and (2) the sale by the original trustee deprived the defendant of the benefit of competition of buyers, because nobody other than the holder of the legal title could buy without buying a lawsuit. This second contention may be disposed of very briefly, as it is without merit, for the reason that the judgment was as much a part of the chain of title as was the deed to the plaintiff, and any buyer would be presumed to know that in no action could the plaintiff in that case set up title of any character in herself by virtue of the first deed.

[4] A consideration of defendant's first objection convinces us that it, also, is without merit. Defendant contends that in the second suit (the present suit) she is not estopped by the consent adjudication in the first suit that the original deed was a nullity, because the original trustee was not a party to the suit and the deed was not in fact a nullity, but conveyed legal title to the plaintiff, which under the case of Seccombe v. Roe, 22 Cal. App. 139, 133 Pac. 507, placed her in a position of a substituted trustee for the original trustee.

When the stipulation was made and the judgment entered, the plaintiff, under the defendant's theory, combined in herself the two relations of trustee and beneficiary of the trust under the trust deed. She agreed with the defendant for the defendant's benefit that the trust deed was a nullity for all purposes. The original trustee accepted the result of this stipulation by executing at her request the second trust deed. Having had the benefit of one result of the stipulation in the first suit, the defendant must bear the burden of the other results of the stipulation, and in a suit between the same parties cannot be heard to say that the deed was effective for any purpose—contrary to the stipulation and judgment between the parties—and this regardless of any legal effect that the instrument may have had as between other parties. Himmelmann v. Sullivan, 40 Cal. 125. The very basis of estoppel is that regardless of the real fact, the parties have placed themselves in a position where they will not be heard to assert any state of facts, whether true or false, in contravention of their agreement. This is as true as to estoppels of record as to estoppels in pais. Love v. Waltz, 7 Cal. 250.

A very similar question arose in the case of Jackson v. Lodge, 36 Cal. 38. That was an action to recover a piece of land, title to which was, in 1860, in one Turman under a deed absolute on its face, and which Turman subsequently conveyed to Lodge, the defendant, and after which he again conveyed to one Jackson. Jackson was the plaintiff and Lodge the defendant. It appeared that Jackson, Turman, and another, prior to the conveyance to Lodge, had borrowed money from him. Upon default, Lodge brought suit against Jackson and his comakers, Turman and the other. Turman allowed the judgment to go by default. Jackson and the other answered, setting forth that they executed the note for accommodation, and that shortly after the execution of the note, Turman, for the purpose of paying it, had conveyed the land to Lodge. Lodge denied the deed to him was made in satisfaction of the note. It was thereafter found that the deed was absolute and not a mortgage. Jackson, having succeeded in his defense against the note on the sole ground that the deed from Turman to Lodge was a conveyance of land in satisfaction of the note, then sought in the second suit to recover the same land under his subsequent deed on the sole ground that the conveyance was not absolute in satisfaction of the note, but a mortgage to secure it. It was urged that Turman who had defaulted in the original suit, would not have been estopped by that judgment. The court said, in language directly applicable to this case:

> The question now is not what title Jackson took by the conveyance, but whether he is concluded by the prior adjudication of the same matter in which he and Lodge were parties, in which he was directly interested in determining the character of the conveyance, and in which it was found and adjudicated in his favor that his grantor had already conveyed the land to Lodge. The benefits of that adjudication he has fully enjoyed. For he has taken a title which, however good it may be, he has once litigated, and had adjudicated and thereby estopped himself from further litigation. He did it with full knowledge of the facts, and he cannot complain. At all events he is concluded."

It has been held in the case of Donner v. Palmer, 51 Cal. 629, that if the parties to an action in ejectment agree to facts which are based on the presumption that at a certain time a title was in a third person, and the court decide on the facts, neither party can afterward be heard to assert, for the purpose of avoiding the effect of the judgment, that such third person had no title. We think this case answers the contention of appellant that the trustee had no power to convey at the time it executed the second deed to the plaintiff.

[5, 6] The third objection of appellant is that the court erred in granting the motion of plaintiff for judgment on the pleadings. The appellant's position, in effect, is that even though the affirmative allegations of the answer should be held to constitute an estoppel, an issue was raised as to the ownership of the plaintiff by a denial of such ownership in the answer. As we have heretofore remarked, the complaint in this case did not contain the ordinary recitals of a complaint to quiet title. The plaintiff pleaded the specific and detailed facts of her ownership and right of possession to the real property in controversy and her special equities, growing out of the relations of the parties, the sale by the trustee, the stipulation and prior judgment between the parties, and the second sale to the plaintiff—and then she alleged that she had not voluntarily or involuntarily parted with any interest acquired by her, and that "by the proceedings hereinbefore mentioned the plaintiff has become, and by such proceedings she now is, the owner of the said real property and of the whole thereof." We think that under the special allegations of the complaint in this case this allegation of ownership is but a conclusion of law arising from the facts previously alleged, and the denial of this conclusion in the answer raised no issue. While it is true that, in general, an allegation that a party is the owner of real property is an allegation of an ultimate fact, and not of a conclusion of law, and there are a number of cases in this state so holding, yet it has been held also that the same averment may be a statement of fact or a conclusion of law, according to the context. Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161; Turner v. White, 73 Cal. 300, 14 Pac. 794. In the present case, the complaint does not contain an allegation of unqualified ownership, but only an allegation of the consequences resulting from the transactions set forth in the complaint. The allegation is that "by the proceedings hereinbefore mentioned * * * the plaintiff is the owner, * * *" etc. This is a legal conclusion, and its denial raises no issue. Furthermore, the denial by the defendant of this conclusion of law was a denial inconsistent with the facts admitted in the answer. It was in effect also a conclusion of law from the facts set out by the defendant, and it was, under our conclusions here, an erroneous conclusion therefrom. Under such circumstances it cannot avail to prevent a judgment on the pleadings. Drew v. Pedlar, 87 Cal. 444, 25 Pac. 749, 22 Am. St. Rep. 257.

In addition to the cases above referred to, the case of Hamman v. Milne (Sup.) 178 Pac. 523, recently decided by our Supreme Court, holds that where in a suit to quiet title, the defendants were precluded from attacking the validity of certain patents upon which the plaintiff relied, judgment on the pleadings is proper.

Under the pleadings in this case, we are of the opinion that judgment on the pleadings was proper.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

40 Cal. App. 451

SUTTER BUTTE CANAL CO. v. RICHVALE LAND CO. et al. (Civ. 1933.)

(District Court of Appeal, Third District, California. March 27, 1919.)

1. Waters and Water Courses 🔑254—Irrigation Contract — Performance — Evidence.

In action to recover for water alleged to have been furnished by plaintiff to a land company for irrigation, *held*, under the evidence, that plaintiff did not deliver water in accordance with the contract.

2. Estoppel 🔑78(1)—Reservation in Conveyance.

Where respondents in contract of purchase agreed with vendor that contract and deed should be subject to prior instrument reserving right of way for irrigation ditches, and thereafter vendor and plaintiff entered into contract under which plaintiff was to furnish water for the premises and vendor should supply all necessary rights of way, *held* respondents are estopped from urging that the language used in the prior instrument does not measure up to a reservation, and that they are entitled to compensation for land taken in construction of ditches.

3. Vendor and Purchaser 🔑46—Reservation of Right of Way—Reversion.

It being the intention of the vendor and purchasers in contract of sale to except from operation of deed a right of way for irrigation ditches, the court is not justified in resorting to technical refinement as to the meaning of "reversions" to defeat the manifest intent to exclude right of way.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Sutter Butte Canal Company against the Richvale Land Company, W. H. Bradley, and W. W. Ralls, in which the two defendants last named filed cross-complaints. At the beginning of the trial, the company withdrew. Judgment for cross-complainants, and plaintiff appeals. Reversed.

Henry Ingram, of Gridley, and W. H. Carlin, of Marysville, for appellant.

Samuel J. Nunn, of Chico, for respondents.

J. Oscar Goldstein, of Chico, for defendant.

BURNETT, J. The action was brought to recover $129 for water alleged to have been furnished to the Richvale Land Company under a certain contract, which is set out in the complaint and which makes the charge a lien upon the land to be irrigated. The real property involved consists of lot No. 35, and the east half of lot No. 36 of Richvale Colony, No. 1, in Butte county, the legal title to which was and is in said land company, although prior to the execution of said contract for water Bradley and Ralls had entered into an agreement with the Richvale Land Company for the purchase of the land, and they were actually in the possession and use of it during the year 1914, the period with which we are herein concerned. At the beginning of the trial, the Richvale Land Company withdrew, and the trial was had on the complaint and answer and the cross-complaint of Bradley and Ralls and answer thereto by plaintiff. The cross-complaint denied that plaintiff had furnished the water as agreed, and cross-complainants set up a claim for damages to their crop of rice because of the failure to deliver the water in time, also a claim for compensation for 4.18 acres of land alleged to have been taken by plaintiff in constructing ditches and roads. The court found that plaintiff had failed to deliver the water according to its contract, thereby damaging cross-complainants to the extent of $277.90 and had appropriated 3.13 acres of the land for which Bradley and Ralls were allowed the sum of $250.40.

It is conceded that the vital questions presented on this appeal are two, as follows: "Did plaintiff deliver the water in the year 1914 in accordance with its contract?" and "Were defendants Bradley and Ralls entitled to judgment for the 3.13 acres of land in question?"

[1] As to the first of these, we think plaintiff is in error in the claim that there is no substantial evidence in support of the adverse finding of the court. It appears that plaintiff was to furnish 95 second feet of water for the irrigation of some 5,066 acres of land altogether, including the lots in controversy, and Mr. Charles T. Tulloch, superintendent and manager of plaintiff, testified positively that the requisite amount was furnished.

It also appears without question that the amount agreed upon was amply sufficient for the purposes of all the landowners. It may be stated further that no witness for respondents attempted to specify the number of second feet that was actually furnished, but several of them related facts from which the conclusion would follow that there was a material omission to comply with the requirement of the contract. It seems unnecessary to recite the testimony or to comment upon it further than to say that the declaration of the witnesses that there was a "shortage" in the supply could be understood to mean, under the circumstances detailed by the witnesses, only that the amount furnished was less than what was promised. The term itself, in a sense, represented the opinion of the witness, but no objection was made on that ground, and we cannot say that the lower court attributed to it a greater significance than it deserved. The other question we regard as of more serious moment.

[2] There is no controversy as to the extent of the land that is embraced in the

ditches and roads used by plaintiff for its irrigating system or as to its value, but it is claimed by appellant that this is not the proper subject of counterclaim or cross-complaint and, furthermore, that appellant obtained a right of way for these roads and ditches by virtue of certain instruments set out in the record.

This latter contention will first receive our attention. The original instrument was executed by the Richvale Land Company on September 20, 1909, and it was recorded in the county recorder's office in Book H of Miscellaneous Records. Said document was termed: "Stipulation, Richvale Colony No. 1." Among other things it recited:

> "The said Richvale Land Company intends selling the said colony in tracts to various purchasers. Now, therefore, it is stipulated that in all such sales the said Richvale Land Company reserves to itself and assigns the right of way over the following property to be used as roads by the general public and the right to enter upon, open, and grade said roads. The property so reserved is a part of said Richvale Colony No. 1, and is particularly described as follows, to wit," said description including the lots in controversy.

Said "stipulation" proceeds:

> "And, it is still further stipulated that in all such sales Richvale Land Company reserves to its assigns and successors a right of way in, to, and across said Colony No. 1 and all portions thereof for the purpose of constructing and maintaining and operating (free of cost) irrigation and drainage ditches and to flow water therein, however, not unnecessarily to the detriment of purchasers of property."

We may state that there is no controversy as to the road, and it will therefore be eliminated from further consideration. Nor is there any claim that any of the ditches which were constructed was or is "unnecessarily detrimental" to any one. Then comes the subsequent agreement of sale with respondents of November 8, 1909, covering said lot No. 35 and the east one-half of lot No. 36 and containing the covenant:

> "It is agreed by and between the parties hereto that on the performance of all the stipulations, covenants and provisions herein on the part of the purchaser the company will execute and deliver to the purchaser, his heirs or assigns, a good and sufficient deed conveying title to the land contracted to be conveyed upon the conditions, however, that the contract and deed made hereunder shall be subject to the terms, provisions, reservations, stipulations, etc., set out and contained or referred to in a certain instrument, dated the 20th day of September, 1909, and recorded the same day in the office of the county recorder of said Butte county in Book H of Miscellaneous Records, at pages 409 and 410. The purchaser hereby assents to the said terms, provisions, reservations, stipulations, etc., in said instrument contained."

Then follows the agreement of June 30, 1911, between appellant and the Richvale Land Company, providing that appellant will furnish water for these very premises, and binding the party of the first part (appellant) to construct and complete for the second party (Richvale Land Company) "on or before the 30th day of December, 1911, all lateral ditches, weirs, gates and structures necessary in its judgment for the delivery of water to said land." The agreement further provides that the Richvale Land Company would "supply all necessary rights of way therefor and install service gates" and maintain the ditches, weirs, etc., and would pay the party of the first part the sum of $13.50 per acre for the construction of said canals and ditches. In accordance with the terms of this contract, said structures were completed by appellant, there being apparently no controversy as to their proper location. The case thus stands for appellant apparently as follows: The undisputed owner of the land, by a solemn instrument of record, declares the purpose and intention to reserve from the operation of any future sale a right of way for canals and ditches necessary for irrigation. Thereafter an agreement of sale for a portion of said land is executed, in which the vendees recognize and consent to said "reservation." This transaction is followed by an agreement between the said owner and appellant, whereby the former grants to the latter a right of way for said purpose, which is accepted and its location agreed upon and the structures completed. Assuming that each step as thus detailed is legally what it purports to be, of course, no one would contend that said vendees could successfully urge a claim against appellant for compensation for the land used for said right of way. But the point is made that the attempted "reservation" for the right of way for said ditches, in said instrument of September 20, 1909, is entirely void, for the reason that it is in favor of a third party, and, also, because said third party is not designated and identified. The "reservation," it is to be remembered, does not read "Richvale Land Company reserves to *itself*, its assigns and successors," as is usual in such cases, but the provision is "Richvale Land Company reserves to its assigns and successors," etc.

In Eldridge v. See Yup, 17 Cal. 52, it was held that such a covenant or reservation would be void, the court saying:

> "A person who is not a party to a deed cannot take anything by it unless it be by way of remainder. The grantor cannot covenant with a stranger to the deed."

However, it is sometimes the case that what is called a "reservation" is treated as an "exception" and effect given to it, although, under the established rules of interpretation, it is inoperative as a "reservation." Martin v. Cook, 102 Mich. 267, 60 N. W. 679; Burchard v. Walther, 58 Neb. 539, 78 N. W. 1061; Bridger v. Pierson, 45 N. Y. 601; Redding v. Vogt, 140 N. C. 562, 53 S. E. 337, 6 Ann. Cas. 312. This is in line with the recognized policy of the law to give effect, as far as possible, to the intention and purpose of the parties to an instrument.

[3] But, it is apparent herein that the said provision in the instrument of September 20, 1909, strictly speaking, constitutes neither a "reservation" nor an "exception." This follows from the fact that the instrument was not a conveyance, nor an agreement for the conveyance, of any property, nor did it purport to be such an instrument. However, it was written evidence of the purpose of the owner to withhold from the operation of the deed to any future purchaser of said land or any portion thereof a right of way for said ditches and canals. Whether the recording of said instrument would constitute notice of such intent we need not consider, since there is no dispute herein as to *actual* knowledge of that instrument. Moreover, as we have seen, respondents expressly agreed to be bound by the terms of that instrument. Their title rests upon said executory agreement of November 8, 1909. We must scan its terms to ascertain the intent of the parties. The vendor therein agreed to convey to the vendees a good and sufficient deed, subject, however, "to the terms, provisions, reservations and stipulations," etc., of said instrument of September 20, 1909. In other words, reading the stipulation of the earlier instrument as thus incorporated in said agreement of sale, we find that the Richvale Land Company, upon the consideration of certain payments by respondents, "agrees to sell and convey unto the purchaser and the purchaser agrees to buy * * * the following real estate * * * subject to the following stipulation that in such sale Richvale Land Company reserves to its assigns and successors a right of way in, to, and across said Colony No. 1 and all portions thereof," etc. No one could doubt from this language that it was the intention of the parties to except from the operation of the deed a right of way for said purpose, and a court is not justified in resorting to technical refinement as to the meaning of "reversions" to defeat the manifest intent of the parties to exclude this right of way.

Again, it is too late for respondents to urge successfully that the language used does not measure up to the definition of a reservation. They deliberately agreed that their deed should be subject to such reservation, and, acting upon that agreement, appellant and the Richvale Land Company entered into their contract under which the improvements were made without any objection, we may assume, from respondents, and they should now be estopped from claiming that said stipulation and reservation is void. That an attempted reservation or exception in a conveyance in favor of a stranger, although not conferring title, may sometimes operate as an admission in his favor, or as an estoppel against the grantor, is supported by the authorities. Butler v. Gosling, 130 Cal. 422, 62 Pac. 596. The same principle would apply to the vendee in a case like this, where he has agreed to the reservation.

As indicated above, there is no question before us as to the authority of the Richvale Land Company to locate the right of way. Where a dispute does arise in such cases, however, the rule to be applied is thoroughly considered in Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769, and Ballard v. Titus, 157 Cal. 673, 110 Pac. 118. If we are right in the foregoing, the other point suggested by appellant becomes unimportant, and we need not consider it.

We think the trial judge was in error in allowing cross-complainants compensation for the land appropriated for said right of way, and for that reason the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

40 Cal. App. 492

HOME TELEPHONE & TELEGRAPH CO. v. CITY OF LOS ANGELES et al. (Civ. 1856.)

(District Court of Appeal, Second District, Division 1, California. March 28, 1919.)

1. LICENSES ⚷34 — RECOVERY—VOLUNTARY PAYMENT.

Taxpayer may recover license tax claimed to have been involuntarily paid, though he was not threatened with actual imprisonment or threatened with the penalty of having his right to do business taken away.

2. LICENSES ⚷34 — RECOVERY—VOLUNTARY PAYMENT.

That license tax collector has recourse to civil action to collect tax does not divest payment of license under protest, of its voluntary character; for protestant can contest validity of tax without suffering risk of incurring excessive penalties or arrest.

3. LICENSES ⚷34—ACTION TO RECOVER LICENSE PAID—SUFFICIENCY OF EVIDENCE—VOLUNTARY PAYMENT.

In action against city to recover license tax paid under ordinance void under Const. art. 13, § 14, where ordinance imposed penalty of fine or imprisonment for failure to pay license, evidence *held* to sustain finding that plaintiff had been coerced into paying the license tax.

4. LICENSES ⚷34 — RECOVERY — WRITTEN PROTEST—SUFFICIENCY.

Where payer of license tax had discussed ordinance imposing tax with collector, claiming it to be unconstitutional, failure of written protest to payment of license to state grounds for invalidity of ordinance was not fatal to recovery of the license paid.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Home Telephone & Telegraph Company against the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for appellants.

John E. Biby and Trippet, Chapman & Biby, all of Los Angeles, for respondent.

JAMES, J. This appeal is taken by the defendant city of Los Angeles and certain of its officers from a judgment entered in favor of the plaintiff. The judgment was for the return of certain fees paid as a license for the conducting of a telephone business within the city of Los Angeles. It was admitted that under an amendment to the Constitution of the state, adopted in November, 1910 (section 14, art. 13), the municipality had no power to exact a license tax from the plaintiff, and that its ordinance attempting so to do was void. The ordinance under which the claim for license tax was made against the plaintiff provided that telephone companies should pay a license tax monthly; that any tax remaining unpaid for a period of 10 days should have added a penalty of 10 per cent.; that "any person, firm or corporation" violating any of the provisions of the ordinance should be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than $5 nor more than $200, or by imprisonment in the city jail for a period of not more than 100 days, or by both such fine and imprisonment; and that "each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted. * * *" There was testimony heard by the trial judge on behalf of the plaintiff showing that the secretary of the latter had had interviews with the tax and license collector, whose duty it was to enforce the terms of the license ordinance, and that it was orally called to the attention of the collector during these conversations that the Constitution had been amended, and the officer of the plaintiff inquired if the city attorney had not advised them regarding the noncollection of the license tax, and that the tax collector had answered, "No," that "they were going right ahead with the operation of it, and that we would have to pay up or they would have to enforce the penalties." Further conversation was had to the same effect, the tax collector's office insisting upon payment of the tax; whereupon the tax was paid by the plaintiff, the payments being accompanied by a written notice of protest. The secretary of the plaintiff corporation testified that he feared proceedings of arrest if payment was not made. He testified further:

> "My recollection was that in the interview that we had in the tax and license collector's office the general statement was made, 'You know the provisions of the ordinance, and if you fail to comply with them you or somebody will have to be arrested under the provisions of the ordinance.' And practically every time we paid afterwards there was an argument because we did not think it was a proper charge to be made, and thought it was illegally made. While I can't point to specific instances, I might say that we practically had an argument every time the payment was made right from January on, and even back of that."

Appellants raise several points in support of their claim that the judgment entered cannot be sustained. The principal of these contentions is that the payments must be considered as voluntary, as no acts were committed on behalf of the city such as would amount to legal coercion. Under the provisions of the ordinance which have already been noted, there was a delinquency penalty to be imposed where the licensee failed to pay his license tax within 10 days from the due date. A further provision existed providing for the arrest of those who violated any of the provisions of the ordinance, with a possible fine and imprisonment, the maximum being $200 fine or 100 days in jail, respectively, and that each day during which such violation continued would constitute a separate offense. Appellant's counsel cite Trower v. City and County of San Francisco, 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183, where the Supreme Court, in defining what constitutes legal duress which will give involuntary character to payments made under pretended force of law, declares:

> "The distinction to be observed is between a payment made for the purpose of protecting or securing the present enjoyment of a right to which the person is immediately entitled, and a payment made to prevent a threatened disturbance of such right where there is no authority to interfere with its enjoyment until the right of the threatening party shall be established in a judicial proceeding in which the rights of the respective parties may be presented and determined. In the latter case a payment to avoid such threatened contest is regarded as voluntary, while in the former case it is compulsory."

Also Justice v. Robinson, 142 Cal. 199, 75 Pac. 776, the court there stating:

> "The general rule in reference to the payment of taxes under protest, where not controlled by some statutory provision, is, that, in the absence of acts amounting to duress or coercion, the payment is deemed to be voluntary, and a mere protest made at the time of such payment does not divest it of its voluntary character. Where there is no legal compulsion, the legal effect of the payment is not impaired by protest."

[1] A number of other cases are cited, among them some from other jurisdictions, which are all declarative of the generally accepted rule that there must be a sufficient showing of legal coercion before a person may pay a public tax and not have such payment considered voluntary. We think, however, that it is not essential to a recovery of such a tax that the person be threatened with actual imprisonment or threatened with the penalty of having his right to do business taken away. There may be penalties which fall perhaps short of this mark to avoid which the person paying may protect himself by protest. As was said in Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050, cited in Hartford Fire Insurance Co. v. Jordan, 168 Cal. 270, 142 Pac. 839:

> "Courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms."

That case, to be sure, had to do with the payment of corporation franchise tax where the failure to pay the tax, if the same were determined legal, would have resulted in the corporation being deprived of its right to do business in the particular state.

[2] If under the ordinance here considered the tax collector had only recourse to a civil action to collect the license tax, then there could be no payment under protest sufficient to divest the payment of its voluntary character; for the protestant could then contest the validity of the tax without suffering the risk of incurring excessive penalties or arrest. But in the enforcement of the provisions of the ordinance there was available to the tax collector the machinery of the municipal criminal courts, and with the provision of the ordinance, as stated, that a violation continued should be deemed a new offense on each succeeding day, the plaintiff might have incurred liability for a large amount of money by way of criminal fines before the legality of the tax could have been finally determined. This is assuming that the arrest would be that of the corporation under the provisions of the Penal Code, rather than the arrest of officials of the corporation individually. In addition to this, there would seem to be little doubt but that there might be such action on the part of the officials of the corporation in violation of the terms of the ordinance as might subject them to individual arrest and thus create an additional reason why the payments made to avoid such consequences should not be considered as voluntary. The secretary of the corporation, according to his testimony, had it in mind that arrests might follow, as the tax-collecting authority had informed him that the "penalties" of the ordinance would be enforced. The state of mind of the official was of more important legal consideration than any undisclosed intent of the officers whose duty it was to collect the city's license taxes. "And a threat of arrest for which there is no ground does not constitute a duress, as the person threatened could not be put in fear thereby. But these rules fail to take into consideration that the question at issue in such cases is whether the mind of the person was overcome by impending criminal proceedings to such an extent as to make his act of payment involuntary. No hard and fast rule therefore should be laid down, but each case must be decided on its own peculiar facts." 21 Ruling Case Law, § 178, p. 154.

[3] Our conclusion on the proposition stated is that there was sufficient evidence to sustain the finding of the trial judge that the plaintiff was coerced into making the payments for which recovery was sought.

[4] It is next contended that the written protest filed at the time of the making of the license tax payments was not sufficient, for the reason that particular grounds were not sufficiently stated. The notice of protest did advise the license collector that the licensee considered the ordinance void, and it was further stated in the notice that the ordinance was in violation of the Constitution of the United States and of the Fourteenth Amendment thereof. We have referred hereinbefore to the testimony of the secretary of the corporation wherein it was shown that he had discussed with the license collector the effect of the amendment made to the California Constitution in 1910, and had claimed that under that amendment the plaintiff company should not be required to pay the tax; that, notwithstanding this notification, the collecting officer insisted that he would enforce the penalties of the ordinance. It has recently been held by our Supreme Court that such a protest may be made orally, and that particular grounds thereof need not be expressly stated, where the collecting official is already informed of the reasons upon which the paying party objects to the tax. Spencer et al. v. City of Los Angeles et al. (Sup.) 179 Pac. 163.

We have examined the specifications pointing to alleged errors of the court in receiving certain testimony, and are satisfied that upon these assignments no such error is shown as to warrant a reversal of the judgment.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

40 Cal. App. 484

JOHNSON v. WUNNER. (Civ. 2669.)

(District Court of Appeal, First District, Division 1, California. March 28, 1919.)

1. SPECIFIC PERFORMANCE 🔑32(3) — CONTRACTS ENFORCEABLE—MUTUALITY.

Oral contract, under which plaintiff landlord agreed to erect building on adjoining property if defendant tenant would then lease entire premises, cannot be specifically enforced by plaintiff after performing his part and tendering lease to defendant for execution, since agreement lacked mutuality.

2. PLEADING 🔑8(20)—CONCLUSIONS OF LAW —INJURY OR DAMAGE.

A complaint seeking specific performance of a lease, which alleges that, unless said lease be executed plaintiff will suffer great and irreparable injury and loss, states a mere conclusion of law, and does not authorize granting damages, instead of specific performance.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action for specific performance by Mina H. Johnson against C. Wunner. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter H. Robinson, of San Francisco, for appellant.

Costello & Costello, of San Francisco (E. R. Hoerchner, of San Francisco, for counsel), for respondent.

KERRIGAN, J. This is an action to compel specific performance of an oral contract, which plaintiff claimed was fully performed on her part. At the time the contract was entered into the parties occupied the relation of landlord and tenant. The defendant, who is the tenant, conducted a grocery store in premises owned by plaintiff, and he was desirous of increasing the dimensions of his floor space. Accordingly the parties entered into an oral agreement whereby plaintiff agreed to purchase a vacant lot adjoining the leased premises and erect thereon a building as an addition to the store held by respondent as lessee. The purchase of the lot was made by plaintiff for the sum of $4.700, and plans for the erection of the building were prepared. In these plans it was provided that the east wall of the leased building should be removed, so that the addition erected should be connected with and open into the store, and thus become an integral part of it. It was further orally agreed by the parties that, before the erection of the building reached the stage where the removal of said wall was necessary, a new lease of the entire premises would be executed. Thereupon plaintiff erected at a cost of some $3,000 the contemplated addition, which, having reached the point when it became necessary to remove the wall, plaintiff signed and tendered the contemplated lease, which defendant refused to execute. Construction of the addition was thereupon discontinued by plaintiff, owing to defendant's refusal to comply with his agreement, and this action was brought to compel respondent to specifically perform his contract. Judgment went for defendant, and plaintiff appeals, taking his appeal on the judgment roll alone.

[1] In support of the judgment respondent argues that, as the agreement was one for the erection and completion of a building, it is not the subject of specific performance for the reason that it lacked mutuality, and it was upon this ground that the trial court rendered judgment in favor of defendant. It is conceded that contracts of this character cannot generally be specifically enforced, the reason being that the obligor cannot be forced to perform, and that therefore the obligee should not be compelled so to do. But it is insisted that in the instant case the contract was fully performed, for the reason that, the parties having agreed to execute the lease when the work had progressed to the point when the intersecting wall was to be removed, when that time arrived nothing further remained executory. But a contract of this character at no period of its existence is specifically enforceable. Neither party to an obligation can be compelled specifically to perform it, unless the other party has performed, or is liable to specifically perform, everything that he has thereby undertaken (Los Angeles v. Occidental Oil Co., 144 Cal. 528, 532, 78 Pac. 25; Tuohy v. Moore, 133 Cal. 516, 65 Pac. 1107); and under this rule the contract cannot be divided into independent covenants (Id.). This being so, specific performance was rightfully refused.

[2] Plaintiff further claims that, if the relief sought is not obtainable, she is still entitled to some relief. The only other possible relief would be damages for breach of the agreement. Plaintiff's whole theory of her cause of action, however, was for specific performance. Her complaint is entitled "Complaint in Specific Performance of Lease," and the prayer is confined to that form of relief. No issue of damages was tendered. The only allegation of damages in plaintiff's complaint is found in the recital "that unless said lease be executed plaintiff will suffer great and irreparable injury and loss." Such an allegation is a mere conclusion of law. Mechanics' Foundry v. Ryall, 75 Cal. 602, 17 Pac. 703; Bishop v. Owens, 5 Cal. App. 87, 89 Pac. 844. Before a court of equity can intervene, it is necessary to al-

lege the facts entitling plaintiff to the relief sought. Here no such facts are set forth.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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40 Cal. App. 458

DAVIS v. BLASINGAME. (Civ. 2642.)

(District Court of Appeal, First District, Division 1, California. March 27, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

1. ANIMALS ⚿91—TRESPASS—REPEAL OF STATUTE.

St. 1907, p. 999, concerning trespassing animals upon private lands and the recovery of damages resulting therefrom, did not operate to repeal St. 1873–74, p. 50, and recovery can be had for the depasturing of unfenced land in Fresno county by trespassing animals.

2. ANIMALS ⚿100(2¼)—TRESPASS—ACTION FOR DAMAGES—LIMITATIONS.

Under St. 1873–74, p. 50, an action for recovery of damages for trespass of stock upon unfenced lands in Fresno county is not limited as to its time of commencement to 60 days after the time of trespass.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by W. T. Davis against A. A. Blasingame. Judgment for plaintiff, and defendant appeals. Affirmed.

D. T. Winne and C. K. Bonestell, both of Fresno, for appellant.

Geo. Cosgrave, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action for damages for the alleged trespass of the defendant's cattle upon the lands of the plaintiff and another, and the consequent depasturing of the same. The complaint contains two causes of action, one relating to the depasturing of the plaintiff's own lands, and one relating to the depasturing of the lands of another who assigned his cause of action to the plaintiff. The defense consists in a denial of the allegations of both counts of the complaint. The evidence educed upon the trial showed that the parties to the action were neighbors living in the eastern foothills of Fresno county, and owning tracts of land of considerable acreage in propinquity to each other. With the exception of about 300 acres, the lands of the plaintiff and his assignor were uninclosed, and the defendant pastured his stock repeatedly upon these uninclosed lands after warning to desist from so doing. The trial court rendered judgment in the plaintiff's favor for the damages in the sum of $1,003.35, with costs of suit.

The only two points urged by the appellant upon this appeal are: First, that no recovery can be had for the depasturing of land in Fresno county unless the land is fenced; and, second, that even if such an action is maintainable, it must be commenced within 60 days after the commission of the trespass. The determination of these points requires an inquiry into the state of the statutory law, and the decisions construing the same, in relation to fences upon pastoral lands in the county of Fresno. This inquiry may well begin with the case of Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, in which Mr. Justice Hart, after a very thorough review of the statutes and cases bearing upon the subject, holds that the rule of the common law which required every man to keep his beasts within his own close was abrogated by the Legislature of this state in 1850 (Stats. 1850, pp. 131, 214), and was for a time thereafter not in force in any of the counties of the state of California, but that, commencing in the year 1863, the rule of the common law began to be restored to operation by special acts in that and later years, applying to an increasing number of the counties of the state as conditions changed therein from a pastoral to an agricultural or horticultural state. The first county to be thus affected was the county of Santa Clara. St. 1863, p. 581, as amended by St. 1871–72, p. 580. In the case of Hahn v. Garratt, 69 Cal. 146, 10 Pac. 329, these acts were held to intend that an owner of land in the county of Santa Clara was no longer required to fence it against cattle belonging to another person, but could maintain an action for damages against the owner of cattle permitting them to trespass upon such uninclosed land. In the year 1874 the Legislature passed an act (St. 1873–74, p. 50) entitled "An act to protect agriculture and to prevent the trespassing of animals upon private property in the counties of Fresno, Tulare, Kern, Ventura, Santa Barbara, San Luis Obispo and Monterey." The act provides that the owner or occupant of lands in the designated counties, whether such lands be inclosed or not, should have the right to take up and impound stock found upon such lands, and proceed to sell such stock for the damages occasioned by their trespass. Section 8 of the act gave to such owner or occupant of such lands the right to maintain an action for the trespass in any court of competent jurisdiction without exercising his right of impounding such stock, provided such action was commenced within 60 days. In the case of Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384, the Supreme Court had occasion to construe and apply this statute to a case of trespassing cattle upon unfenced lands in the county of Monterey, and the court there held that a cause of action existed for such trespass in that county in addition to the remedy of the proceeding in rem provided for in that statute, and that the plaintiff in that action was not restricted to the period of 60 days within which to bring his action.

In the case of Heilbron v. Heinlen, 70 Cal. 482, 12 Pac. 385, which was an action for the trespassing of stock upon unfenced land in Fresno county, the Supreme Court sustained such action upon the authority of Triscony v. Brandenstein, supra, holding that the plaintiff was not confined in his proofs to the trespasses committed by the defendant's cattle within 60 days prior to the commencement of his action. A similar ruling was made in the case of Zumwalt v. Dickey, 92 Cal. 156, 28 Pac. 212, an action arising in the county of Tulare.

[1, 2] In the year 1878 the Legislature passed an act entitled "An act concerning the trespassing of animals upon private lands in certain counties of the State of California." By the terms of this act it was declared to be unlawful for any animals, the property of another person, to enter upon any land owned or lawfully in the possession of another than the owner of such animal. The act as at first passed was made applicable to the county of Colusa and certain other counties of the state, not including Fresno, Monterey, or Tulare, and was later in the same session amended so as to apply to the county of Los Angeles. Stats. 1877–78, pp. 176, 878. It was this act which was under review in the case of Blevins v. Mullally, supra, and which was further considered in its application to the county of Los Angeles in the case of Hicks v. Butterworth, 30 Cal. App. 564, 159 Pac. 224. In each of these cases last above cited an important question applicable to the case at bar arose. This was the question as to the effect upon the statute of 1877–78, and necessarily also upon the statute of 1873–74, of the act of the Legislature passed in 1907, entitled "An act concerning trespassing animals upon private lands and the recovery of damages resulting therefrom." St. 1907, p. 999. By the terms of this latter act it was made unlawful for any person owning or in possession of an animal to suffer or permit such animal to break in or enter upon any land of another person where such land is planted to growing crops, vines, fruit trees, or vegetables, "and is at the time entirely inclosed by a substantial fence or other inclosure." The act provides that "all acts and parts of acts in conflict with this act are hereby repealed." The question discussed by the District Courts of the Second and Third Districts in the two cases last above cited was as to the effect of this act upon the act of 1877–78, and inferentially also upon the act of 1873–74. In both of these cases the conclusion was arrived at that the act of 1907 did not operate to repeal the act of 1877–78, or any other of the special acts declaring the common-law rule as to trespassing stock upon uninclosed lands to be in force in the counties designated therein, but only to limit the application of such rule to lands other than those specially required to be inclosed under the terms of the latter enactment. In each of the foregoing cases a petition for rehearing before the Supreme Court was denied.

The law as thus stabilized by the line of authorities above set forth would seem to be that the rule of the common law regarding the keeping of stock within its owner's close is in full force and effect in its application to pastoral lands in the county of Fresno, and that an action for the recovery of damages for the trespass of stock upon such uninclosed lands is not limited as to its time of commencement to 60 days after the act of trespass complained of. It follows that neither of the two points urged by the appellant herein has sufficient merit to justify a reversal of the case. It may be stated that nothing which was said in the case of Montezuma Improvement Co. v. Simmerly[1] decided by the Second division of this court, is to be taken as contrary to the views herein expressed, that case having application to the county of Mendocino, in which the common-law rule as to trespass has never been in force.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 532

GIANELLI v. BRISCOE. (Civ. 1928.)

(District Court of Appeal, Third District, California. April 2, 1919.)

APPEAL AND ERROR 🔑80(4)—JUDGMENTS APPEALABLE—"FINAL JUDGMENT."

In a suit for the dissolution of a partnership, appointment of a receiver, an accounting, sale of the property, and for a deficiency decree, a decree failing to determine the amount of proceeds and profits due plaintiff, being interlocutory merely, is not appealable; a judgment being final only when it terminates the litigation on the merits and leaves nothing to be done but enforce by execution what has been determined.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Suit by Andrew Gianelli against Michael Briscoe. On the death of plaintiff, Bridget Gianelli was substituted as the administratrix of his estate, and from a decree in her favor, defendant appeals. Appeal dismissed.

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[1] Opinion of Court of Appeal superseded by that of Supreme Court, 189 Pac. 100.

A. H. Ashley, of Stockton, for appellant.

A. H. Carpenter, of Stockton, for respondent.

HART, J. The pleadings disclose that there is a dispute between the parties as to whether or not, for about 14 years, there was a partnership existing in the saloon business in the city of Stockton between Andrew Gianelli, plaintiff's intestate, who commenced the action, and the defendant.

The complaint was filed on October 16, 1916. It was alleged that a partnership between the parties was formed in April, 1902; that it existed until July 2, 1916, at which time defendant took exclusive possession of the partnership property and has prevented plaintiff from having access thereto, and retains the income derived from said business. The prayer of the complaint was that said partnership be dissolved; that a receiver be appointed to take possession of the partnership property; that defendant be ordered to account to plaintiff for all moneys and property received by him, in running said partnership since the 2d day of October, 1912; that plaintiff's share thereof be paid to him by the receiver out of the proceeds realized from the sale of the property; and for judgment against defendant for any deficiency.

On April 16, 1917, the trial court caused to be filed an "interlocutory decree," the material portions of which are as follows:

> "This cause came regularly on for trial upon certain preliminary questions as to whether a partnership existed between plaintiff and defendant, and whether plaintiff was entitled to a dissolution of the same, and to an accounting thereof, on the 5th day of December, 1915, before the court sitting without a jury." It was then stated that evidence was introduced and the matter was submitted to the court for decision, "and all and singular the law and the premises being understood and considered, the court makes and renders its interlocutory decree herein as follows: * * *
>
> "That from the date of the aforesaid agreement of partnership up to the 2d day of July, 1916, both plaintiff and defendant observed and carried out the terms and conditions of said agreement, when on the date last named the defendant, in violation of the terms and conditions of said agreement of partnership, took exclusive and adverse possession of said entire saloon business and all the property thereof, including all the proceeds and profits thereof since the 2d day of July, 1916, and converted the same to his own use, and thereby deprived plaintiff of his right thereto.
>
> "The plaintiff is entitled to a decree dissolving the aforesaid partnership and to an accounting from defendant of all the profits thereof since the 2d day of July, 1916, and to have all the property of said partnership, including the good will thereof, sold, and to have all the proceeds of such sale and the net amount of all moneys received by said defendant from said partnership business since the said 2d day of July, 1916, as may appear by said accounting, equally divided between him and said defendant, and the defendant is hereby directed to render such account within 30 days from date hereof.
>
> "It is further ordered that upon the rendition of said account and a satisfactory settlement and division of the proceeds thereof, and after a legal and proper sale of all the said partnership property and a satisfactory division of the proceeds thereof, as herein provided, the same be reported to this court for approval and confirmation."

Other than what might be regarded as such in the decree, the court made no findings.

Defendant appeals from the judgment under the alternative method.

The first proposition submitted for consideration is that the decree is merely interlocutory, and that therefore no appeal lies therefrom. Upon that ground the respondent insists that the appeal should be dismissed. On the other hand, the appellant contends that since, as is the claim, all the vital issues in controversy are adjudicated by the decree, the same is final.

It is not claimed that, if the decree from which the appeal is taken is interlocutory, it is one from which an appeal will lie. Nor in that case could any such claim be sustained, inasmuch as it is not among those interlocutory orders or decrees from which an appeal is authorized to be taken by section 963 of the Code of Civil Procedure. Illinois Trust & Sav. Bank v. Alvord, 99 Cal. 407, 410, 33 Pac. 1132. And we think the decree appealed from is merely interlocutory, and not a final judgment. It will be observed that it leaves for future determination and adjudication the question as to the proceeds and profits accruing and derived from the business of the partnership from the 2d day of July, 1916, which, it is stated in the decree, were received by the defendant and converted by him to his own exclusive use. It is therefore still necessary, before a final judgment can be rendered, that the amount of such proceeds and profits shall be ascertained by the accounting which was ordered and the same determined and adjudicated by the court upon a consideration of the report of the account of said proceeds to be rendered and returned by the defendant within 30 days from the date of the rendition and entry of the decree.

It is true that the language of the last paragraph of the decree contemplates that the parties themselves may agree to a settlement, in which case all that would remain to be done would be the approval and confirmation of the same by the court upon a report to it of such settlement. And the appellant takes the position that this is all that can be done or that no more is left to be done except to confirm such report as may be made and to enforce by execution the decree already made. But the position is founded on a precarious or indefinite premise, viz. that there will be arrived at between the parties litigant a satisfactory agreement as to the profits withheld from the plaintiff and division thereof, but the assumption that such will be the result of the accounting conducted by the parties themselves cannot be granted. It is possible, if, indeed (in view of the hostile feeling which would in such a controversy as this naturally arise between the opposing litigants), not probable, that a satisfactory or any settlement cannot be agreed upon between the parties themselves, and thus the controversy finally settled. In that case the court would, of course, be compelled to take evidence and make findings as to the several vital matters necessarily involved in the question of profits retained and converted by the defendant and the division thereof, and thereupon render judgment accordingly. It would in such case have to be ascertained and determined by the court how much, if any, of the profits of the business that the defendant received into his possession of which he had made no account to the plaintiff or which he had wrongfully appropriated to his sole and exclusive use. It is, however, not material to inquire whether a satisfactory arrangement or agreement might be reached between the parties themselves so as to leave nothing remaining for the court to do but to confirm the findings contained in the report of their accounting and see that the judgment is then executed. The important proposition is, as above stated, that there are vital matters which the decree appealed from does not adjudicate, but which are left for future determination and adjudication by a judgment or decree from which it would not be seriously contended that an appeal would not lie, since, unlike the decree already entered herein, it would involve a full, complete, and definitive adjudication of all the essential questions in the action.

A judgment is final only "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." Klever v. Seawell, 65 Fed. 373, 12 C. C. A. 653; Express Co.'s Case, 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; Griffin v. Orman, 9 Fla. 22; In re Smith, 98 Cal. 636, 640, 33 Pac. 744; Doudell v. Shoo, 159 Cal. 448, 453, 114 Pac. 579. In the last-named case it is said:

> "Our system of procedure contemplates that there shall be but one final judgment in a case [citing cases], and in the absence of a clear showing, it is not to be presumed that the court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy."

In the case of Clark v. Dunnam, 46 Cal. 204, cited by appellant, involving an action for the dissolution of a copartnership, the court below made specific findings as to all the assets and indebtedness of the firm, and entered a decree whereby a sale of the partnership property and effects were to be made, and directed the payment of all the debts of the partnership and a distribution of whatever might remain of the proceeds of the sale amongst the copartners in certain proportions which were fixed by the decree. The Supreme Court entertained an appeal from the judgment in that case holding it to be a final judgment because all the essential matters in controversy were thereby fully and completely adjudicated. There was nothing remaining to be done but to enforce by execution what had been determined by the judgment. The litigation between the parties on the merits was thus terminated. And if, in this case, the court had ascertained and determined the amount of the profits of the business which the decree declares were received and converted by the defendant, and so have determined how much thereof the plaintiff was entitled to, we would, of course, have a case here to which the case of Clark v. Dunnam would be in all respects analogous, but manifestly that case is not like this, and is therefore not in point. The other cases cited by the appellant are not similar to this, and consequently are of no assistance to him.

Our conclusion is that an appeal does not lie from the decree here, and the appeal therefrom is, therefore hereby dismissed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

40 Cal. App. 471

BLESSING v. FETTERS et al. (Civ. 1905.)

(District Court of Appeal, Third District, California. March 28, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

1. Landlord and Tenant 🔑184(2)—Deposits to Secure Lease—Termination of Tenancy by Eviction.

In an action by a tenant's successor in interest to recover a deposit made by the tenant with the landlord, evidence *held* sufficient to sustain a finding that the lease was terminated by eviction, so that the landlord was not entitled to retain the deposit.

2. Landlord and Tenant 🔑172(2)—"Constructive Eviction"—What Constitutes.

Any intentional and injurious interference by a landlord, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises, or any part thereof, or materially impairs such beneficial enjoyment, is a "constructive eviction."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Eviction.]

3. Landlord and Tenant 🔑184(2)—Deposits to Secure Lease — Landlord's Right of Retention.

A landlord is not entitled to retain deposits given to secure certain covenants of the lease after the termination thereof by eviction.

4. Landlord and Tenant 🔑76(3) — Assignments of Lease—Necessity of Landlord's Consent.

Under a lease requiring the landlord's written consent to an assignment by the tenant, that the tenant assigned a half-interest in the lease to his partner without the written consent of the landlord, and in violation of covenants of the lease, did not forfeit the lease, where the landlord accepted rent from the original tenant with knowledge of the assignment.

5. Landlord and Tenant 🔑101½—Partnership — Effect of Bankruptcy Proceedings.

Where an original lessee forms a partnership, he is entitled to possession of the premises, after the bankruptcy of his partner, by his right as original lessee, and as the remaining solvent partner, until he consents to have the partnership property administered in bankruptcy.

6. Husband and Wife 🔑238(3)—Actions — Joinder of Husband — Judgment Against Husband Formally Joined.

In an action by a tenant to recover a deposit securing the lease, after termination of the tenancy by wrongful eviction by defendant, that defendant's husband is joined as a defendant as a formality required by Code Civ. Proc. § 370, does not authorize a judgment against such husband personally.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Charles B. Blessing against Emma Fetters and husband. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

W. F. Cowan, of Santa Rosa, for appellants.

Reuben G. Hunt and Samuel M. Samter, both of San Francisco, for respondent.

BUCK, Judge pro tem. This is an action brought by a successor in interest of a tenant to recover from the landlord moneys deposited as security for the performance of the covenants of the lease, upon the claim that there had been an eviction of the tenant by the landlord and a consequent termination of the lease. With the foregoing cause of action there is joined a cause of action to recover the sum of $250 deposited by the tenant with the landlord at the time of the making of the lease, with the understanding that this sum should be returned by the landlord to the tenant at the termination of the lease, upon the renewal of a certain liquor license in favor of the landlord.

The case was tried without a jury, and the court found that there was an eviction, and that plaintiff was entitled to recover the $250 deposited to cover the saloon license, and also was entitled to recover the sum of $1,000 deposited as security for the performance of the covenants of the lease, less the sum of $350, being the damage caused by breach of covenant to take proper care of the premises and goods leased. Judgment accordingly in the sum of $900 was given against defendants Emma Fetters and her husband, George Fetters, from which they each took this appeal.

In appellants' brief no points are made or suggested in regard to the findings or evidence in the cause of action in regard to the $250 deposited on account of the liquor license. In their brief "appellants claim in this action that the sole question for decision is: Did the lessor either actually or constructively evict the tenant Nichols?" On this issue the finding of the court was as follows:

> "On or about the 13th day of September, 1917, the defendant Emma Fetters, while the said lease was still in full force and effect, wrongfully re-entered upon the said hotel premises and evicted all persons therefrom and assumed possession thereof, all without the consent and against the will of said partnership, said Nichols, and said bankrupt, and thereby terminated said lease, and released the said Nichols from his obligation to pay rent under said lease. Ever since such re-entry the defendant Emma Fetters has been and now is in full possession of the said premises to the exclusion of said Nichols, the said bankrupt, the said partnership, and the plaintiff as such receiver and trustee. Ever since on or about the 4th day of October, 1917, the defendants have been operating the said hotel premises for their own use and benefit, to the exclusion of said Nichols,

the said bankrupt, the said partnership, and the plaintiff as such receiver and trustee."

This finding is in strict accord with the issues made by the pleadings, and no issue is raised by the pleadings in regard to the termination of the lease in any other manner than by the eviction above found. On most points the evidence is sharply in conflict, and in some respects the inferences which may be drawn from the evidence are equally conflicting; but it substantially appears from the evidence that the lease in question was executed on the 2d day of January, 1917, for the term of five years, at the annual rental of $960, payable quarterly in advance, and was for the property known as the "Hotel Chauvet," consisting of the hotel building and hotel equipments and furniture therein contained, and of the estimated value of $1,000. The lease contained the usual covenants for the payment of rent, and that the tenant should not "voluntarily or involuntarily assign this lease without the written consent" of the landlord, and provided that the tenant should conduct the hotel business in a quiet, lawful, and orderly manner, and should properly care for the premises and keep the buildings in good condition of repair at his own cost and expense, and "upon the expiration of this lease, or any sooner determination thereof, the tenant will quit and surrender the premises and all of said personal property in as good state and condition as reasonable use and wear thereof will permit." And the lease further recited that the tenant, upon the execution of the lease, has deposited with the landlord "the sum of one thousand ($1,000.00) dollars as a guaranty that he will faithfully perform each and every of the covenants of this lease, and said sum of one thousand ($1,000.00) dollars is to be kept and retained by the said party of the first part (the landlord) during the term of this lease as a guaranty for the faithful performance thereof, and any damage or detriment that said party of the first part may sustain by reason of any violation of any of the covenants of this lease shall be indemnified and paid from said sum of one thousand ($1,000.00) dollars."

On May 15th, following the execution of the lease, the tenant Nichols entered into an agreement of partnership with one Oscar Banks for the purpose of conducting the hotel and saloon business in the leased premises. For a one-half interest in the business Banks paid to Nichols the sum of $800, and received from Nichols an assignment of a one-half interest in the lease and moneys deposited under the terms of the lease. The defendant had knowledge of this transaction and of the association of Banks in the business, but never gave any written consent to the assignment, though there is testimony to the effect that she promised so to do. On July 1, 1918, the rent, payable quarterly in advance to October 2, 1918, was paid by Nichols and accepted by the landlord. Later in July some controversy arose between the parties and the landlord, Emma Fetters, who claimed that the hotel business was not being conducted in a proper and lawful manner, and after offering Banks $250 for his interest she stated:

> "If you don't want to sell sooner or later, you have to go out; and if you don't go out, I will show you that I have to put you out."

About two weeks after this Nichols went away on a trip, leaving his partner, Banks, "in charge of the place." But he returned in about two weeks after some attachments had been levied upon the place. After these attachments were paid off by himself and Banks, he went away again, leaving Banks in charge, and saying that "he wanted to go on a trip." Shortly after other attachments were levied, and Mrs. Fetters appeared at the place and told Banks "that, if Mr. Nichols wasn't there, she would have to take over the place, and if I would not go out she would put me out, and that I had no business over there, and I should not stay; that I would spoil her business, her whole investment." To which Banks replied, "I am in charge of this place, and I take very well care for it." Whereupon Banks "sent a telegram to Mr. Nichols that the Chauvet Hotel, the saloon, was attached, and I ask him for his advice what to do. I waited a couple of days, and finally a telegram came and said to do the best I could; so I went up to Santa Rosa, and I left Mr. Billie Karns in charge of the place, and I told him if anybody comes and wanted to go in that place, don't let him in." Upon returning from Santa Rosa about September 11th, Banks was taken in custody by the constable upon a warrant of arrest sworn to by Mrs. Fetters and taken back to the hotel, where he found Mrs. Fetters in possession with the constable. She told him, among other things:

> "If you don't go out, I will have to put you out; and if you don't go out, I will put you in jail, you to stay there."

After Mrs. Fetters had taken an inventory of the furniture in the place, Banks was told by her that he could now go; and Banks, left, fearing, as he states, that if he didn't go she would have him prosecuted and sent to the state's prison, and "Mrs. Fetters commanded the constable to lock everything in the house, let nobody in there, and she would put somebody in, or the constable would put somebody in, and Mr. Doon, what was there, I told him to take charge of the place, and she says, 'There will be nobody here in the place; that place belongs to me, and I don't want to have nobody run my place.' So I went to take the bus to Napa and I never went back." Banks had already contemplated going into bankruptcy, and for that purpose had made an inventory of and segregated a part of the personal property belonging to him on the premises, and on September 13th Banks filed his petition in bankruptcy, and on that day was adjudged a bankrupt. On September 28th the plaintiff herein was appointed receiver, and on October 4th appointed trustee in bankruptcy. On September 20th Nichols filed in the bankruptcy court his written consent to the administration of the partnership affairs by the bankruptcy court. But prior to this, and since the attachments were dissolved by the adjudication in bankruptcy, Mrs. Fetters directed the attachment keeper of the property on the premises to "stay there and take care of the place; that she would have to keep a man there on account of the neighbors"; also at the time of the last attachment, on or about September 11th, Mrs. Fetters told one of the attaching creditors, who had just levied an attachment at her suggestion:

> "We will have to get them out, or I will have to get them out. The remark was made at the time I put the attachment on there; struck me that Mrs. Fetters certainly wanted to get them out."

[1-3] From the foregoing it appears that there was sufficient evidence to justify the finding of the trial court that there was a termination of the lease by eviction before the appointment of the trustee in bankruptcy, and that consequently the defendant landlord was not entitled to retain the deposit given to secure the performance of the covenants of the lease after it had been thus wrongfully terminated by her. As stated in the case of New State Brewing Ass'n v. Miller, 43 Okl. 183, 141 Pac. 1175:

> "Any intentional and injurious interference by the landlord, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises, or any part thereof, or materially impairs such beneficial enjoyment, is a constructive eviction."

And the case of Onward Const. Co. v. Harris (Sup.) 144 N. Y. Supp. 318, holds that threats and abusive language may in some instances be sufficient to constitute an eviction. And the following authorities are conclusive on the proposition that a landlord is not entitled to retain a deposit given to secure certain covenants after the termination of the lease by eviction: Green v. Frahm, 176 Cal. 259, 168 Pac. 114; Rehkopf v. Wirz, 31 Cal. App. 695, 161 Pac. 285; Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156; Wollenshlager v. MacLean, 34 Cal. App. 102, 166 Pac. 853; Tiffany on Landlord and Tenant, pp. 1221, 1258; Wilson v. Agnew, 25 Colo. App. 109, 136 Pac. 96.

[4] Though the assignment of the half-interest in the lease to Banks and its use by the partnership was without the written consent of the landlord, and in violation of the covenant in the lease, it did not create a forfeiture of the lease, especially after the landlord had accepted the rent with knowledge of the assignment. Garcia v. Gunn, 119 Cal. 315, 319, 51 Pac. 684.

[5] The evidence is sufficient to show that at the time of Banks' eviction, Nichols had not abandoned the lease, and that Banks was attempting to hold possession, not only for himself, but also to take care of the property for Nichols. Furthermore, even after the bankruptcy proceedings, on September 13th, Nichols was entitled to hold possession and to have some one on the premises on his behalf, not only under his right as original lessee, but also as the remaining solvent partner until he consented to have the partnership property administered in bankruptcy. Francis v. McNeal, 228 U. S. 696, at page 700, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706.

[6] Appellants insist that in any event the judgment against the husband, George Fetters, should be reversed; and it is clear both from the evidence and the judgment roll that no judgment should have been entered against him. In the complaint it is stated that:

> "Said George Fetters is joined as party defendant herein only because of the provisions of section 370 of the Code of Civil Procedure of the state of California."

And at the opening of the trial counsel stated:

> "The only reason George Fetters is joined as a defendant is because he is the husband of Emma Fetters."

But, notwithstanding this, the plaintiff took judgment that he "have and recover of and from the defendants Emma Fetters and George Fetters, her husband, the sum of $900," etc. By its terms this judgment unjustly binds and affects, not only the separate property of George Fetters but also the community property. But, as stated in the case of Terry v. Superior Court, 110 Cal. at page 88, 42 Pac. at page 465, husbands become—

> "proper and necessary parties defendant, not, however, to the end that they or their property should be bound by the judgment, but solely that they might be able to aid their wives in their defense. The present utility of the statute in this progressive day may be open to question, but, however this may be, it was passed at a time when the lawmakers, perhaps with mistaken chivalry, believed that a wife, brought into litigation, might be the better for the comfort, protection, and support of her husband's authorized presence."

See, also, Van Maren v. Johnson, 15 Cal. 308.

Substantial justice, however, can be accomplished by a modification of the judgment. Davis v. Lamb et al., 5 Cal. Unrep. 765, 35 Pac. 306.

It is therefore ordered that the judgment as to the defendant Emma Fetters be affirmed, with direction to the trial court that the judgment be modified, so as to provide that it do not affect the separate property of the defendant George Fetters or the community property (Van Maren v. Johnson, supra), and, as so modified, the judgment will be affirmed, without costs to either appellant.

We concur: HART, J.; BURNETT, J.

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40 Cal. App. 501

KIRCH v. WATTELL et al. (Civ. 2619.)

(District Court of Appeal, Second District, Division 1, California. March 29, 1919.)

1. Specific Performance ⟹32(3)—Mutuality.

Under agreement expressed in part in a memorandum and in part by certain escrow instruments given to a trustee selected by the parties, whereby plaintiff sold to defendant furnishings, furniture, and leasehold interest in a lodging house, *held*, that there was such mutuality of obligation as entitled plaintiff to specific performance, though the agreement contained a provision for liquidated damages.

2. Damages ⟹85—Liquidated Damages or Security.

Where purchaser agreed that upon his default, deed held by a trustee and transferring certain property to plaintiff as security was to be delivered to plaintiff, and that purchaser should forfeit property as liquidated damages, plaintiff was entitled to the deed as security upon default of purchaser, though provision for liquidated damages was void.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Claire J. Kirch against Junot Wattell and another. Decree for plaintiff, and defendants appeal. Affirmed.

Bernard Potter, of Los Angeles, for appellants.

Ira L. Brunk and J. H. Creighton, both of Los Angeles, for respondent.

PER CURIAM. In this action a decree was entered agreeable to the prayer of the complaint requiring specific performance of the agreement made between defendant Wattell and the plaintiff. In the decree it was further determined that a deed made by Wattell to his codefendant was void as to the plaintiff. The cause of action grew out of a transaction had wherein plaintiff sold to Wattell the furniture, furnishings, and her leasehold interest in a certain lodging house located in the city of Los Angeles. The agreement was expressed in part in a memorandum made at the time and signed by both parties, and in part by certain escrow instructions give to a trustee selected by the parties.

[1] Counsel for appellants, in insisting that there was no mutuality such as would entitle the plaintiff to the remedy which she obtained in this action, refers only to the memorandum first made, which is only in part expressive of the admitted agreement intended to be entered into. In order to arrive at the full purpose of the contracting parties, the escrow instructions constituted a necessary part of the contract. The lodging house sold by plaintiff to Wattell was furnished, and the agreed price was $3,750 for the furnishings, furniture, and leasehold interest. Wattell agreed first to pay the sum of $1,200 on or before the 26th day of December, 1914, and agreed to execute a chattel mortgage on the furniture for $2,550, which should be payable in certain parts per month, with interest stated. It was provided that an extension of time might be given in certain contingencies. As further security that he would comply with the terms of the agreement, Wattell was to deposit a deed with the trustee, transferring title to a lot in the city of Los Angeles to the plaintiff, which deed was to be held by the trustee until default was made by Wattell, whereupon it was to deliver it to the plaintiff. It was stated in the agreement that upon default of Wattell to fulfill his obligations under the contract the deed was to be delivered to the plaintiff, and the contract recited that "the second party [Wattell] agrees to forfeit above named property as liquidated damages." An extension of time was given on the contract, but defendant failed to make the payments to the plaintiff as required, whereupon this action was brought. We think that specific performance was the appropriate remedy, and that plaintiff was not required to resort to an action for damages as her only means of obtaining satisfaction of the obligations assumed by the defendant. Shannon v. Cavanaugh, 12 Cal. App. 434, 107 Pac. 574.

[2] Appellants insist that the court improperly decreed that the deed from Wattell to the plaintiff should be delivered to the plaintiff to be held as security. They argue that the term of the contract providing that the property should be taken under the deed as for liquidated damages was void for the reason that the case was not such a one as to permit damages to be fixed in advance. We may agree that this was so. However, assuming that the plaintiff had received the deed, she would have been entitled to retain it as security for the performance of the obligations of the defendant. She could not have claimed the property transferred by

defendant absolutely as her own, but would have been required to foreclose in order to subject the lot to the payment of her debt. So here the court properly decreed that the deed should be delivered and held in the same way. The form of the chattel mortgage which the court decreed should be executed by Wattell was precisely in record, as to the payments to be made, with the contract as expressed in the memorandum agreement and the trust instructions executed by Wattell. The court found against the defendant's claim that there had been fraudulent representations as to the value of the lodging house, furnishings, and furniture; hence we are not concerned with that question here, as there was sufficient evidence to support those findings. The contract between these parties was poorly expressed, and the action taken under it somewhat disconnected. However, on the record before us we cannot perceive wherein justice has miscarried in this case.

The judgment appealed from is affirmed.

40 Cal. App. 465

CALIFORNIA HIGHWAY COMMISSION OF DEPARTMENT OF ENGINEERING OF STATE OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2945.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

MASTER AND SERVANT ⚿361—WORKMEN'S COMPENSATION — RELATION OF EMPLOYER AND EMPLOYÉ—EVIDENCE.

Where deceased was fatally injured by the overturning of an automobile secured by the highway commission to transport him and another to the place where they, if acceptable to the foreman, would be employed, *held* deceased was not in the employ of the commission at the time of the injury, and his dependents were not entitled to compensation.

Proceedings by Nettie H. McGillivray and others, for compensation for the death of George J. McGillivray, opposed by the California Highway Commission of Department of Engineering of the State of California. Compensation awarded, and the Highway Commission petitions for writ of review. Award annulled.

Daniel W. Burbank, of San Francisco (F. J. Creede, of San Francisco, of counsel), for petitioner.

Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. Upon a writ of review issued herein we are asked to annul an award of compensation made by the Industrial Accident Commission against the California Highway Commission and in favor of dependents of George J. McGillivray, deceased, who is alleged to have died as the result of injuries received while in the employ of the Highway Commission.

The facts are as follows: In May, 1918, petitioner was engaged in constructing highways some distance from the city of Los Angeles, where the office of its division superintendent, whose duties were the general supervision of the work in his division, was located. Each section or job of work was in charge of a superintendent or foreman on the ground. In the month of May the Public Employment Bureau of Los Angeles, having received notice from the division superintendent's office that petitioner was in need of laborers, sent George J. McGillivray to the office of said superintendent, where he applied for work as a teamster, and was told by Mr. Swartz, then in charge of the office, that he could secure a job by applying to Mr. J. G. Beckjord, the foreman on the ground of what was known as the "Ridge Route," distant some 60 miles from Los Angeles, provided he was satisfactory to him. He was also informed as to compensation paid and the amount deducted therefrom as board for employés, who were required to furnish their own blankets, and told that transportation to the place would be furnished him, no charge for which would be made, provided he held his job for one month. For the purpose of conveying deceased and another to the work, the Highway Commission secured an automobile, the owner of which undertook, for hire, the transportation of the men to the place where they, if acceptable to the foreman, would be employed. On the way to the prospective work the automobile overturned, injuring McGillivray, as a result of which he died. In the employment of men for the work Swartz had no authority other than, when men were needed and finding those whom he thought would be acceptable to the foreman, to send them on to the work, telling them, as he did McGillivray, that they could secure a job provided they were satisfactory to the foreman; that as to men thus sent to him the foreman was vested with full authority, as in cases of independent application, to employ them or not, as he might determine. Indeed, as conclusively shown by the evidence, the only person who had the right to employ labor upon the work was the foreman in charge, who frequently refused to accept men sent to him by the office, and that nothing was paid for time consumed in going from Los Angeles to the place of prospective employment.

Upon these facts, as to which there is no controversy, a majority of the commissioners found that McGillivray at the time he received the injuries which caused his death was an employé of petitioner, and that the injury arose out of and in the course of his employment as such employé. In our opinion, there is no evidence to support this finding. As appears from the facts, the relation of the Los Angeles office of petitioner to the foreman on the ground in charge of the work, having sole power to engage laborers, was identical with that of an employment office in finding work for those seeking employment. As was done in this case by Swartz, they are informed as to wages, terms, and conditions upon which, if satisfactory, employment may be obtained by applying to the person in charge of work at a designated place. But until such application is made, and the party accepted, the relation of employer and employé is not established. The information as to wages, terms, and conditions under which petitioner was employing men upon the Ridge Route, coupled with the statement made by Swartz that deceased could secure a job there if he proved satisfactory to the foreman in charge of the work, no doubt induced him to undertake the trip in the hope of obtaining employment; but, in the absence of proof that he applied to the foreman or entered upon service, it is insufficient to establish the relation of master and servant, without which compensation for injury or death cannot be awarded. Deceased knew that success in obtaining employment depended upon the foreman who, as shown by the uncontradicted evidence, was vested with full and arbitrary power in determining whom he would or would not employ. Hence, until he had reported to the foreman and there was some word or act on his part manifesting an acceptance of his proffered service, he could not be said to be an employé of the Highway Commission. Indeed, upon arriving at the camp and finding conditions unsatisfactory, he might, at his option, conclude that he would not apply for work. He was traveling upon his own time, for his own benefit, was not performing, and had never performed, any service for petitioner. The fact that he, instead of providing his own means of conveyance and cost of transportation, availed himself of the proffered offer of petitioner to advance the cost thereof, is an immaterial factor in the consideration of the question, since "the law operates upon a status, i. e., that of employer and employé, and affixes certain rights and obligations to that status." North Alaska S. Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642. Since the status did not exist, the provisions of the Compensation Act are not applicable.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 434

GROSJEAN v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2684.)

(District Court of Appeal, First District, Division 1, California. March 25, 1919. Rehearing Denied by Supreme Court May 22, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS ⟹56—RULES OF BOARD OF EDUCATION—SUSPENSION OR FAILURE TO OBSERVE.

Rules of Board of Education of City and County of San Francisco, § 12, providing that any rules might be amended or repealed by the affirmative vote of three members at any meeting, provided notice in writing of such intended amendment or repeal had been given at a previous meeting, was merely a rule of procedure for the guidance or protection of the members of the board, which they could suspend or ignore on occasion, and in respect to their action in so doing only the members themselves had a right to complain.

2. SCHOOLS AND SCHOOL DISTRICTS ⟹56—RULE OF BOARD OF EDUCATION—SUSPENSION.

Rules of Board of Education of City and County of San Francisco, § 12, providing that any rules might be amended or repealed by the affirmative vote of three members at any meeting, provided notice in writing had been given at a previous meeting, was effectually suspended by the board through its unanimous action in passing amendment to another rule without the formality of the notice in writing of its proposed enactment.

3. SCHOOLS AND SCHOOL DISTRICTS ⟹141(1)—RULES OF BOARD OF EDUCATION—CHANGE—NOTICE TO TEACHER.

Rules of board of education of city and county of San Francisco, § 47, requiring principals when officially notified of any changes or amendments to the rules to cause them to be inserted in the copy belonging to each teacher, was complied with sufficiently where the principal of a teacher directed her attention to a new rule regarding absence of teachers shortly after its passage, and where the teacher then read the rule.

4. MUNICIPAL CORPORATIONS ⟹8—CHARTER—OPERATION AS GENERAL LAWS.

The charter of the city and county of San Francisco, in creating the duties and relations of the superintendent of schools and the board of education, is to be regarded as a state law of equal dignity with the general laws of the state, so long as in school matters it is not in conflict with them.

5. SCHOOLS AND SCHOOL DISTRICTS ⟹141(5)—DISMISSAL OF TEACHER—SUPERINTENDENT OF BOARD OF EDUCATION—RIGHT TO OBJECT.

A school-teacher of the city and county of San Francisco, dismissed from her position, cannot object, on application for mandamus for reinstatement, that the superintendent of schools was disqualified to sit or act as a member of the board of education in hearing and determining charges which he had, as prosecutor, laid

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

before the body; the fact being that he did not sit or act as a member of the board in the final determination of the charges.

6. SCHOOLS AND SCHOOL DISTRICTS ⚷53(2)—BOARD OF EDUCATION—DISQUALIFICATION OF SUPERINTENDENT OF SCHOOLS.

In relation to the acts of such inferior and quasi judicial tribunals as boards of education, boards of supervisors, town councils, and other governing bodies of public subdivisions or municipal corporations, the rules relating to the disqualification of officers, as the superintendent of schools, ex officio a member of the board of education, have but a limited application.

7. SCHOOLS AND SCHOOL DISTRICTS ⚷141(5)—REMOVAL OF TEACHER—OBJECTION TO BOARD OF EDUCATION AS TRIBUNAL—LATE CHARACTER.

Where a school-teacher of the city and county of San Francisco, when meeting charges before the board of education, did not object to any passion or prejudice of the board, but did object on appeal from the decision of the board to the superintendent of schools, the objection was too late, even if it had been valid instead of general.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Application for writ of mandate by Eily S. M. Grosjean against the Board of Education of the City and County of San Francisco, State of California, and others. From judgment for defendants on demurrer to the application, plaintiff appeals. Judgment affirmed.

C. W. Eastin, of San Francisco, for appellant.

George Lull, City Atty., Milton Marks, Asst. City Atty., and Edward F. Moran, all of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in the defendants' favor after an order sustaining their demurrer to the sufficiency of the plaintiff's application for a writ of mandate.

The plaintiff, prior to May 12, 1917, had been a teacher in the public schools of San Francisco for many years, holding diplomas and certificates which entitled her to be a teacher therein and to be retained in such position unless dismissed therefrom for "insubordination, immoral or unprofessional conduct," after the presentation of charges and a hearing thereon as provided by law. It appears affirmatively from the plaintiff's petition that such charges were presented and a hearing had thereon before the said board of education, which thereupon made an order for the plaintiff's dismissal. It is the regularity and legality of this action on the part of said board which the plaintiff attacked by her petition and which she assails upon this appeal.

It sufficiently appears upon the face of the plaintiff's petition that the alleged dereliction of duty which furnished the basis of the charges which were preferred against her was that of insubordination, consisting: First in violations of the rules of the board of education, by repeated absences from her place in the particular school to which she had been assigned; and, second, in insubordination, by failing or refusing to report at the office of the superintendent of schools when required to do so in order to explain such absences. The charges presented against the plaintiff to the board of education by the superintendent of schools on April 30, 1917, specifically asserted that the plaintiff had been absent from her duties without permission for 17 school days out of a possible 20 during four weeks in the months of March and April, 1917, the dates of such absences being March 13th, 14th, 15th, and 16th, after which a vacation intervened from March 26th to April 9th; then followed absences on April 9th, 10th, 11th, 12th, 13th, 17th, 18th, 19th, 20th, 24th, 25th, 26th, and 27th. Prior to April 10, 1917, section 86 of the rules of the board of education read as follows:

> "Teachers desiring to be absent from duty for more than one calendar week must give notice thereof to the board, stating the cause and duration of such absence. Such notification, made upon official blanks, and approved by the principal, must be sent to the board. In cases of sudden illness, or other emergency, teachers may absent themselves temporarily without permission for a term not to exceed five days."

On Apirl 10th the board of education adopted the following resolution, purporting to change this particular rule:

> "Whereas regularity in attendance is a prime duty of the teacher; therefore be it
>
> "Resolved, that section 86 of the rules be and it is hereby abolished and the following substituted therefor:
>
> "In cases of serious sickness or death in the family and of illness grave enough to keep a teacher at home or in a hospital, teachers may absent themselves without permission for a term not to exceed five days. Where teachers wish to absent themselves for other reasons they must notify the board, stating the cause and duration of such absence, and obtain permission therefor, to be certified to them by the secretary of the board of education."

[1] It is the contention of the appellant that the foregoing change in said rule 86 of the board was not legally made, and hence ineffectual, for the reason that its adoption was in alleged violation of section 12 of the rules of the board, which provides as follows:

"Sec. 12. Any rules adopted by the board may be amended or repealed by the affirmative vote of three members at any meeting, provided notice in writing of such intended amendment or repeal has been given at a previous meeting."

We perceive no merit in this contention. The section above quoted is merely a rule of parliamentary procedure adopted for the guidance, and it may be protection, of the members of the board, and which they had power to suspend or ignore when occasion required, and, in respect to their action in so doing, no one but the members of the board themselves would have a right to complain. Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785; Greeley v. Hamman, 17 Colo. 30, 28 Pac. 460; Cooley, Const. Lim. (7th Ed.) p. 113; Heiskell v. Mayor, etc., 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 311.

[2] Besides we think the rule referred to was effectually suspended by the board of education through its unanimous action in passing the amendment to rule 86 without the formality of the notice in writing of its proposed enactment required by section 12. People v. Rochester, 5 Lans. (N. Y.) 11; Nelson v. City of Omaha, 84 Neb. 434, 121 N. W. 453.

[3] It is next contended by the appellant that she was not legally notified of the change thus made in rule 86 of the board, and was therefore not bound by it. This contention is predicated upon section 47 of the said rules, which reads as follows:

> "Sec. 47. Principals, when officially notified of any changes or amendments to these rules, shall immediately cause them to be neatly inserted in the copy of the rules belonging to each teacher in their respective schools."

While it is conceded by the respondent that the record does not affirmatively show that this requirement was complied with, it is pointed out that the plaintiff nowhere alleges that she was not personally made acquainted with the fact and substance of the change in the rule within a day or two after such change was made. On the contrary, the plaintiff sets forth in her petition the full text of the charges made against her, wherein it appears that her principal directed her attention to the new rule regarding absences of teachers shortly after its passage, and that she then read it. This statement the plaintiff nowhere denies; and since the rule imposing upon principals the duty of pasting copies of changes made in the teachers' books of rules has for its only purpose the giving to such teachers notice of the text of changes thus made, this purpose was fully subserved by the plaintiff's reading of the rule.

[4] This brings us to a consideration of the charges which were presented against the plaintiff, and the procedure thereon, to which the plaintiff and appellant offers several more or less specific objections. The charges were presented by the superintendent of schools acting under the express authority and duty conferred upon him by the terms of the city charter, which in chapters I to VI of article VII thereof provides a system of government of the public schools of San Francisco in amplification of the provisions of the Political Code. We perceive no valid objection to the assignment of this specific duty to the superintendent of schools, who is made by the charter an ex officio member of the board of education. The charter in creating these duties and relations is to be regarded as a state law of equal dignity with the general laws of the state so long as in school matters it is not in conflict with them. Stern v. Council, etc., 25 Cal. App. 685, 145 Pac. 167.

Turning now to the substance of the charges themselves, we find that the plaintiff was therein charged with having been absent from her duties four days in the middle of March, 1917, without excuse; that she was again absent during all of the school days of the week commencing April 9, 1917; and was again absent during all of the school days of the following week excepting Monday, if school was held on that day; and was again absent on all of the school days of the succeeding week, again excepting Monday, all of which absences were without permission or excuse. It would be a very strained construction of rule 86 of the board of education as it read prior to April 10, 1917, which would permit teachers without the excuse of illness or other emergency to absent themselves from their place and duty for three successive weeks with the exception of two separate intervening days, without being liable to the charge of dereliction of duty; even, therefore, if rule 86 had not been validly amended on April 10, 1917, as the plaintiff charges, these unexplained absences would have been a violation of both the letter and spirit of the original rule. The change in the rule effected by its valid amendment on the latter date puts the matter, however, beyond dispute, since the amendment requires that teachers wishing to absent themselves from their places for any other reasons than serious sickness or death in their families, or illness of themselves grave enough to keep them at home or in the hospital, must notify the board of education of the cause and duration of such absences, and obtain permission therefor. Under this amended rule the plaintiff by her absences after April 10, 1917, or at least after the rule as changed had been read by her within a brief time thereafter, had subjected herself to the charges which were preferred against her. These charges further specify that on April 18, 1917, the board of education by letter of that date directed the principal of her school to notify the plaintiff to report to the office of the superintendent of schools, but, owing to her absence, this notice was not conveyed to her until

April 23d, which was one of the Mondays when she was at school. She did not so report, nor attempt to do so until after the close of school hours on that day, when she did attempt to report, but failed to find the superintendent in his office. On the following Monday she called the superintendent on the telephone, when he told her that he had prepared charges against her. On that day she again absented herself without permission for the remainder of the week.

The foregoing facts form the basis of the charges which the superintendent presented to the board on April 30, 1917. Upon their presentation the board suspended the plaintiff, and fixed the date of hearing thereon for May 12, 1917, of which the plaintiff had due notice. She appeared before the board on that day, and pleaded not guilty to the charges, but apparently offered no objection to the right of the superintendent to present, or of the board to hear, such charges upon any of the grounds of bias, prejudice, or interest which she now urges against the legality of the proceeding. Upon the hearing upon said charges, and after the taking of evidence pro and con thereon without objection on the plaintiff's part, the board made its findings sustaining said charges and dismissing her from her position as a teacher in the public schools. The plaintiff appealed to the superintendent of schools within the time and in the manner provided by the school laws, which appeal was denied by the superintendent on June 4, 1917. To the charges thus presented, the hearing thus held, the findings and order thus made, and the appeal thus taken and determined, the plaintiff presented certain objections in her petition, and has reiterated these upon this appeal.

[5, 6] The chief of these objections, aside from those already noted and disposed of, relate to the alleged disqualification of the superintendent to present, and of the members of the board of education to hear and determine, said charges by reason of the asserted bias and prejudice of these officials. As to the alleged disqualification of the superintendent of schools to present charges, there is no merit in the plaintiff's claim, since the charter expressly imposes the duty of presenting such charges upon that particular official, and any bias or prejudice which he might have could not affect his right and duty to prepare and present the charges in question. The more serious part of the objection is that relating to the alleged disqualification of the board of education to act in the hearing and determination thereon. The first part of this objection embraces the asserted disqualification of the superintendent of schools to sit or act as a member of the board in the hearing and determination of charges which he has himself in the character of a prosecutor laid before that body. Such an objection might in a proper case prove effectual, but not in the case at bar, since the plaintiff's petition affirmatively shows that the superintendent of schools, while ex officio a member of the board, did not in fact sit or act as a member of the board, in the final determination thereon. But aside from this we think the authorities quite consistently hold that in relation to the acts of such inferior and only quasi judicial tribunals as boards of education, boards of supervisors, town councils, and other governing bodies of public subdivisions or municipal corporations, the rules relating to the disqualification of regular judicial tribunals or officers have but a limited application. In the recent case of Federal Construction Co. v. Curd, 177 Pac. 469, this subject was quite fully discussed in a case not distinguishable in principle from the case at bar, and in which the court declared it to be the settled rule "that the interest of one or all of the members of boards of trustees, city councils, or other municipal bodies charged with the making or rectifying of assessments for street or other improvements may have, arising from the fact of their ownership of property directly affected by the proposed improvement, does not create such a disqualification to sit or act in the premises as to render their action void as not constituting due process of law." Other cases bearing upon the same subject and applying the same rule to officials sitting upon the hearing of charges against municipal officers are the following: Riggins v. Richards, 97 Tex. 229, 77 S. W. 946; State v. Com. Council, 90 Wis. 612, 64 N. W. 304; McQuillin on Municipal Corp., vol. 2, § 565.

[7] Aside, however, from these considerations, the plaintiff's petition discloses that the plaintiff's objection to the action of the board of education or any of its members, in proceeding to try her upon the charges presented by the superintendent of schools upon the ground of their or any of their disqualification by reason of bias or prejudice, was made for the first time after the trial, decision, and order for her dismissal, and in her appeal to the superintendent for a reversal of such decision and order, and that her objection then taken was merely the general one "that the said findings, decision, and order were the result of passion and prejudice on the part of said board of education." Such an objection came entirely too late, even had the same been valid, since it is a general rule of law applicable to the alleged disqualification of judicial officers that the objection upon that ground must be presented at the inception of the hearing, and must be supported by affidavits. This rule and the reasoning which supports it also applies to the appeal taken by the plaintiff to the superintendent of schools, against whom she makes for the first time in her petition a similar charge, but to whom she committed her cause upon appeal without objection as to his personal qualification to hear and act upon the same. Our conclusion upon this branch of the case is that the board of education and the members thereof were not disqualified to hear, entertain, and determine the charges presented against the plaintiff, or to enter the order for her dismissal from the school department based thereon.

We do not deem it necessary to discuss the other points presented by the appellant upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

180 Cal. 338

VARCOE v. LEE et al. (S. F. 7980.)

(Supreme Court of California. May 8, 1919.)

1. New Trial 🔑70—Grounds—Sufficiency of Evidence.

In negligence action, based on reckless driving of automobile at excessive speed, evidence that automobile was brought to a stop within 10 feet after it struck child does not warrant setting aside verdict for plaintiff on ground that it demonstrates that automobiles was traveling at a speed of 10 miles or less, since jury may have disbelieved that automobile came to a stop within 10 feet, or that it could not be stopped within that distance if traveling more than 10 miles an hour, or may have disbelieved both propositions.

2. Municipal Corporations 🔑706(7)—Use of Streets—Contributory Negligence—Conduct of Child.

A child who, after waiting for wagons and street cars to pass, ran, instead of walked, across street, was not, as a matter of law, guilty of contributory negligence.

3. Appeal and Error 🔑1004(1)—Discretion—Damages.

Appellate court's power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice, or corruption on the part of the jury.

4. Death 🔑99(3) — Excessive Damages—Death of Child.

Verdict of $5,000, given parent for death of child killed by automobile, is not excessive as a matter of law, or such as to suggest passion, prejudice, or corruption on the part of the jury.

5. Appeal and Error 🔑1050(1)—Review—Harmless Error—Evidence.

In a negligence action, based on driving of automobile at excessive speed, the admission of traffic ordinance limiting speed to 15 miles an hour was harmless, where Motor Vehicle Act, § 22, subd. "b," which was applicable to case, limited the speed at place where accident took place to 15 miles an hour.

6. Appeal and Error 🔑1064(2)—Review—Harmless Error.

In action for child's death by automobile, instruction that that portion of the street at which the accident took place was a business district, if on weight of the evidence, was harmless, where it was a matter of common knowledge, and was an undisputed fact, that such street at such point was a business street.

7. Evidence 🔑1—Judicial Notice—Appellate Court.

An appellate court can properly take judicial notice of any matter of which any court of original jurisdiction may properly take notice.

8. Evidence 🔑3—Judicial Notice.

That trial judge has actual knowledge of a fact, or that fact is a matter of common knowledge and notoriety, does not warrant him taking judicial knowledge thereof, where fact is not indisputable.

9. Evidence 🔑1—"Judicial Notice"—Definition.

"Judicial notice" is a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Notice.]

10. Evidence 🔑5(1) — Judicial Notice—Matters of Common Knowledge.

The power of judicial notice as to matters of general knowledge is to be used with caution, and if there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required.

11. Evidence 🔑5(1) — Judicial Notice—Matters of Common Knowledge—Test.

Where it is sought to avoid or excuse production of evidence, because the fact to be proven is one of general knowledge and notoriety, the test is whether the fact is one of common everyday knowledge in the particular jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know, and whether it is certain and indisputable.

12. Evidence 🔑1—Judicial Notice—Discretion of Court.

There is no error or impropriety in requiring evidence as to a fact, even though it be a matter of judicial cognizance.

13. Evidence 🔑10(1) — Judicial Notice—Character of Street.

In an action being tried by superior court of city and county of San Francisco, relating to an automobile accident on Mission street, between Twentieth and Twenty-Second streets, the court will take judicial notice that such portion of Mission street is a business district; its character as a business street being well known to people of San Francisco.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Stella Varcoe, substituted for J. J. Varcoe, deceased, against Cuyler Lee and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Redding, Boalt & Pier and John T. Ryan, all of San Francisco (Joseph D. Redding, and Fletcher G. Flaherty, both of San Francisco, of counsel), for appellants.

Marcel E. Cerf, C. H. Sooy, and H. W. Glensor, all of San Francisco, and U. S. Webb, Atty. Gen. (William F. Herrin, of San Francisco, of counsel), for respondent.

Albert Lee Stephens, City Atty., and Wm. P. Mealey, Deputy City Atty., both of Los Angeles, George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, amici curiæ.

John W. Stetson, of Oakland, for California State Automobile Ass'n.

David R. Faries and Ivan Kelso, both of Los Angeles, for Auto Club of Southern California.

OLNEY, J. This is an action by a father to recover damages suffered through the death of his child, resulting from her being run over by an automobile of the defendant Lee, driven at the time by the other defendant, Nichols, the chauffeur of Lee. The automobile was going south on Mission street in San Francisco, and was approaching the crossing of Twenty-First street, when the child, in an endeavor to cross the street, was run over and killed. The cause was tried before a jury, which returned a verdict of $5,000 for the plaintiff. From the judgment upon this verdict, the defendants appeal.

The alleged negligence, upon which plaintiff's right to recover is predicated, consisted in the speed at which it is claimed the automobile was proceeding. In the opening brief for the appellants it was contended, first, that the evidence demonstrated that the automobile was not proceeding at a negligent rate of speed; second, that the child was guilty of contributory negligence; and, third, that the amount of damages is excessive. None of these contentions requires particular consideration.

[1] The contention that the evidence demonstrated that the machine was not traveling at a negligent rate of speed is based on testimony that it was brought to a check stop 10 feet after it struck the child, and that a machine of the weight of that involved could not be brought to a stop in 10 feet if it were proceeding more than 10 miles an hour. On the other hand, there was testimony that the machine was going at a high rate of speed, from 30 to 40 miles an hour. It cannot be said that the testimony relied on demonstrates a speed of 10 miles or less, so that the verdict of the jury to the contrary must be set aside, assuming that a speed of 10 miles an hour could not under the circumstances of the case be considered negligence. The jury may well have disbelieved, either that the car came to a stop in 10 feet, or that it could not be stopped within that distance if traveling more than 10 miles an hour, or it may have disbelieved both propositions.

[2] The claim that the child was guilty of contributory negligence is based on the fact that she ran across the street, instead of walking, and was looking the other way when she got in front of the car. There was testimony that she was seen waiting on the left-hand side of the street, with relation to the chauffeur, for some wagons and a street car going north to pass, and that as soon as they passed she started to run across the street. Not improbably she ran across, thinking it the safest way to get across. Certainly there is nothing to justify taking from the jury the question as to whether or not her conduct amounted to contributory negligence, particularly in view of her youth.

[3, 4] As to the claim that the verdict of $5,000 is excessive, "our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury." Bond v. United Railroads, 159 Cal. 270, 286, 113 Pac. 366, 373 (48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50). The present case hardly comes within this rule.

In appellants' reply brief a further question is raised for the first time. As we have stated, the claim of negligence is based upon the speed at which the machine was going. On this point the testimony was sharply conflicting. The plaintiff offered, and the court over the objection of the defendants admitted, a copy of the San Francisco traffic ordinance specifically providing that Mission street between certain limits, which include the point of accident, is a heavily traveled street and the speed of vehicles shall not exceed 15 miles an hour. When he came to charge the jury, the trial judge instructed them that, if they found that the defendant Nichols was running the automobile along Mission street at the time of the accident at a greater speed than 15 miles an hour, he was violating the city ordinance, and also the state Motor Vehicle Act, and that such speed was negligence in itself. The trial judge then read to the jury the portion of subdivision "b" of section 22 of the Motor Vehicle Act (St. 1913, p. 639), which provides that it shall be unlawful to operate a motor "in the business district" of any incorporated city or town at a greater speed than 15 miles an hour, and defines (see section 1) a business district as "territory * * * contiguous to a public highway, which is at that point mainly built up with structures devoted to business." Having read this definition, the court proceeded with its charge as follows:

> "That is the situation on Mission street between Twentieth and Twenty-Second streets, where this accident happened, so that is a business district and the maximum legal rate of speed on that street at the time of the happening of this accident was 15 miles an hour."

In connection with the admission in evidence of the ordinance mentioned, and the giving of the foregoing instructions, it is contended by appellant, first, that the state law superseded the municipal ordinance and rendered the latter inapplicable; and, second, that the instruction that Mission street at the point in question was a business district and therefore the maximum legal speed there was 15 miles an hour was a charge as to a question of fact and an invasion of the province of the jury.

On the first point, as to whether or not the state law superseded and rendered inoperative the city ordinance, elaborate briefs have been filed by third parties interested in the question so presented. By reason, however, of our views upon the second point we need not decide it. It is manifest that the jury was not concerned with the reason why a speed in excess of 15 miles an hour was illegal. They were concerned only with the proposition that it was in truth illegal. If it were, they were not misled in the discharge of their function, no matter how erroneous the reason given may have been.

[5] The situation is that either the city ordinance or the state law applies, or both. If the ordinance applies, either alone or concurrently with the state law, no question arises, for the provisions of the ordinance specifically cover the place of accident. If it does not apply, but the state law does exclusively, and under the latter's provisions a speed at the point of accident in excess of 15 miles an hour was illegal, there was still no prejudicial error. We are brought, therefore, to the second point, that the trial judge erred in charging the jury that the location of the accident was in "a business district" as those words are defined in the state act, with the consequent result that 15 miles an hour was the maximum legal speed.

So far as the record itself goes, there is little to show what the character of Mission street between Twentieth and Twenty-Second streets is. The defendant Nichols himself refers to it in his testimony as part of the "downtown district," undoubtedly meaning thereby part of the business district of the city. The evidence shows incidentally that at the scene of the accident there was a drug store, a barber shop, a haberdashery, and a saloon. If there had been any issue or question as to the character of the district, the record in this meager condition would not justify the taking of the question from the jury, as was undoubtedly done by the instruction complained of.

[6] The actual fact of the matter is, however, that Mission street, between Twentieth and Twenty-Second streets, is a business district, within the definition of the Motor Vehicle Act, beyond any possibility of question. It has been such for years. Not only this, but its character is known as a matter of common knowledge by any one at all familiar with San Francisco. Mission street, from its downtown beginning at the water front to and beyond the district of the city known as the Mission, is second in importance and prominence as a business street only to Market street. The probabilities are that every person in the courtroom at the trial, including judge, jury, counsel, witnesses, parties, and officers of the court, knew perfectly well what the character of the location was. It was not a matter about which there could be any dispute or question. If the court had left the matter to the determination of the jury, and they for some inconceivable reason had found that it was not a business district, it would have been the duty of the court to set aside the verdict. We are asked now to reverse the judgment, because the court assumed, without submitting to the jury, what could not be disputed, and what he and practically every resident in the county for which the court was sitting knew to be a fact. If error there was, it is clear that, upon the actual fact, there was no prejudice to the defendants.

It would have been much better if counsel for the plaintiff or the trial judge himself had inquired of defendants' counsel, before the case went to the jury, whether there was any dispute as to the locality being a business district within the meaning of the state law. There could have been but one reasonable answer, and, if any other were given, the matter could have been easily settled beyond any possibility of question. But this was not done, and we are now confronted by the question whether either this court or the trial court can take judicial notice of the real fact.

[7] An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847; Salt Lake City v. Robinson, 39 Utah, 260, 116 Pac. 442, 35 L. R. A. (N. S.) 610, Ann. Cas. 1913E, 61; 15 Ruling Case Law, 1063.

In fact, a particularly salutary use of the principle of judicial notice is to sustain on appeal, a judgment clearly in favor of the right party, but as to which there is in the evidence an omission of some necessary fact which is yet indisputable and a matter of common knowledge, and was probably assumed without strict proof for that very reason. Campbell v. Wood, 116 Mo. 196, 22 S. W. 796.

The question, therefore, is: Was the superior court for the city and county of San Francisco, whose judge and talesmen were necessarily residents of the city, entitled to take judicial notice of the character of one of the most important and best-known streets in the city? If it were, the court was authorized to charge the jury as it did. Section 2102, Code Civ. Proc.

[8] It should perhaps be noted that the fact that the trial judge knew what the actual fact was, and that it was indisputable, would not of itself justify him in recognizing it. Nor would the fact that the character of the street was a matter of common knowledge and notoriety justify him in taking the question from the jury, if there were any

possibility of dispute as to whether or not that character was such as to constitute it a business district within the definition of the statute applicable. If such question could exist, the fact involved—whether the well-known character of the street was sufficient to make it a business district—was one for determination by the jury. But we have in this case a combination of the two circumstances. In the first place, the fact is indisputable and beyond question. In the second place, it is a matter of common knowledge throughout the jurisdiction in and for which the court is sitting.

[9] A consideration of the reasons underlying the matter of judicial notice and its fundamental principles leaves, we believe, but little doubt as to its applicability here. Judicial notice is a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it. So far as matters of common knowledge are concerned, it is saying there is no need of formally offering evidence of those things, because practically every one knows them in advance, and there can be no question about them. The rule in this respect is well stated in 15 R. C. L. 1057, as follows:

> "It may be stated generally with regard to the question as to what matters are properly of judicial cognizance that, while the power of judicial notice is to be exercised with caution, courts should take notice of whatever is or ought to be generally known, within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind. This rule enumerates three material requisites: (1) The matter of which a court will take judicial notice must be a matter of common and general knowledge. The fact that the belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by every one. Courts take judicial notice of those things which are common knowledge to the majority of mankind, or to those persons familiar with the particular matter in question. But matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized. (2) A matter properly a subject of judicial notice must be 'known'; that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient notoriety attaches to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said that courts must 'judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life.' (3) A matter, to be within judicial cognizance, must be known 'within the limits of the jurisdiction of the court.'"

The three requirements so mentioned—that the matter be one of common and general knowledge, that it be well established and authoritatively settled, be practically indisputable, and that this common, general, and certain knowledge exist in the particular jurisdiction—all are requirements dictated by the reason and purpose of the rule, which is to obviate the formal necessity for proof when the matter does not require proof.

[10] It is truly said that the power of judicial notice is, as to matters claimed to be matters of general knowledge, one to be used with caution. If there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required; but, if the court is of the certain opinion that these requirements exist, there can properly be no hesitation. In such a case there is, on the one hand, no danger of a wrong conclusion as to the fact—and such danger is the reason for the caution in dispensing with the evidence—and, on the other hand, purely formal and useless proceedings will be avoided.

Little assistance can be had by a search of the authorities for exactly similar cases. The one perhaps nearest to it that we have found is State v. Ruth, 14 Mo. App. 226. What may be a proper subject of judicial notice at one time or place may not be at another. It would be wholly unreasonable to require proof, if the fact became material, as to the general location in the city of San Francisco of its city hall before a judge and jury made up of residents of that city and actually sitting in the building. But before a judge and jury in another county proof should be made. The difference lies in the fact being one of common knowledge in one jurisdiction and not in the other. Similarly it has been held repeatedly that courts will judicially notice the general doctrines of any religious denomination prevalent within its jurisdiction, and yet it was held by an Ohio court, and properly held, in the early days of Christian Science, that notice would not be taken of the doctrines of that sect. Evans v. State, 9 Ohio St. C. Pl. Dec. 222, 6 Ohio N. P. 129. Now that the sect has grown to large numbers, and its general doctrines are a matter of common knowledge, it is as proper to notice them as to notice those of older denominations. As is well said by Wigmore (4 Wigmore on Ev. § 2580):

> "Applying the general principle (ante, section 2565), especially in regard to the element of notoriousness, courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science. It is unprofitable, as well as impracticable, to seek to connect them by generalities and distinctions; for the notoriousness of a truth varies much with differences of period and of place. It is even erroneous, in many, if not in most instances, to regard them as precedents. It is the spirit and example of the rulings, rather than

their precise tenor, that is to be useful in guidance."

[11, 12] The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know? and (2) is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence.

[13] Applying this test to the facts of the case, the matter is not in doubt. The character of Mission street is as well known to San Franciscans as the character of Spring street to residents of Los Angeles, or of State street to residents of Chicago, or of Forty-Second street to residents of New York, or of F street to residents of Washington. It is a matter of their everyday common information and experience, and one about which there can be no dispute.

The conclusion follows that the charge of the trial court that Mission street, between Twentieth and Twenty-Second streets, was a business district, was not error. The judgment is therefore affirmed.

We concur: SHAW, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.; WILBUR, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment, and also in the opinion, except upon the question of judicial notice, a determination of which question appears to be considered by the majority opinion as essential to a conclusion that the trial court did not err in instructing the jury that Mission street, at Twenty-First street, was a "business district," within the meaning of the provision of the Motor Vehicle Act limiting speed in such a district to not exceeding 15 miles an hour. I am not satisfied that the opinion does not carry the doctrine of judicial notice to an unwarranted extent. It seems to me, after a careful consideration of the record, that the instruction referred to may fairly be upheld upon the theory that there was no question in the trial court as to the place of the accident being within such a district, and that this was something practically conceded on all hands. Certainly every scrap of evidence tending to throw any light whatever on the matter so tended to show, and the trial court apparently took the matter as granted. No complaint whatever was made as to these instructions until the closing brief of appellants was filed in this court. I do not think they should now be held erroneous.

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40 Cal. App. 582

LAPIQUE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 2947.)

(District Court of Appeal, Second District, Division 1, California. April 5, 1919. Rehearing Denied May 5, 1919.)

APPEAL AND ERROR ⊂⊃609—FURTHER TRANSCRIPT—TIMELY DEMAND AND SHOWING.

Where petitioner's demand upon reporter for further transcript was not made until after trial judge had regularly allowed and settled transcript, and demand upon judge for allowance and settlement of further reporter's transcript was not made until after certified transcript had been filed in Supreme Court, petitioner, without any special showing, is not entitled to settlement of an additional statement based upon reporter's certificate; the trial court's authority to settle transcript having been exhausted.

Application by John Lapique for a writ of mandate to compel L. H. Valentine, Judge of the Superior Court of Los Angeles County, to certify to the correctness of a reporter's transcript. Proceeding dismissed.

John Lapique, of Orange, in pro. per.

H. L. Dunnigan, Haas & Dunnigan, and J. J. Wilson, all of Los Angeles, for respondents

CONREY, P. J. Application by John Lapique for a writ of mandate to compel the respondent judge to certify to the correctness of a reporter's transcript made pursuant to the demand of said Lapique, against whom judgment had been entered in an action wherein he was defendant, from which judgment he has an appeal pending in the Supreme Court. After alternative writ issued and an answer filed by the respondents, this matter has been submitted upon evidence taken by this court.

The judgment was entered on the 18th day of December, 1917. Within 10 days thereafter, Lapique served and filed his notice of intention to move for a new trial, and filed his notice to the clerk requesting a reporter's transcript.

The petition herein alleges that the court reporter made a transcript and certified to the truth and correctness thereof; that thereafter, on July 2, 1918, petitioner believed said transcript to be full, true, and correct, and that on that day respondent judge,

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⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes who tried the case, made an order settling and allowing said transcript as a part of the record, but that said order was made without notice having been given as required by section 953a, Code of Civil Procedure; that on or about August 1, 1918, petitioner found that said reporter's transcript was defective, and on August 15, 1918, he demanded of the reporter a further transcript, in response to which the reporter did, on the 29th day of August, 1918, certify a further reporter's transcript; that on August 30, 1918, a notice was served on plaintiffs' attorneys and filed, stating that said reporter's transcript would be presented for allowance and settlement before the court on the 4th day of September, 1918; that on the 4th day of September the matter was continued until the 5th of September, 1918, and on the 5th of September was continued until the 6th day of that month; that at the hearings thereof Haas & Dunnigan, attorneys for the plaintiffs, did not appear; that on the 6th day of September, 1918, the trial judge refused to certify to the truth and correctness of said reporter's transcript on the grounds, "first, that the order appealed from is not an appealable order, and, second, that the transcript is not complete in that it does not set forth the title of the court and cause"; that said reporter's transcript is a full, fair, and correct transcript of the various proceedings described in the demand for transcript.

The evidence received herein shows that, as stated in the petition, an order of settlement was made by the judge on July 2, 1918, and that the same was made without notice; that on the 3d day of July, 1918, Lapique filed in the superior court an affidavit setting forth the fact that said order of July 2, 1918, had been made without notice, and thereupon an order was made, which was duly served upon the plaintiffs' attorneys, requiring them to appear before the court on the 6th day of August, 1918, at 9:30 a. m., to show cause why the reporter's transcript, "settled and allowed by the trial court without notice on the 2d day of July, 1918, should not be allowed to stand, settled and allowed by the trial court on July 2, 1918," in said action; that at the time specified in said action to show cause the matter was continued to Tuesday, August 13, 1918, at 9:30 a. m. The minutes of the court for August 13th showed that at the time to which said matter had been continued John Lapique appeared in court in propria persona, plaintiffs' attorneys not appearing, and "order to show cause granted by the court [Judge Valentine], and reporter's transcript settled and allowed by the court." Under that date a statement of such settlement and allowance, signed by the judge, appears at the end of the transcript. The evidence herein further shows that the reporter's transcript, certified, settled, and allowed as above stated, was filed in the Supreme Court on the 23d day of August, 1918. (Supreme Court No. L. A. 5837.)

It thus appears that petitioner's demand upon the reporter for a further transcript of the proceedings in question, which demand he alleges that he made on the 15th day of August, 1918, was not made until after the trial judge, after due notice and on request of the petitioner, had regularly allowed and settled the transcript which had been duly and regularly certified by the reporter, and that petitioner's demand upon the lower court and the judge thereof for allowance and settlement of such "further reporter's transcript" was not made until after the original duly certified transcript had been filed in the Supreme Court, where the appeal then was and now is pending.

The court's duty, as well as its authority, to settle a transcript, had been exhausted. If the order of settlement was made through mistake, inadvertence, surprise, or excusable neglect of the party who demanded the transcript, it may be that, upon application made as required by section 473, Code of Civil Procedure, he might have been relieved from such order. No such application appears to have been made. Petitioner seems to have relied upon the mistaken theory that, without any special showing of reasons for relief in the matter, he was entitled in the ordinary course of procedure to demand the settlement of an additional statement based upon the reporter's certificate to the correctness of a document containing matter additional to that contained in the settled transcript.

Petitioner's contentions herein are without merit, and the proceeding is dismissed.

We concur: SHAW, J.; JAMES, J.

40 Cal. App. 564

CUNEO v. CUNEO. (Civ. 2776.)

(District Court of Appeal, First District, Division 2. California. April 4, 1919.)

1. DIVORCE 🔑152 — FINALITY OF JUDGMENT—ENTRY IN DIVORCE SUIT.

In divorce suit entry upon minutes of court reading: "Plaintiff's prayer for a divorce is denied. Defendant's prayer for divorce is denied"—without the making and filing of findings upon issues tendered by the pleadings, and without such findings having been waived, is not final judgment.

2. JUDGMENT 🔑256(1)—FINDINGS TO SUPPORT—NECESSITY.

Where issues are tendered by the pleadings and findings thereon are not waived by the parties, there can be no rendition of judgment until such findings are made and filed with the clerk.

3. APPEAL AND ERROR 🔑130 — DECISIONS APPEALABLE—ORDER AS FINAL JUDGMENT.

Order denying motion for execution for alimony, made as court's entry upon minutes reading: "Plaintiff's prayer for a divorce is denied. Defendant's prayer for divorce is denied"—where findings upon the issues tendered by the pleadings were not waived by the parties and were not made and filed with the clerk, is not appealable; not being an order made after final judgment under Code Civ. Proc. § 963, inasmuch as such entry is not a final judgment.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Anna Cuneo against John Cuneo. From an order denying plaintiff's motion for an order directing clerk to issue an execution for sum claimed to be due plaintiff as alimony, plaintiff appeals. Appeal dismissed.

Leon E. Prescott, of San Francisco, for appellant.

Joseph J. Bullock, of Redwood City, and Phil. J. Strubel, of San Francisco, for respondent.

HAVEN, J. In this action for divorce an order was made shortly after the filing of the complaint, requiring the defendant to pay to plaintiff's attorneys a certain sum on account of counsel fees, and further providing that defendant "pay forthwith to plaintiff personally the sum of $50 per month for the support and maintenance of the plaintiff pending this action, and the same sum every month thereafter pending this action, until the further order of this court." The action was subsequently brought to trial upon plaintiff's complaint, the allegations of which were denied by defendant's answer, and upon the cross-complaint of defendant; each party to the action seeking a decree of divorce against the other. On November 23, 1917, the following order was entered in the minutes of the court:

> "This cause having been heretofore submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein, it renders the following decision: 'Plaintiff's prayer for a divorce is denied. Defendant's prayer for a divorce is denied.'"

On February 28, 1918, plaintiff made a motion for an order directing the clerk of the lower court to issue an execution in said action in favor of plaintiff and against the defendant for the sum of $150, claimed to be due her as alimony for three months, commencing December 16, 1917, and ending March 15, 1918. On March 18, 1918, the court made an order denying the said motion of plaintiff, from which latter order plaintiff attempts to prosecute this appeal.

[1-3] The entry in the minutes of the court on November 23, 1917, is not a final judgment in the action. Issues were tendered by the pleadings, and there is no showing that findings were waived. Consequently there could have been no rendition of judgment until such findings were made and filed with the clerk. Crim v. Kessing, 89 Cal. 478, 488, 26 Pac. 1074, 23 Am. St. Rep. 491. The record does not disclose that this has been done. The order from which this appeal is attempted to be taken is therefore not an order made after final judgment, and is not an appealable order under section 963 of the Code of Civil Procedure.

The appeal is dismissed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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40 Cal. App. 623

CLOVIS FRUIT CO. v. CALIFORNIA WINE ASS'N. (Civ. 2648.)

(District Court of Appeal, First District, Division 1, California. April 10, 1919. Rehearing Denied by Supreme Court June 9, 1919.)

SALES 🔑106 — NOTICE OF CANCELLATION—REASONABLE TIME.

In suit for defendant's alleged breach of contracts to purchase wine grapes raised by plaintiff's assignors, plaintiff's claim that defendant did not seasonably exercise his option to cancel contracts after brandy tax was raised was untenable in absence of showing of loss or prejudice to plaintiff by such delay.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Clovis Fruit Company, a corporation, against the California Wine Association, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Pillsbury, Madison & Sutro, of San Francisco (Alfred Sutro, of San Francisco, of counsel), for appellant.

Short & Sutherland, of Fresno, and Carl E. Lindsey, for respondent.

KERRIGAN, J. Plaintiff, as assignor of 22 claims arising under as many separate contracts made by defendant with plaintiff's assignors for the purchase of grapes, brought suit against defendant for the alleged breach of the contracts. Plaintiff had judgment for $4,932.32, and defendant appeals.

The complaint consists of 22 separate causes of action. For the purposes of this appeal they may be said to be identical, as they grow out of similar action taken by defendant with regard to each of said contracts. The substance of each cause of action, of the answers thereto, and of the findings on the issues, is, it is conceded, correctly stated in defendant's opening brief, as follows: On a certain date plaintiff's respective assignor, mentioned in the particular cause of action, made an agreement with the defendant for the sale of the crops of wine grapes over a period of years at a fixed price per ton, grown on the respective vineyard of each assignor. In the vintage season of 1915, between August 15th and November 15th of that year, each respective assignor, it is alleged, raised and produced a certain tonnage of wine grapes, which he offered to deliver to defendant, but defendant refused to receive or to pay for the same. Each agreement is alleged to have been in full force and effect, and never to have been canceled, terminated, or ended. An assignment of each respective agreement to the plaintiff is alleged, and it is then alleged that plaintiff, by reason of the premises stated in each cause of action, has been damaged in a certain sum.

The answers to the causes of action may also, for the purpose of this appeal, be said to be identical. So far as material here the issues raised by the answer may be stated as follows: Defendant denied that any assignor offered to deliver any of the 1915 grapes to it, or that, in violation of the agreement, it refused to receive or pay for the grapes. It also denied that the agreement was in full force and effect, or that it had not been canceled or terminated or ended.

As a further and separate defense it averred that in each contract sued on it is provided that, should the United States laws be so modified that the tax on brandy used in fortifying should be greater than 6 cents per proof gallon, then the defendant might, at its option, cancel the contract by giving written notice of such cancellation to each respective assignor of plaintiff; that by the terms of the act of Congress of October 22, 1914, the United States laws were so modified that the tax on brandy used in fortifying was increased from 6 cents per proof gallon to 55 cents per proof gallon, and that on or about April 21, 1915, the commissioner of internal revenue of the United States ruled that on and after January 1, 1916, the tax on brandy used in fortifying would be increased to $1.10 per proof gallon, and that thereupon, and prior to the alleged tender of any grapes by each respective assignor of the plaintiff to the defendant, and prior to knowledge by the defendant of any assignment of the contract to plaintiff, defendant canceled or terminated the contract of each assignor by giving each assignor written notice of cancellation, and that each assignor accepted the notice, and thereafter treated the contract as canceled or terminated and of no force or effect.

The trial was by the court without a jury. The court found for the plaintiff, and made findings in accordance with the allegations of the complaint; it also found the averments of the separate and special defense of the answer to be true, except that it found that the defendant did not give notice of cancellation of the contracts within a reasonable time after the act of October 22, 1914, was passed, and that the contracts were therefore not canceled, but were in full force and effect.

At the trial plaintiff offered no evidence to sustain its allegation of a tender and offer of performance, taking the position that such evidence was unnecessary because of the fact that it appears from the matter set forth in defendant's further and separate defense that such an offer would have been futile. Against the objection of the defendant the court accepted this view, and at the conclusion of plaintiff's case denied defendant's motion for nonsuit. Thereupon in support of the allegations of its separate defense the defendant introduced evidence, from which it appeared that the plaintiff's various assignors had been given written notice, under date of June 1, 1915, of the cancellation of the contract.

It is conceded that an averment of performance will not be supported by proof of a legal excuse for nonperformance. Estate of Warner, 158 Cal. 441, 445, 111 Pac. 352. It is also conceded to be a general rule of pleading that a defendant may plead inconsistent defenses, and that where there are several answers an admission made in one is not available to destroy the efficacy of the averments or denials of the others. Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076. These fundamental rules of pleading were ignored in the trial of this case, but the consequence of the failure to observe them, and several minor questions involving the correctness of rulings upon matters of evidence, need not be here considered, in view of the conclusion we have reached on a question which goes to the merits of the case.

The principal question raised by the appeal is whether or not the defendant within a reasonable time exercised its option to cancel the contracts after the concurrence of the event giving it the right to do so. On this phase of the case the evidence is without conflict. Summarized, it shows that each of the contracts in question provided that if the tax on brandy used in fortifying wines should be increased from 6 cents a gallon the defendant might at its option terminate the contract by giving notice to that effect; that by an act of Congress of October 22, 1914, the tax on such brandy was increased from 6 to 55 cents per proof gallon; that on June 1, 1915, defendant gave written notice of cancellation of the contract. The contracts called for deliveries of grapes for the years from 1913 to 1917. It was agreed that the vintage season each year is from August 15th to November 15th, from which it is evident that no delivery of grapes could be made before the first-mentioned date.

What is a reasonable time in any case depends upon the circumstances of the particular case. Smith v. Pelton Water Wheel Co., 151 Cal. 394, 90 Pac. 934; Salmon Box Co. v. Helena Box Co., 147 Fed. 408, 77 C. C. A. 586. In the case of Colfax County v. Butler County, 83 Neb. 803, 120 N. W. 444, it is held that a reasonable time, when no time is specified, is a question of law, and depends upon the subject-matter and the situation of the parties.

Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injury or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong; and the main question in each case should be, Is there any just cause, because of delay, to object to the cancellation? Hogan v. Tucker, 116 Ky. 918, 77 S. W. 197, 199. Here, while the notice of cancellation was given about 7 months after the occurrence of the event giving rise to the right of cancellation, it was yet 2½ months before the commencement of the vintage or crushing season and about 5 months before its close; and there is no evidence in the record to show that any of plaintiff's assignors were prejudiced because the notice was not sooner given. No witness testified that had earlier notice been given the assignors of plaintiff could have disposed of their grapes to better advantage than they actually did. Uncontradicted evidence introduced by the defendant was to the effect that according to the custom in Fresno county (the place in which these contracts were to be executed) contracts for the sale of grapes are made each year during the vintage season; and, indeed, the first witness called by the plaintiff, one of its assignors, testified that he made no attempt to sell his 1915 crop of grapes until September of that year. For aught that appears in the record the defendant may have had a very good reason for not sooner giving the notice of cancellation, which reason may have related to the mutual interest of the parties. It certainly does not appear that the delay was for any unfair purpose. But however that may be, plaintiff cannot base its claim that the notice was not timely upon a mere surmise or some possibility which has no foundation in fact. To substantiate its position that the notices were not seasonably given, plaintiff must base the same upon some competent evidence showing the assignors of plaintiff to have been injured or to have suffered loss or prejudice. This the plaintiff has not done, and the finding of the trial court that the notice of cancellation was not given within a reasonable time is not sustained by the evidence.

The judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

(40 Cal. App. 630)

SAN FRANCISCO BAR ASS'N v. McCLELLAN. (Civ. No. 2504.)

(District Court of Appeal, First District, Division 1, California. April 11, 1919.)

1. ATTORNEY AND CLIENT 🔑53(2)—DISBARMENT PROCEEDINGS — CONFLICTS IN EVIDENCE—RESOLVING IN FAVOR OF ACCUSED.

In a disbarment proceeding, a conflict in the evidence should be resolved in favor of accused.

2. ATTORNEY AND CLIENT 🔑44(2)—DUTY OF ATTORNEY—ACCOUNTING.

It is the duty of an attorney to notify his client with reasonable diligence of the collection by him of money due his client, and to promptly pay over the same upon settlement of his fee, and under no circumstances is he warranted in falsely stating that the money has not been received.

3. ATTORNEY AND CLIENT 🔑44(2)—DISBARMENT—GROUNDS.

Conduct of accused in failing to notify his client of collection of money due client until two months after receipt of money, while blameworthy, *held* not to require disbarment.

Proceedings by the San Francisco Bar Association for the disbarment of Clifford McClellan, an attorney and counselor at law. Accusation dismissed.

Frank S. Brittain, Nathan Moran, and Bert Schlesinger, all of San Francisco, for bar Ass'n of San Francisco.

Edward Lande, of San Francisco, for respondent.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PER CURIAM. This is a proceeding instituted by the Bar Association of San Francisco for the disbarment of Clifford McClellan, an attorney and counselor at law.

The accusation contains three separate charges:

(1) That the accused misappropriated funds belonging to his client in the course of professional employment.

(2) Willful concealment and denial on his part of the moneys collected.

(3) The making of a false and fraudulent claim to a portion of the money received.

The accused denied all the charges.

[1] The evidence presented upon the first and third counts of the accusation is voluminous. Under it a conflict exists which should be resolved in favor of the accused. No useful purpose, therefore, would be subserved by narrating or closely analyzing it.

In support of the second count, however, and the one mainly relied upon for the penalty sought to be imposed, the evidence shows that the accused was employed by one Elizabeth Douglas, a widow, to collect the proceeds of an insurance policy on the life of her deceased husband. Payment of the policy was at first refused by the insurance company, but finally the accused received a check in settlement of the claim for the sum of $1,189.75. The check was received by him on November 20, 1917, and he deposited the same in his personal bank account, but failed to advise his client that he had received payment until some two months later, when demand was made upon him for a settlement, after his client had received information that the claim had been paid. The demand was made by attorneys employed by Mrs. Douglas, and a settlement was had between them and the accused, whereupon the amount agreed upon was paid, which amount, Mrs. Douglas testified, was satisfactory to her.

[2] Accused does not deny that he failed to advise his client of the receipt of the money, but he seeks to justify his tardiness in turning over the amount on the ground that his accounts with her were confused, and that he was ignorant of the exact amount to which he was entitled, and that the stress of business prevented him from informing himself upon the subject. There is also testimony to the effect that the accused informed his client that he had not collected the money at a time when it was in his possession. This the accused denies. It is true that the accused was entitled to a portion of the fund collected as compensation for his services, the amount of which had not been definitely fixed and determined. While the retention of this portion was justified it did not free him from his duty of advising his client that the collection had been made. It is the plain duty of an attorney to notify his client with reasonable diligence of the collection by him of money due his client, and to promptly pay over the same upon the settlement of his fee, and under no circumstances is he warranted in falsely stating that the money has not been received.

[3] The conduct of the accused is blameworthy for its laxity in this particular; yet we do not feel from a careful review of the evidence that it calls for the drastic measurement of disbarment. His delay, however, as shown by the evidence, was a gross neglect to fulfill his obligation, and constituted unprofessional conduct, which calls for the censure of this court. It is to be hoped that the bringing of these proceedings by the Bar Association of San Francisco, prompted by a high sense of duty, may prove a warning to the accused, and cause him to so acquit himself in the future as to avoid the slightest appearance of infidelity to professional duty.

The accusation is dismissed.

40 Cal. App. 566

DAMIANO v. BUNTING et al. (Civ. 2652.)

(District Court of Appeal, First District, Division 1, California. April 4, 1919. Rehearing Denied by Supreme Court June 2, 1919.)

1. Corporations 🔑239 — Liability of Stockholder—Torts.

A cause of action exists against the stockholder of a corporation under the laws of this state upon a corporate liability arising out of a tort.

2. Abatement and Revival 🔑57—Survival of Stockholders' Liability—Surviving Death of Stockholder.

A stockholder's liability for a corporate tort survives the death of the stockholder.

3. Corporations 🔑264 — Action Against Representatives of Deceased Stockholders—Limitations—Construction of Statute.

Under Code Civ. Proc. § 359, which limits the time of beginning actions against the directors and stockholders of corporations to recover a penalty to three years after liability accrues, and provides that no other section of the title shall be applicable to its provisions, section 353, as to suits against personal representatives of decedents on causes of action which survive within year after beginning of administration, has no application.

4. Constitutional Law 🔑70(3)—Liability of Stockholders for Corporate Tort—Legislative Policy—Review by Court.

In an action to enforce liability for corporate tort against the representatives of a deceased stockholder, Code Civ. Proc. § 359, expressly limiting such action to three years, may not be disregarded, on the ground that the policy is unwise.

5. Corporations 🔑264 — Action Against Stockholder for Corporate Tort.

An action against a stockholder for corporate tort resulting in personal injuries must be brought within three years from the time of such injuries, under Code Civ. Proc. § 359, and such time limit cannot be extended to three years after the recovery of judgment against the corporation for such injuries.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Giuseppe Damiano against Fieda O. Bunting, as executrix of the estate of John A. Bunting, deceased, and others. Judgment for defendants, and plaintiff appeals. Judgment affirmed.

James A. Bacigalupi and Edmund Nelson, both of San Francisco, for appellant.

Thomas C. Huxley, of Oakland, for respondents.

RICHARDS, J. This is an appeal from a judgment in defendants' favor after the order sustaining their demurrer to the plaintiff's complaint without leave to amend. The following are the facts of the case as shown by said complaint:

On May 13, 1913, one John A. Bunting was the owner of 180,000 shares of a total issue of 200,000 shares of a mining corporation known as the Birchfield Mining Company. On said May 13, 1913, the plaintiff was an employé of said corporation, and was injured in an accident occurring in the course of his employment. John A. Bunting died on May 1, 1916. Thereafter, and on May 17, 1916, the defendants were appointed the executors of his estate. Notice to creditors was duly ordered and published May 27, 1916. On February 27, 1917, the plaintiff herein presented his claim against said estate for the sum of $10,900.32, alleged to be due upon the proportionate statutory liability of said John A. Bunting, deceased, as a stockholder in said corporation. The claim being rejected, the plaintiff commenced this action on March 31, 1917.

To his complaint setting forth the foregoing facts the defendants demurred upon the general ground, and also upon the grounds that the cause of action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, and also by the provisions of section 359 of the same Code. The court sustained the defendants' said demurrer generally and without leave to amend. The judgment followed, from which the plaintiff prosecutes this appeal.

[1] Three questions are presented upon this appeal, the first being as to whether a cause of action exists against the stockholder of a corporation under the laws of this state upon a corporate liability arising out of a tort. This question has, we think, been settled in favor of the existence of such liability on the part of a stockholder for the torts of the corporation by the case of Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856, and by the case of Lininger v. Botsford, 32 Cal. App. 386, 163 Pac. 63, upholding such liability.

[2] The second question which arises herein is as to whether the cause of action upon such stockholder's liability survives the death of the stockholder. This question was also determined in favor of the survival of such cause of action in the case of Lininger v. Botsford, supra, and to the reasoning and conclusions of that case we adhere.

[3] The third and final question arising herein is as to whether this action is barred by the provisions of section 359 of the Code of Civil Procedure relied upon in the defendants' demurrer, and which reads as follows:

> "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

The foregoing section of the Code of Civil Procedure is one of the sections embraced in chapter 4 of title 2 thereof, which relates to the time of commencing civil actions. Section 353 of the same chapter and title contains this provision:

> "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

[4] It is the contention of the appellant herein that the provision of the Code last above quoted takes his case out of the operation of the first above quoted section of the Code, and gives him an extension of the period within which he otherwise must have commenced his action, arising out of the fact of the death of John A. Bunting a few days before the three-year period of limitation would have expired. This contention, however, is answered by the case of King v. Armstrong, 9 Cal. App. 368, 99 Pac. 527, in which Mr. Justice Shaw, of the Second appellate district, quite clearly points out that section 359 of the Code of Civil Procedure is so explicit in its terms expressive of the inapplicability of any of the other provisions of the title of that Code of which it is a part to actions against stockholders of corporations to enforce the liability created by law as to leave no room for any other construction. The conclusion arrived at in this case is fully enforced by the reasoning of the Supreme Court in the case of Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87.

wherein the court, with direct reference to the application of section 359 of the Code of Civil Procedure to the liability of stockholders of corporations in this state, says:

> "It must be remembered that the right to pursue the stockholder at all does not exist at common law, but is solely the creature of the written law; and that it must be exercised upon the conditions and within the limits which the written law prescribes. The invocation by respondent of the clause of the state Constitution declaring the liability of stockholders of corporations does not strengthen his position; for the statement of a right in a Constitution is always subject to reasonable statutory limitations of the time within which it may be enforced, unless otherwise declared in the Constitution itself; and three years is certainly not an unreasonable period of limitation. We see, therefore, no reason for disregarding the plain language of section 359. We need not inquire into the policy of the section; but, as certificates of stock of many corporations pass frequently from hand to hand, it may well be assumed that the Legislature intended to protect temporary stockholders from the power of officers of corporations and their creditors, to indefinitely extend the enforcement of liabilities created while they happened to be holders of stock. If the policy be unwise or bad, it is for the Legislature to change it."

See, also, Bank of San Luis Obispo v. Pac. Coast St. Co., 103 Cal. 594, 37 Pac. 499.

[5] In the reply brief of appellant it is attempted to be argued that, regardless of the liability of said stockholder arising at the time of the plaintiff's injuries, he is entitled to rely upon a liability which was created by the alleged fact that appellant had in an action commenced by him against the corporation recovered a judgment for damages for his said injuries within the period of three years prior to the commencement of the instant action. It suffices to say that the cases of Hunt v. Ward and Bank of San Luis Obispo v. Pac. Coast St. Co., supra, furnish a complete answer to this contention.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 578

INGRAHAM v. INGRAHAM. (Civ. 2653.)

(District Court of Appeal, First District, Division 1, California. April 5, 1919.)

1. Divorce 🔑109—Refusal to Have Matrimonial Intercourse—Burden of Proof.

In divorce suit based on Civ. Code, § 96, as to persistent refusal to have matrimonial intercourse being desertion, plaintiff had the burden of showing that health or physical condition of defendant did not make refusal reasonably necessary.

2. Divorce 🔑150(2)—Findings—Necessity.

In divorce suit based on Civ. Code, § 96, as to persistent refusal to have matrimonial intercourse being desertion, there must be a finding as to whether just cause exists for refusal.

3. Divorce 🔑179—Objection to Complaint—Availability on Appeal.

In suit for divorce, general allegation as to desertion, in the absence of a demurrer for a definite statement of facts, is not subject to the objection for the first time on appeal that it does not inform defendant that the desertion was intended to be established under the first provision of Civ. Code, § 96.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Ida Ingraham against George A. Ingraham. Plaintiff was granted an interlocutory decree of divorce on the ground of willful desertion, and defendant appeals. Reversed.

M. L. Rawson, of San Leandro, and Geo. Ingraham, of Oakland, for appellant.

John W. Stetson and A. T. Shine, both of Oakland, for respondent.

WASTE, P. J. Plaintiff was granted an interlocutory decree of divorce, on the ground of willful desertion, and defendant appeals. The original complaint alleged that—

> "Defendant willfully and without cause or provocation deserted and abandoned plaintiff, with intent to desert said plaintiff, and ever since said time has continued to live separate and apart from plaintiff without her consent, and against her will, and with intent to desert and abandon her, and without fault of plaintiff."

An amended and supplementary complaint was filed, setting forth the ground of desertion in the same form, and adding a second count, based on allegations of extreme cruelty. Defendant answered, denying the allegations of the complaint, and at the same time filed his cross-complaint, alleging willful desertion and extreme cruelty on the part of plaintiff.

The trial court found for the plaintiff on the ground of willful desertion alone, and decree followed. The finding as to willful desertion is couched in almost the identical language of the allegation hereinbefore quoted. Appellant attacks this finding upon the ground that the testimony introduced in the action, and on which the finding is based, is not sufficient to support the judgment or decree in that regard.

"Willful desertion is voluntary separation of one of the married parties from the other with intent to desert." Section 95, Civ. Code. Sections 96, 97, and 98 of the same Code set forth the different classes of facts which may manifest such desertion. Devoe v. Devoe, 51 Cal. 543. Section 96 is as follows:

> "Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or refusal of either party to dwell in the same house with the other party, when there is no just cause, for such refusal, is desertion."

The proof adduced at the trial of this action established the fact that the plaintiff and defendant, for several years, and up to the time of the commencement of the action, continued to live in the same house, but occupying separate rooms. The desertion complained of by the plaintiff consisted of the gradual, and finally the persistent, refusal of the defendant to have any matrimonial intercourse with the plaintiff as husband and wife. The corroboration in this regard was merely the testimony of other witnesses that the parties occupied separate bedrooms in the house, and was not of the character and degree required by the Code section relating to corroboration in divorce cases. We are not unmindful of the fact that the secrets of the bedchamber are very frequently hard to substantiate by other witnesses than the parties themselves. Nevertheless, the parties to a divorce action are not thereby relieved from the necessity of complying with the mandate of the law.

From a careful reading of the lengthy record, the trial appears to have been conducted by the parties on the theory that extreme cruelty was the real issue between them. Near the conclusion of the trial, the court gave an intimation that the finding should be on the ground of desertion, predicated on the failure of defendant to grant the marital rights that the plaintiff was entitled to. The court reached the conclusion, and so stated, that "the testimony shows no adequate cause for an entire cessation of sexual relations, and the testimony fairly shows it."

[1, 2] From our examination of the lengthy record we must disagree with the learned judge of the court below. There was no testimony, nor were any facts elicited, tending to show that the health or physical condition of the defendant did not make his refusal to have reasonable matrimonial intercourse reasonably necessary. The burden of establishing this fact rested on plaintiff. Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19. There must be a finding in such cases as to whether or not just cause for such refusal exists. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546. In the instant case plaintiff did not meet the burden imposed on her, and her case was not assisted by that of defendant, whose own testimony was against such a finding.

The finding of the court in the language of the complaint is not therefore a sufficient finding on the facts attempted to be proved. Devoe v. Devoe, supra. Furthermore, had the court used appropriate language in the finding to cover the facts required by the first portion of section 96, supra, the evidence would not be sufficient to support it.

[3] The general allegation of the complaint hereinbefore set forth, in the absence of a demurrer for a definite statement of the facts, is not now subject to the objection, for the first time on this appeal, that it does not inform defendant that the desertion was intended to be established under the first provision of section 96. Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73.

As the case must be reversed for failure of the proof to support the finding as to the desertion, we will not comment in detail on the evidence relied on by respondent to corroborate the testimony of plaintiff as to her residence. Suffice to say that we are of the opinion that it is sufficient under the liberal rule laid down in MacDonald v. MacDonald, 155 Cal. 674, 102 Pac. 927, 25 L. R. A. (N. S.) 45. On a retrial of the case the corroborating evidence should appear in proper order and sequence. The appellate court should not have to minutely examine the testimony of a multitude of witnesses, that it may, here and there, pick out fragments of proof, which, when pieced together, will support a finding of the trial court.

No other points made on the appeal require examination.

The judgment and decree are reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

40 Cal. App 678

LUTGE v. DUBUQUE FIRE & MARINE INS. CO. (Civ. 2716.)

(District Court of Appeal, First District, Division 2, California. April 15, 1919. Rehearing Denied May 14, 1919; Denied by Supreme Court June 12, 1919.)

1. APPEAL AND ERROR 🔑1001(2)—REVIEW—VERDICT—PREPONDERANCE OF EVIDENCE.

Whatever the appellate court may think as to the preponderance of the evidence, it may not substitute its own opinion for that of the jury wherever there is a fair, reasonable ground for a difference of opinion.

2. INSURANCE 🔑235 — FIRE INSURANCE — CANCELLATION OF POLICY—SUFFICIENCY OF EVIDENCE.

In action on fire policy, defended on ground that policy had been canceled, and involving issue of whether the receipt signed by insured upon receiving payment for small loss which had occurred some time prior to the fire in question contained words, "Said policy is hereby surrendered for cancellation," evidence *held* sufficient to support verdict for plaintiff.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. NEW TRIAL ⚷104(1)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

A trial court does not abuse its discretion in refusing a new trial applied for on the ground of newly discovered evidence, where the new evidence is merely cumulative.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Richard Lutge against the Dubuque Fire & Marine Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Courtney L. Moore, Coogan & O'Connor, and Perry Evans, all of San Francisco, for appellant.

Thos. A. Allan and Geo. K. Ford, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment rendered against it in a suit to recover upon an insurance policy issued by defendant company covering loss by fire. The facts of the case are briefly these: The plaintiff was the owner of a building in San Francisco which was insured against fire by defendant. The policy had been in force for some years. The fire which caused the loss upon which suit is brought occurred on August 7, 1915. Prior to that time, to wit, on July 10, 1915, a small fire on the premises had occurred. The insurance company settled the claim therefor by paying the plaintiff $18, and it is claimed by the defendant that upon making this payment the policy was canceled by attaching to the draft sent to plaintiff a receipt which contained the statement, just above where plaintiff placed his signature, "Said policy is hereby surrendered for cancellation," and that Lutge by signing the receipt containing this statement consented to the cancellation of the policy. This is the one issue between the parties, and the appellant contends that the evidence is insufficient to justify the implied finding of the jury that the policy had not been canceled prior to the loss, and, further, that the trial court abused its discretion in denying to the defendant a new trial.

[1, 2] Appellant's argument upon the weight of the evidence has much force, but it is one that should properly be addressed to a jury. Whatever we may think as to the preponderance of the evidence, we may not substitute our opinion for that of the jury wherever there is a fair, reasonable ground for a difference of opinion. It is true that the claim of the appellant that the words purporting to cancel the policy were a part of the receipt at the time it was signed by the plaintiff is upheld by the testimony of the clerk in defendant's employ who prepared the draft, by the testimony of the general agent of the defendant company who signed it, and by the testimony of an insurance broker to whom it was sent by the defendant, and who in turn delivered it to plaintiff. There is the further testimony of the insurance broker to the effect that he specifically called plaintiff's attention to the fact that the insurance policy was canceled, and that plaintiff replied that he did not care. On the other hand, the plaintiff denied that the words "surrendered for cancellation" were on their receipt when he signed it, or that he had any notice of any kind that the policy was canceled, or that he consented to the cancellation in any way. There are the additional circumstances that the insurance company did not accompany its receipt alleged to have embodied the agreement for cancellation with any letter calling attention to the cancellation; that the policy was in the possession of the plaintiff at the time of the fire, and had never been surrendered, and its surrender had not been demanded by the defendant; that the defendant company had not offered, prior to the loss, to return to plaintiff the unearned premium paid upon the policy; that, after the loss occurred, plaintiff employed an insurance adjuster to present his claim, who notified the defendant of the loss and presented the preliminary proofs of loss on August 25th; that five days thereafter the defendant replied to this letter, making some technical objection to the proofs, but not intimating in any way that the policy had been canceled, and it was not until September 14th that the defendant asserted that the policy had been canceled and denied liability thereunder. We cannot, under such a condition of the evidence, hold that there was no substantial conflict in the evidence, and that the jury rendered a verdict which was unsupported by the evidence.

[3] The only other point made by appellant is that the motion of the defendant for a new trial should have been granted. The affidavits filed upon the motion are all to the effect that the printed receipt had been altered and the words "surrendered for cancellation" made a part thereof before it was signed by the plaintiff. The statements in the affidavits constituted material and valuable evidence for the defendant, but such evidence was merely cumulative, and it should have been produced upon the trial. Defendant did produce evidence upon this very question in the testimony of the clerk of the defendant company who prepared the draft, in the testimony of the general manager who signed it, and in the testimony of the broker who delivered it to the plaintiff. Defendant therefore anticipated that this would be an issue in the case, and, after the decision has been adverse to it, it may not retry the case in order to produce other and perhaps stronger evidence upon a question which was

contested at the trial, when such evidence was available to the defendant at the time of the trial. A trial court does not abuse its discretion in refusing a new trial applied for on the ground of newly discovered evidence where the new evidence is merely cumulative. People v. Selby S. & L. Co., 163 Cal. 84, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267; In the Matter of the Estate of Walden, 166 Cal. 446, 137 Pac. 35; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; In the Matter of the Estate of Doolittle, 153 Cal. 29, 94 Pac. 240.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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40 Cal. App. 638

BRADLEY v. BRADLEY et al. (Civ. 2670.)

(District Court of Appeal, First District, Division 1, California. April 12, 1919. Rehearing Denied by Supreme Court June 9, 1919.)

1. DIVORCE ⚷245(2)—DECREE FOR ALIMONY — APPLICATION FOR MODIFICATION — MATTERS CONSIDERED.

Upon a motion to modify the alimony provisions of a final decree of divorce which has not been appealed from, only such facts as have arisen or become known to the party since its entry may be made the basis of the attack, and as to all other matters the judgment or decree is final after the period for appeal has expired.

2. DIVORCE ⚷286—DECREE FOR ALIMONY—MODIFICATION—APPEAL.

Upon defendant's appeal from an order granted upon his motion modifying the alimony provisions of a divorce decree, the defendant cannot be granted relief by the appellate court for the reason that the conditions of the parties have changed since the entry modifying the order was made, since those matters may only be taken advantage of by being first brought to the attention of the trial court upon proper motion for modification.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Suit by Emma Bradley against Richard Bradley for divorce and alimony, in which the Bradley Company was also made a defendant. Judgment for plaintiff. Defendants moved the court for an order modifying the final decree, and from an order reducing the alimony, defendant Richard Bradley appeals. Affirmed.

Richard Bradley, in pro. per.

Charles Baer, of San Francisco, for respondent.

RICHARDS, J. This appeal is from an order modifying a final decree of divorce between the parties hereto in so far as the provisions of said decree undertook to provide for the future maintenance of the plaintiff and respondent upon this appeal.

By the terms of the original final decree the plaintiff was granted a divorce from the defendant upon the ground of cruelty, and the defendant was directed to pay to the plaintiff the sum of $100 per month so long as she remained unmarried, and was further directed to give reasonable security for the payment of said sum. The decree recited that the defendant had, by virtue of the interlocutory decree, furnished a bond in the sum of $4,000 as and for such security, and said bond was by the final decree to remain in full force and effect. This decree was entered on October 7, 1915. On November 24, 1916, the defendant moved the court for an order modifying said final decree by the elimination therefrom of its provision respecting the plaintiff's further maintenance and support. Upon the hearing on said motion, affidavits and counter affidavits and also oral testimony pro and con were presented by the respective parties, going with much detail into the past and existing financial relations and abilities of the respective parties. These, it is almost needless to say, were strongly and decidedly in conflict as to almost every matter which was asserted or disputed therein. The trial court, having considered these, concluded to modify its former final decree by reducing the former amount of $100 to the sum of $85, to be paid monthly to plaintiff by the defendant. It is from the order making this modification that the defendant has prosecuted this appeal.

[1] In his briefs upon appeal, which the defendant has presented in propria personam, he attempts to discuss many matters which were the subject of controversy upon the main trial of the cause and which were concluded by the findings and decrees of the court therein, from which no appeal was taken. The appellant seeks to justify his attempt to reopen these matters by the claim that, the terms of the final decree as to the property rights of the parties and as to alimony being subject to future modification, these matters therein treated may always be relitigated. But this is not the rule, since upon a motion to modify a final decree of divorce in these respects which has not been appealed from it is only such facts as have arisen or become known to the party since its entry which may be made the basis of an attack upon its provisions. As to all other matters it is as final as any other final judgment or decree after the period for appeal has expired. In so far as the appellant's briefs have relation to facts arising since the entry of said final decree tending to show a change of condition in the defendant's financial ability to make the required payments,

the evidence educed upon the motion for a modification of the decree was, as we have seen, in sharp conflict. The court had the parties before it, and not only read their conflicting affidavits, but both heard and saw their examination, and, having done so, saw fit to make the modification in the decree, which, in so far as it went, was in the defendant's favor. We are unable to say from the state of the record before us that the court in any way abused its discretion in the form or substance of the modifying order.

[2] The appellant finally contends that he is entitled to some measure of relief from the court for the reason that, since the entry of the modifying order herein appealed from, the court has had occasion to pass upon the merits of certain other appeals between the parties hereto involving certain aspects of their property rights and interests, and that this court should now take those matters into consideration in passing upon this appeal, but it is apparent that this cannot be done, since the matters concluded by those appeals were not before the trial court at the time its modifying order herein appealed from was made. This is not, therefore, the forum wherein the appellant may obtain relief depending upon any conclusions arrived at in those cases; for any advantage which he might derive therefrom could only be gained through a renewal of his effort to have said final decree modified in the trial court based upon such change in conditions as may have arisen or been established since the making of the present modification of said original degree.

Order affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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40 Cal. App. 395

AHLMAN v. BARBER ASPHALT PAVING CO. et al. (Civ. 1916.)

(District Court of Appeal, Third District, California. March 22, 1919. Rehearing Denied April 21, 1919; Denied by Supreme Court May 19, 1919.)

1. TRIAL 🔑396(7)—FINDING OUTSIDE OF ISSUES—COMPLAINT.

In action to quiet title and to restrain issuance of bonds on plaintiff's property for street work, where complaint inferentially alleged improvement district was described so as to be capable of identification, which was not denied, finding that description of district was not sufficient to identify it or was indefinite was outside of the issues.

2. APPEAL AND ERROR 🔑219(2) — REVIEW — FINDING OF FACT NOT IN ISSUE.

Though the finding of a fact not in issue is sometimes upheld on the theory the parties have waived the point by failure to object to evidence, the rule cannot be extended to the justification of a finding in favor of a party contrary to his allegation, which allegation is not denied by his adversary.

3. MUNICIPAL CORPORATIONS 🔑488, 489(5)—ASSESSMENT FOR STREET IMPROVEMENT—FAILURE TO OBJECT BEFORE CITY COUNCIL.

Appeals, by property owners assessed with the cost of a street improvement, to the city council, contemplate the correction of errors in the assessment, such as an improper charge for the cost of making it, and, if a property owner fails to avail himself of the privilege accorded him, he will be precluded thereafter from urging the objection, the presumption being that if he had objected the error would have been corrected.

4. MUNICIPAL CORPORATIONS 🔑513(3) — STREET IMPROVEMENT—ASSESSMENT—REMEDY FOR ERROR.

If proceedings to assess the cost of a street improvement on property owners were defective, in that a lot in the improvement district was omitted from the assessment, the remedy of an owner was by appeal to the city council, whereon the owner should have specified and designated the lot or lots claimed to have been omitted.

5. MUNICIPAL CORPORATIONS 🔑488, 489(5)—STREET IMPROVEMENT—ISSUANCE OF BONDS—RIGHT TO COMPLAIN.

Under Bond Act Feb. 27, 1893 (St. 1893, p. 33), a property owner who did not pursue the course specified in section 4 of the act, providing a simple procedure whereby the owner may prevent the issuance of any bond for the assessment on his lot, cannot complain of issuance of the bonds, which created no new liability, and merely provided for payment in installments and after a period of years.

6. TRIAL 🔑404(2)—FINDING—CONCLUSION OF LAW.

In suit by a property owner to restrain the issuance of bonds on his property for street work in the city, the finding that no sufficient legal resolution of intention was passed was a conclusion of law.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by G. T. Ahlman against the Barber Asphalt Paving Company, Louis Lightston, as treasurer of the city of San Jose, and S. J. Farrell, as superintendent of streets of the city. From judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Judgment and order reversed.

William H. Johnson, of San Jose, for appellants.

Beggs & McComish, of San Jose, for respondent.

BURNETT, J. This is an action to quiet title and to restrain the issuance of bonds upon plaintiff's property for street work in the city of San Jose. Similar actions were brought against the defendants by four other property owners. By stipulation, the actions were consolidated and tried together.

The only pleadings in the record before us are the complaint of the plaintiff, Ahlman, and an amendment thereto, and the answer of defendant the Barber Asphalt Paving Company. Respondent in his brief states that said answer was adopted by the other defendants, and we will so consider it, although there is a reference in appellants' specifications to a separate answer of the defendants Lightston and Farrell.

There is no denial in the answer of plaintiff's allegation of ownership of the property in question.

Paragraph 5 of the complaint alleges that the defendants and each of them claim some interest in or lien upon said property, but that such claims are wholly without right. The answer denies this allegation, and alleges that defendant, the Barber Asphalt Paving Company, does claim a lien upon said property, and that its claim is neither wholly nor at all without right. The court found in accordance with the allegation of the complaint.

Paragraph 6 alleges that "on April 14, 1913, the common council of the city of San Jose passed a resolution purporting to be a resolution of intention, and on April 16, 1913, the same was approved by the mayor of said city, wherein and whereby it was resolved that Market street, from San Carlos street to First street, in said city, be improved by constructing thereon a pavement consisting of two inches of asphalt," etc.; "that said resolution provided that the cost of said work should be charged against a district, and described the district, which district included the land of the plaintiff hereinbefore described, and said resolution further provided that 10-year serial bonds, bearing interest at the rate of 7 per cent. per annum, should be issued by the city treasurer to represent each assessment of $25 or more; that no sufficient or legal resolution of intention was ever passed for the doing of said work; that the said resolution did not sufficiently describe the work to be done, or which was done thereunder, nor did it comply with the conditions of the charter * * * or of the Vrooman act, so called, or of the said bonding act of 1893." The answer denied this allegation, and a copy of the resolution of intention was attached and made a part of the answer "for all particulars therein and thereby appearing," and there was also annexed "the notice of street work" posted and published by the superintendent of streets pursuant to said resolution of intention. The finding (III) adopted the allegation of the complaint down to and including the following: "That said resolution provided that said work should be charged against a district, and described the district," and continued: "But the description of the district as given in said resolution of intention was not sufficient to identify the same, but was indefinite, and such that it could not be located upon any particular land or lands within the city of San Jose; that said resolution purported to include the land of plaintiff herein described"; and "that no sufficient or legal resolution of intention was ever passed for the doing of said work, nor did it comply with the conditions" of the charter or of said street bonding act.

Paragraph 9 of the complaint alleged: "That on June 9, 1913, the mayor and common council passed a resolution ordering said work to be done in accordance with the plans and specifications passed and adopted * * * on February 17, 1913; that said resolution was posted from June 23 to June 27, 1913." The answer alleged that it was declared in said resolution "that the public interest and convenience required to be done the street work in said resolution and in said resolution of intention described," and a copy thereof was made a part of the answer. There was no finding of the court upon this point.

It is alleged in paragraph 10 that on June 20, 1913, the mayor and common council gave notice inviting proposals for the doing of said work, which was posted from June 23 to June 27 and not otherwise. Defendants made this notice a part of the answer, and alleged that it was "conspicuously posted near the chamber door of said mayor and common council on the 23d day of June, 1913, and was so kept posted thereafter for five consecutive days." The finding was in the language of the complaint.

Allegation 11 is that the defendant corporation put in a bid offering to do said work for certain specified prices. The answer amplified the allegation by enumerating the contents of said bid and stating that it was accompanied by a bond, etc. The finding followed the allegation of the complaint.

Paragraph 12 alleged the acceptance of said bid by the city authorities, the passage of the resolution awarding the contract to the corporation defendant, and that said company entered into a contract to do said work according to the resolution of intention and said plans and specifications. The answer went into further details and attached a copy of the notice of award. It then proceeded to set out the various steps taken by defendant preliminarily to doing the work, and alleged that it did perform the work to the satisfaction of said superintendent of streets. The finding was in the language of the complaint.

Paragraph 13 alleged that "the superintendent of streets made his warrant, diagram, and assessment whereby the land of plaintiff * * * was assessed for the sum of $951.69; that the total sum assessed upon said district contained large items, which are not legally chargeable upon said district, or the lands embraced therein." The answer went into details concerning the preparation of the diagram and the assessment, and denied the allegation concerning illegal charges. The finding was in the language of the complaint, and as to the last portion thereof it was: "That the sum of $25.00 for making said assessment" was not legally chargeable upon the district or the lands embraced therein.

In paragraph 14 it was alleged that the assessments were not uniform or equal, which allegation was denied by the answer. As to this there was no finding.

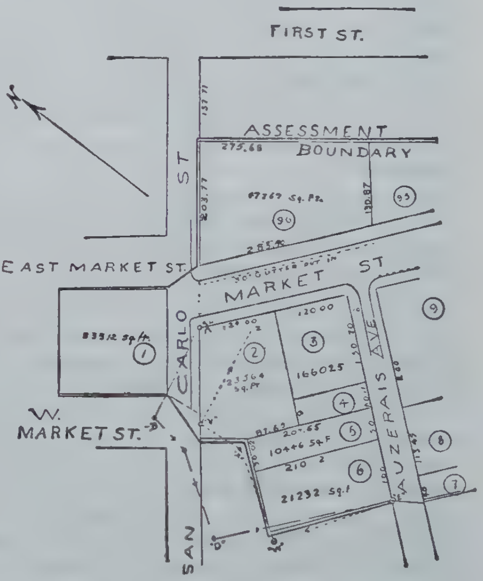
There is no reference in the answer to the remaining allegations of the complaint. As to these the court found: That within the time allowed by law certain owners of property within the district appealed to the mayor and common council from said assessment and specified the particulars in which it was alleged to be illegal, which are fully set out; that said appeal came on for hearing, but was denied by the mayor and common council. There was then a finding that prior to August 4, 1873, the portion of Market street in question had been constructed, repaired, and fully improved and duly accepted by ordinance, which provided "that thereafter the roadway of said portion of said street should be kept open and in repair by said city, and that the expense thereof should be paid from the general fund"; and that said ordinance has never been repealed. It was then found that it was not true that said diagram showed said land to be all within said district; that it was not true that the superintendent of streets estimated benefits arising from said work upon said lots within the district nor that he assessed the total sum upon the several pieces within said district; "but it is true that no assessment district was described in said resolution of intention * * * with sufficient certainty to identify the same."

The judgment was that plaintiff was the owner in fee of the property referred to free and clear of all claims of the defendants or either of them; that neither of the defendants has any claim of lien upon said property; and that plaintiff is entitled to recover from the Barber Asphalt Company his costs, taxed at $34.65.

1. The portion of finding No. 3, "that the description of the district as given in said resolution of intention was not sufficient to identify the same, but was indefinite," etc., is attacked by appellants.

In this connection the claim of respondent is not only that the description is indefinite, but that if it may be accepted at all, and the description contained in the resolution of intention had been properly delineated upon the diagram of the assessment district, there would have been included in said district a lot of land which is shown to have been excluded from the assessment.

Said description commences as follows: "Beginning at a point 160.45 feet westerly from the intersection of the westerly line of Market street with the southerly line of San Carlos street; running thence southerly 69.19 feet to a point; thence southwesterly 150.07 feet to a point; thence southerly a distance of 214.4 feet," etc. The last two calls in the description are: "Thence southerly along the easterly line of the west branch of Market street to its intersection with the northerly line of San Carlos street; thence southwesterly to the point of beginning." In respondent's brief is a diagram of the portion of the district in question, which we here reproduce:



"The heavy solid line," says the brief, shows the boundary of the district as shown on the diagram. The dot and dash line (B–C–D–E) shows where the boundary would have run if the description found in the resolution of intention had been followed. The dotted line (E–W–X–Y–Z) shows where the line would have run if traced backwards from the point "E" in the northerly line of Auzerais avenue, which is the first point definitely fixed by a physical description. Neither of these lines coincide with the boundaries shown on the diagram.

"The plat we furnish herewith shows that there is no assessment on the parcel of land bounded on the northerly side by the southerly line of San Carlos street and a portion of the line C–D; on the westerly side by a portion of the line D–E; on the southerly side by the northerly line of lots 6 and 5; and on the easterly side by a portion of the westerly line of lot 2."

R. C. McComish, one of the attorneys for plaintiff, testified:

> "I am familiar with First street, in this city, I know the course of that street. It is about 30 degrees west of north. It runs northwest and southeast and varies from north to south about 30 degrees. I am familiar with San Carlos street, in this city. It runs at right angles to First street."

Irving L. Ryder, city engineer, testified:

> "I know First street varies to the west. Take the monument line, generally speaking, throughout the town, not for this particular street, but in the neighborhood of the angle, San Carlos street, there may be a variation of from one-half of a minute out, due to the variation of the monument, the general direction of the street. The streets are, generally speaking, at right angles to one another, but not absolutely; the variation of San Carlos between First and along past Market street is not more than one minute, at any rate, from a right angle to First street."

W. E. McIntyre testified on behalf of defendants:

> "I assisted in preparing the description relative to the Market street improvement. I was city engineer at the time. In connection with the map I could answer as to the intention of the description; with the map the intention and the resolution is perfectly apparent. I am familiar with the resolution of intention. Beginning the description at the intersection of the southerly line of San Carlos street with the westerly line of Market street, the description at that point had to be referenced out, * * * and then the point begins 160.45 feet westerly from that point of intersection. * * * As I understood it, not knowing the technicality of law, the descriptions in cases of law, I understood westerly would naturally mean along the street line. * * * I made the diagram that was finally used by the superintendent of streets for the purpose of making the assessment. San Carlos avenue runs 30 degrees south of west."

The foregoing constitutes all the evidence in the record as to the description of said assessment district. It must be apparent that plaintiff's showing was quite meager. His diagram was not produced at the trial, nor, of course, introduced in evidence. It simply represents his deductions from the testimony of his own attorney, and has been submitted in his brief for the inspection of this court. It is apparent that, according to the diagram which was made by the city engineer and upon which the assessment was based, the starting point of the description was located on the southerly line of San Carlos street. This point was deemed to be 160.45 feet "westerly" from the intersection of said line with the westerly line of Market street. Respondent, however, claims that this point is not due west from said intersection, but that to satisfy said call you must go across San Carlos street to obtain the starting point as indicated on his diagram.

Following strictly the language of the description, we would probably have to agree with respondent's contention, although we consider it a fair conclusion from the whole record that the intention was to select said point in the southerly line of said San Carlos street as the starting point for the description of the district. We may add, further, that if an error was made in the description as claimed by respondent, it is, at least, doubtful whether it was of a prejudicial nature.

[1, 2] But, be that as it may, the finding as to the description is outside of the issues and is contrary to the allegation of plaintiff's complaint. While the complaint does not allege that the district was described so as to be capable of identification, we deem it susceptible of no other construction. Such is the necessary implication from the averment "that said resolution described the district."

While the finding of a fact not in issue is sometimes upheld upon the theory that the parties have waived the point by their failure to object to the evidence—in other words, because they have treated the case as though it were a material finding—the rule cannot be extended to the justification of a finding in favor of a party contrary to his allegation, which allegation is not denied by his adversary.

[3] 2. Appellants attack the finding of the court that the sum of $25 "for making said assessment" was not legally chargeable upon the district. The evidence disclosed that the item "was paid to the San Jose Abstract Company for search of record on the property to ascertain the exact frontage of the lots." It is not disputed that respondent's portion of this was one dollar, and such amount was added to his assessment. Several contentions in reference to it are made by appellants, but we may refer to one only, which is that respondent cannot question the validity of the assessment on this ground, for the reason that he did not present it to the council on his appeal to that body. In said appeal he urged seven different and distinct grounds, but did not even suggest that the assessment was too large or that it contained any improper or illegal item. Of course, it must be presumed that if he had called the attention of the council to the fact that his assessment was thus excessive to the extent of one dollar, that tribunal would have relieved him from the burden of this charge. Such appeals contemplate the correction of errors like this, and it is entirely just and right that, if a property owner fails to avail himself of this privilege thus accorded him by the law, he should thereafter be precluded from urging the objection.

The point is, indeed, covered by the decision of the Supreme Court in Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. 1143, where it was held that "an objection to a street assessment in San Francisco, that it included an amount, as incidental expenses, for engineering and printing, is waived by a failure to appeal to the board of supervisors."

[4] 3. Another point made in favor of the judgment is that a lot in the district was omitted from the assessment and for this reason the whole assessment was void. There is no specific finding as to this, the court basing its judgment upon the ground, substantially, that no district was created, since it could not be identified from the description. But if the point may be considered at all, it is sufficient to say that there is no such allegation in the complaint nor is there any evidence to support it. It is true that plaintiff's said diagram includes apparently a lot that was not assessed, but this diagram, as we have said, constitutes no part of the record. Besides, if such error was committed, the remedy was by appeal to the council. Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125. It is true that an appeal was taken to said council and in support thereof it was alleged "that various parcels of property within the district upon which said work has been made a charge have not been assessed to pay their proportionate share of the cost of said work," but respondent should have specified and designated the lot or lots which he claimed were thus omitted. Moreover, the record does not show that he offered any evidence in support of this claim, the transcript simply showing that "the proceedings relative to the Market street paving was offered in evidence on appeal to the council; that said proceedings included all the records and proceedings in the office of the superintendent of streets connected with the assessment and were offered in evidence without argument." Manifestly, we cannot assume that any of those proceedings showed that any lot was improperly omitted from said assessment. In a matter of this kind it is as much incumbent upon the property owner to present evidence to the council to support his claim as it is to make the appeal. If he does not offer any such evidence, he must abide by the finding against him.

[5] 4. Another point urged in the briefs is as to whether the bond act of February 27, 1893 (Stat. 1893, p. 33), under which admittedly the bonds involved herein were issued, is applicable to the city of San Jose.

There is no dispute that said city is operating under a freeholders' charter (Stats. of 1897, p. 592); that this charter provides a system of street improvements and the collection of the costs thereof; that the improvement of streets is a municipal affair (Byrne v. Drain, 127 Cal. 663, 60 Pac. 433); and that municipal affairs are regulated and controlled by the charter where it provides therefor, and not by general laws passed by the Legislature (California Constitution, art. 11, § 6; Byrne v. Drain, supra). Said charter provides:

> "An act of the Legislature of the state of California entitled 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885, as since amended, and as hereafter shall be amended, is hereby adopted as a part of this charter, and shall have the same force and effect as if incorporated at length herein, except where the provisions of said act conflict or are inconsistent with the provisions of this charter."

Said act of 1885, commonly known as the "Vrooman Act," as it existed at the date of the adoption of the San Jose charter, did not provide for the issuance of bonds for the payment of street assessments, although this scheme was thereafter included therein by amendment. The contention of respondent is therefore that the provisions of the Vrooman Act as they existed on March 5, 1897, became a part of said charter as though they had been expressly incorporated therein (Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920; 2 Lewis' Sutherland, Statutory Construction, 787); but that subsequent amendment to said Vrooman Act cannot be so regarded, notwithstanding the said language of the charter, for the reason that the charter cannot be amended in that manner (article 11, § 8), and the provision in the statute must yield to the rule laid down in the Constitution. The conclusion is reached that said bond act as a part of the general law is no part of said charter. Byrne v. Drain, supra; Fritz v. San Francisco, 132 Cal. 373, 64 Pac. 566; Sunset Telephone Co. v. Pasadena, 161 Cal. 265, 118 Pac. 796.

It is further claimed that said bond act was not adopted as a part of the charter by virtue of the reference in section 4, c. 1, art. 8, as follows:

> "If bonds are to be issued pursuant to an act of the Legislature entitled 'An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds,' approved February 27, 1893, and any assessment less in amount than $50 remains unpaid for thirty days from the date of the warrant, or for five days after final decision on appeal, as provided in section 11 of said act, the mayor and common council may, by resolution, order such assessment paid from the street contingent fund, and the superintendent of streets shall thereupon release said assessment on the books of his office as upon payment in other cases."

There is force in the contention that such reference to the bond act is not sufficient to make it a part of the charter. There is certainly no clearly expressed intention to adopt it such as is found in reference to the Vrooman Act. Moreover, if the reference thereto be deemed sufficient to constitute it a part of the charter, then it would include said act as it stood in 1897. Said act at that time authorized the issuance of bonds only upon a finding by the council upon estimates of the engineer that the cost would be greater than $1 per front foot along each line of the street. Stat. 1893, p. 33. The complaint alleges that there was no such estimate or finding, and this was not denied. It would seem, therefore, that justification is not shown for the issuance of the bonds.

However, we are satisfied that the plaintiff is in no position to complain of the issuance of the bonds. Section 4 of said Bond Act provides a simple procedure whereby the property owner may prevent the issuance of any bond for the assessment on his lot. This course was not pursued. As stated in German S. & L. Soc. v. Ramish, 138 Cal. 126, 69 Pac. 92:

> "The bond creates no new liability, and in effect provides for what by some would be regarded as more favorable payment, because in installments and after a period of years. However this may be, the lot owner cannot complain, since he may pay the assessment and prevent the issuance of the bond."

Of course, if plaintiff had made this objection, his land would still be subject to the assessment under the other provisions of the Vrooman Act.

It would be an unjust construction of the law that would permit the property owner to escape his obligation to pay for the improvement altogether, because a mistake may have been made in granting him the favor of payment for the benefit in installments. He is at least put to his election to choose which method of collection shall be pursued.

5. We have not noticed specifically the finding of the court that said Market street had been previously "constructed, repaired, and fully improved to the satisfaction of the mayor and common council," and accepted by an ordinance duly passed with a provision that it should thereafter be "kept open and in repair by said city," for the reason that respondent at the oral argument disclaimed reliance upon that finding.

[6] We may add that the finding that "no sufficient legal resolution" of intention was passed is manifestly a conclusion of law and it requires no specific consideration.

The proceedings awarding the contract were in all respects regular and there is no claim of fraud of any kind. The paving company performed its contract fully and justly; it improved and regraded the street to the satisfaction of the city; and it hardly seems right that it should lose any compensation for its services by reason of the technical objections that have been made to the assessment.

We think the judgment and order should be reversed. It is so ordered.

We concur: BUCK, Presiding Judge pro tem.; HART, J.

(40 Cal. App. 526)

TRUCKEE RIVER GENERAL ELECTRIC CO. v. ANDERSON et al. (Civ. 1927.)

(District Court of Appeal, Third District, California. April 2, 1919.)

1. Adverse Possession 🔑19 — Necessity of Inclosure—Statutes.

In a suit to quiet title as against one who claimed by adverse possession, evidence that defendant had inclosed his land for less than five years is admissible as showing possession, Code Civ. Proc. § 325, as amended by St. 1877–78, p. 99, relating to adverse possession by one claiming title not founded on a written instrument, not requiring that the land claimed should be inclosed for five years before the commencement of the action, but merely that the land must have been occupied and taxes paid for such period.

2. Adverse Possession 🔑114(1) — Evidence—Possession by Plaintiff—Statutes.

In a suit to quiet title as against one who claimed by adverse possession, evidence *held* insufficient to show that plaintiff had been seised or possessed of the property within five years before the commencement of the action, as required by Code Civ. Proc. § 318.

Appeal from Superior Court, Placer County; William M. Finch, Judge.

Action by the Truckee River General Electric Company against John Anderson and others to quiet title. Decree for plaintiff as to all the land, except that of defendants Bliss and Ferris, and plaintiff appeals; the appeal being prosecuted by the United States, which during the pendency of the action had acquired plaintiff's rights. Affirmed.

John W. Preston and Ed. F. Jared, both of San Francisco, for appellant.

Tuttle & Tuttle, W. J. Prewett, and Prewett & Chamberlain, all of Auburn, for respondents.

HART, J. Plaintiff commenced the action against John Anderson and a number of others to quiet its title to a tract of land in Placer county, containing about 54 acres. As to all of the defendants, except Bliss and Ferris, the action was either dismissed by plaintiff or default was taken against them for failure to appear. The decree of the court was in favor of plaintiff for all the land mentioned in the complaint, except that defendant Bliss was found to be the owner of a parcel thereof amounting to about one-fifth of an acre, and defendant Ferris of a parcel thereof amounting to about seven-eighths of an acre. It is stated in appellant's brief:

> "During the pendency of the action, the rights of the plaintiff were acquired by the United States of America, and this appeal is now prosecuted by the government."

The land in controversy is situated on Lake Tahoe and along the bank of the Truckee river near its source, which, throughout the record and in the briefs is spoken of as the "mouth of the Truckee river." Each of the defendants, Bliss and Ferris, claimed title by adverse possession. The findings of the court were in their favor, and it was also found that the action against defendant Bliss was barred by the provisions of section 318 of the Code of Civil Procedure.

There was documentary evidence received tending to prove title in the plaintiff corporation to the 54 acres, which included the two parcels awarded to Bliss and Ferris, the inception of said title being a patent from the United States to Central Pacific Railroad Company, dated April 18, 1870.

The Ferris Title.

C. B. Ferris testified that he had been living on the property claimed by him since 1896. The tract has a frontage of about 150 feet on the lake front, and it runs back from the lake about 80 feet. The witness testified:

> "The improvements on the property are a house and a boathouse and a small garage on the hill above the house, and I have a wharf, a boat landing. The property that would be between the house and boathouse and wharf and the county road, I have used for a little of everything; piling wood, lumber, and whatever became necessary to put in there. * * * Below the wharf I have a toilet and outhouse. The toilet is probably 40 feet from my southwest line, and the ground in that distance I have used for a little of everything—storage, hauling boats, boat repairing."

The witness built a fence around the property, either in 1907 or 1908—he was pretty positive it was in June, 1908—and it has been maintained ever since. He stated that he had resided continuously on the property, winter and summer. It was stipulated at the trial that for the years 1908 to 1912, both inclusive, the taxes on the whole property were assessed to and paid by appellant, and that the parcel claimed by Ferris was assessed to him, and the taxes were paid by him, during the same period of time.

It is contended by appellant that, as Ferris did not occupy the land under color of title, but was a mere squatter, he would be subject to the provisions of section 325 of the Code of Civil Procedure, and must prove that the land "has been protected by substantial inclosure," and "has been usually cultivated or improved," and it is claimed that neither of these requirements has been met.

The complaint was filed on October 3, 1912, which was four years and four months after the construction of the fence in June, 1908. Section 325 of the Code of Civil Procedure, as adopted in 1872, read as follows:

> "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:
>
> "1. Where it has been protected by a substantial inclosure.
>
> "2. Where it has been usually cultivated or improved."

In 1878 (Stats. 1877–78, p. 99), the section was amended by re-enacting the above language and adding thereto the following:

> "Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land."

It will be noted that, as originally enacted, there was no provision in the section that the land in dispute should have been (1) "protected by a substantial inclosure," or (2) "usually cultivated or improved" for any period of time, nor did the amendment change those terms of the section. The five-year period provided by the amendment applies only to the occupancy and claim of the land and to the payment of taxes.

In Gray v. Walker, 157 Cal. 381, 108 Pac. 278, our Supreme Court said:

> "The requirement of the statute that the land be 'usually cultivated or improved' means that it should be cultivated or improved in the manner or to the extent usual in the case of similar property. Allen v. McKay, 120 Cal. 332, 52 Pac. 828. If so improved, it is not necessary that it should be either cultivated or inclosed. Daniels v. Gualala M. Co., 77 Cal. 300, 19 Pac. 519."

In the case of Allen v. McKay, above cited, it was held that an instruction was properly given which stated that "a piece of property is said to be usually improved, or improved in the usual manner, when it is improved as similar property is improved," and in the Daniels Case it was held that the right of way of a railroad company, "improved in the usual manner of railroads with reference to their roadbed and right of way," constituted adverse possession, "though the land was not protected on all sides by a substantial inclosure."

[1] Inasmuch as section 325 does not require that the land should be inclosed for the period of five years before the commencement of the action, testimony tending to show that it was inclosed for a shorter pe-

riod will be admitted as a fact tending to show possession. As it was stipulated that defendant, Ferris, for a period of five years prior to the commencement of the action, had paid the taxes assessed against the parcel of land claimed by him, and in veiw of the testimony showing acts of possession on his part, we conclude that the judgment in his favor should be affirmed.

The Bliss Title.

In 1879 or 1880, one John Branch, a fisherman on Lake Tahoe, squatted on the property claimed by defendant Bliss, and built a house upon it. He lived upon it until 1900. In 1881, or 1882 he built a fence with cedar posts around the tract "for the purpose of having a garden; he only kept his garden two or three years; the ground was not very good"—as testified by a witness. There was also a woodshed and a boathouse built upon the property. The place was commonly known in the neighborhood as "the Johnnie Branch Place," and was reputed to be his property. Branch died some time between 1900 and 1904.

In 1900, J. H. Pomin bought from Branch the house and his boats—"everything he had, lot and house," Pomin testified. This transaction was evidenced by the following document, which was admitted in evidence over plaintiff's objection:

> "This is to certify that I, John Branch, do this 3d day of August, 1900, for the sum of one hundred and fifty ($150.00) dollars, which money has been paid me this day, and in consideration of which sum, I do transfer and sell to J. H. Pomin all right, title, and interest in the houseboats, fixtures, and whatsoever property is contained in said building or buildings on lot occupied by said buildings. The said property being located at the mouth of the Truckee river (west bank). This includes each and all property of whatsoever description formerly owned by me (Jno. Branch). Witness my signature. [Signed] John Branch. Witness: H. W. Wills. Tahoe City, Cal., August 3, 1900."

On the 14th day of November, 1912, H. W. Wills went before a notary public and acknowledged that John Branch had signed and executed said instrument.

Pomin testified that, when he bought the place, he had it rented for a couple of years; that the renter came on the place in 1901 or 1902, and stayed during one summer; that it was vacant for three or four years.

W. S. Bliss, a civil engineer, made a survey of the Branch property for his brother, the defendant Bliss, in 1907 or 1908, seven or eight years before the trial. He stated that he followed the outside boundaries of the land as shown by the old fence; that there was a fence there, but he did not know whether it was all standing or not.

The defendant Duane L. Bliss, Jr., was sworn as a witness and identified a deed, executed June 13, 1907, and acknowledged June 20, 1907, by J. H. Pomin, which conveyed to the witness:

> "Lot known as the John Branch property, county of Placer, state of California, located at the mouth of the Truckee river, west bank, together with the buildings on said lot and all fixtures or contents therein."

Over the objection of the plaintiff, this deed was admitted in evidence. The witness testified:

> "At the date of this deed I was living at Tahoe. I personally took possession of this property, and had an Italian carpenter that worked at the tavern. He and his family lived there; paid me $5 a month. I haven't any way of getting the exact record of when he went into that property, but some time during the summer of 1907. He was there five or six or eight months. I think the next winter after he went in, after he ceased to occupy it, William Gifford occupied it in the spring of 1908. Gifford occupied it as a tenant. He or his people continued there until this spring. [The trial was had on October 18, 1915.] It was April, I believe, when he was ejected. I brought a suit in ejectment or unlawful detainer. During the time I have been in possession of this property, either by myself or through my tenants, I have always claimed it as my own absolutely. There has never been any interruption of my occupation or possession of it. I have paid the taxes upon the property ever since I have had it."

Tax receipts, showing the payment of taxes by the witness for the years 1908 to 1912, both inclusive, were received in evidence. The assessment for the year 1908 was for "Lot Tahoe." For 1909, 1910, 1911, and 1912, the assessment was for "lot at mouth of Truckee river." In the last two receipts there is also included another lot owned by Mr. Bliss. He testified that during the time covered by the first three receipts the lot in question was the only property he owned at Tahoe.

It was shown by the assessment roll of Placer county that, in 1907 and 1908, the 54 acres, together with dam and water rights, were assessed to M. F. Vandall, the grantor of the plaintiff. In the years 1909, 1910, 1911, and 1912, the property was assessed to the plaintiff; reference to the dam and water rights being omitted from the assessments of 1911 and 1912. The property claimed by defendant Bliss is a portion of lot 9 of section 7, township 15 north, range 17 east, and the government plat shows that the lot contained 17.38 acres, and that it is situated in the northwest quarter of the northeast quarter of said section 7. The assessment to plaintiff and its grantor in the above-named years, so far as the property in dispute is concerned covered "the fractional N. W. ¼ of the N. E. ¼ of section 7," etc.

Section 318 of the Code of Civil Procedure reads as follows:

> "No action for the recovery of real property, or for the recovery of the possession thereof,

can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

A similar statute of Minnesota was considered in Seymour v. Carli, 31 Minn. 81, 16 N. W. 495, and the court said:

> "The title of the owner of a freehold estate is described by the terms 'seizin,' or 'seizin in fee'; yet in a proper legal sense the holder of the legal title is not seized until he is fully invested with the possession, actual or constructive. When there is no adverse possession, the title draws to it the possession. * * * An actual possession in hostility to the true owner works a disseizin, and, if the disseizor is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished."

[2] The facts in this case, as above detailed, show that it was impossible that plaintiff could have been "seized or possessed of the property in question, within five years before the commencement of the action," and sustain the finding of the court below that plaintiff's cause of action is barred by the provisions of said section. Consequently it becomes unnecessary to consider the points raised by appellant in its attack upon the judgment.

The judgment is affirmed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

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40 Cal. App. 647

SPORGIS v. BUTLER. (Civ. 1944.)

(District Court of Appeal, Third District, California. April 14, 1919.)

1. Appeal and Error ⟹1011(1)—Findings by Trial Judge—Conclusiveness.

Court findings on conflicting evidence will not be reviewed, unless there is no sufficient evidence or inferences that may be drawn therefrom to sustain the findings.

2. Damages ⟹185(1)—Injuries—Evidence—Findings.

In an action for personal injuries, where the claimed injuries of plaintiff were of a subjective nature, and depended for proof so entirely upon plaintiff's own testimony and statements that it became specially incumbent on the trial court to thoroughly test his credibility, accuracy, and good faith as a witness, findings as to plaintiff's injuries *held* not contrary to the evidence.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Karl Sporgis against Drury Butler. Judgment for plaintiff for less relief than demanded, and plaintiff appeals. Affirmed.

Thomas H. Christiansen, of Sacramento, for appellant.

J. W. S. Butler and B. F. Van Dyke, both of Sacramento, for respondent.

BUCK, Presiding Judge pro tem. This is an action to recover damages for personal injuries sustained by plaintiff as the result of his collision, while riding a bicycle, with an automobile driven by the defendant. The accident occurred in July of 1915, and the case was tried in December of 1916 by the court sitting without a jury. Findings and judgment were given in favor of the plaintiff in the sum of $400; but from this judgment the plaintiff has appealed, bringing up all of the testimony under the alternative method.

In its brief plaintiff contends that the findings with respect to the extent of the plaintiff's injuries are not justified by the evidence, and that the evidence without substantial conflict shows that plaintiff sustained permanent injuries which will make him a cripple for life, and that he has been and will be in the future prevented from working at his trade as a carpenter, and that consequently the judgment awarded him by the court in the sum of $400 is wholly inadequate and insignificant, and that the court "was biased and prejudiced against the appellant, and that as a result thereof he did not have a fair trial."

[1] In this case the not unusual duty was imposed upon the trial judge of making his findings from evidence of a very conflicting character, and the only power that this court has in the premises is to determine whether or not there is in the record any sufficient evidence or any reasonable inferences that may be drawn therefrom to sustain the findings; for under the law of the land the trial tribunal to which the plaintiff chose to submit his case is the sole and exclusive judge of the credibility of the witnesses and of the value and effect of their evidence.

[2] In this case the claimed injuries of the plaintiff were of a subjective nature, and depended for proof so entirely upon plaintiff's own testimony and statements that it became specially incumbent upon the trial court thoroughly to test the credibility, accuracy, and good faith of the plaintiff as a witness. The following is some of the testimony which is sufficient to justify and sustain the findings in this case:

First, in regard to the violence of the collision which plaintiff claims was the cause of his "invisible" injuries: Plaintiff himself testified that, while he was riding his bicycle on the public highway, defendant came at the rate of 30 miles per hour in his automobile directly behind him, striking the bicycle and—

"throwing me off the wheel and on the front part of his machine. After I was knocked off the wheel, I was on the ground between the pavement and the wheel. The left-hand wheel of the front part of the machine caught me in the middle of the back, and the machine went about 15 feet, between 10 and 15 feet, before it stopped. The automobile dragged me under the wheel on top of the pavement for a space of 10 or 15 feet. I was lying on my face toward the pavement."

On the other hand, three disinterested witnesses on behalf of the defendant testified in substance that the car—

"did not travel at all after hitting the bicycle. Possibly it moved a foot, but not more than that. The plaintiff was not dragged one foot, probably, or I would not call it that. I would say, now, he was not dragged at all."

Second, as regards the visible and tangible evidence of the effect of the collision plaintiff testifies:

"I was visibly injured up from my wrist to the middle between the shoulder and elbow—torn off the skin part of the flesh like with a scraper about three inches in width."

Immediately after the accident, appellant, at his own request, was taken to the office of his family physician, who testified as a witness on his behalf at the trial that—

"He had an abrasion on the right arm, the forearm, extending from 2 or 3 inches above the wrist up to a little above the elbow about 2 or 3 inches wide—it looked red and raw, just took off the superficial lesion of the skin, a little deeper cut."

Also:

"A small abrasion on the left hand, back of the hand and fingers as near as I can remember. There were no abrasions or bruises on the back—no skin wound at all; without an abrasion of the skin at all. Q. Has there been any change in the condition of his back from the end of say 3 months of the time of the injury? A. No. From then on the symptoms were subjective, what we call subjective symptoms to me. Nothing that demonstrates to any one else—unless there was a tenderness to the pressure. Q. By the Court: In your opinion, is the patient suffering continual pain now at the present time? Well, that, of course, is a subjective inference. I have no reason to think that he is; that he does not feel weak and feel some sensation there. I do not know if it would be an out-and-out pain. * * * A long time after the injury I got an X-ray that shows that all the vertebræ is in line, of proper position; no evidence of bones having been broken."

Plaintiff also produced at the trial as a witness on his behalf Dr. E. W. Twitchell. In his brief counsel states that Dr. Twitchell's testimony was largely founded on hypothetical questions. But Dr. Twitchell at the trial testified that he had—

"made an examination of the plaintiff in this case, which extended for an hour or more. * * * I made what I believe was a very thorough examination. * * * To be frank, I am not able to state exactly what is the matter with his back. I have examined him carefully, but I was not able to make any definite finding; that is, rather nothing which evidenced any anatomical changes—anything which I could demonstrate to anybody else. Q. You found no condition which indicated that there had been an injury to his back? A. No. If he had come to me, if a person, like anybody, and said nothing to me, and I examined him, after I got through, I would not be positive sure there was anything wrong with him. * * * I found no deformity; no anatomical changes; no swellings; no bruises; no scars. * * * No apparent injury to the muscles or nerves."

On behalf of the defendant, Dr. C. B. Jones testified that as the result of an examination of the appellant at the time of the trial:

"I found the man extremely well developed muscularly, so far as the movements are concerned of the body. Every joint seems to be an absolute normal movement. The spinal column is movable in every direction, twisting and bending. Bends backward and forward, both lateral movements. The muscularity of the spinal column is more or less sensitive; he holds it in tension considerably By directing his attention to other parts, I was able to get him to relax the muscles. They relaxed the same as a normal back. Just as he was bending forward, leaning over in the position the muscles tightened up, he could not relax, did not relax himself. In moving other parts of his body, the muscles that were held tense became relaxed giving perfect movement of the spinal cord. In manipulating the spinal column by the hands, I could find no displacement of the vertebræ, the vertebral column itself. I could get extreme bending in the lumbar region and in the cervical region—those two movements of the spinal cord. * * * I watched the man as he walked, I saw no limping or lameness of any character which sustains my conclusion of my examination. * * * I found no chronic sign. This indicates there is an absence of inflammatory condition of the spinal cord."

Dr. Jones was then asked by respondent's counsel a hypothetical question framed by the plaintiff's attorney and based upon a large number of subjective symptoms narrated by the plaintiff as a part of his testimony, such as the violent and terrific character of the collision, his suffering great pain in the small of his back, his inability to walk at all for 2 weeks and his ability for the ensuing 3 months to walk only with great difficulty and with great pain, and the continued existence of this pain and weakness in the back and his inability to bend his back either forward, backward, or sidewise without severe pain and suffering, his inability to walk except very slowly and for short distances and with great pain, etc. Assuming these conditions to exist, the doctor stated that he would—

"expect him to be suffering from an injury to the back. Q. Taking now the basis of this hypothetical question, and add to it the further facts that after a physical examination of the back there were no physical signs of injury. No physical signs of any injury to the bones or muscles, what, then, would be your opinion as regarding the nature of this injury? A. From my examination I would term the condition as I find there is what we call traumatic spine. If he was hurt in a railroad accident, they would call it a railroad spine. It is an indefinite injury in which it is impossible to find any spot or definite lesion. The characteristics of these injuries are, the fact is there is a psychic condition as well as the injury. Of course we know that a man that is injured, we know that condition has something to do—there is a psychic condition—the mental attitude mixed with the injury. From my past experience, and from the history of such cases, and the authorities which we go by, we find that individuals of this character are cured, either by receiving a certain amount or sum for their injury, or else by not receiving a certain amount. When they find out they cannot, there is no further recourse for them, they will go back to work, either immediately or very shortly afterwards and be cured of their injuries."

Furthermore, Dr. Twitchell, plaintiff's own witness, testified:

> "I regard him (plaintiff) as a man of what we call a neurotic type, that is rather characteristic of his nationality. He is from a province in Russia, a province, a country where I am in the habit of seeing that decided mental action is due to shocks of any sort, mental and physical shocks. Q. Is that condition such that, after this suit is over, he will improve? A. I should say that a suit of this kind would have a very profound impression upon an individual of his type—that is to say, genuinely affects his condition without any connivance on his part. Q. Is the condition such a condition that after this suit is over he is very liable to improve? A. That would depend likewise on the conditions, if the court disappointed him, he would be that sort of an individual who would be very much disappointed—gross disappointment, that sort of thing. Q. Doctor, so far as you are able to discover, there is nothing in his injury, physical condition, that would cause him to get worse as a result of his injury; it would be more the result of his disappointment? A. Yes; I should say so. I would not expect him to get worse because of the condition, on account of his physical condition, so much as I would on account of the other."

There is nothing in the record to justify or warrant appellant's charges that the plaintiff did not have a fair trial as a result of bias or prejudice on the part of the court, or that the record discloses any bias or prejudice. In asking questions of the witness, the court acted with a due and proper sense of the responsibility cast upon him by the duty of his office to try the case according to all the evidence available to him from the witnesses on the stand. There is no evidence to show that by any act or conduct of the judge the witnesses were coerced or attempted to be coerced into telling anything except what they believed to be the truth.

The findings attacked were therefore not contrary to the evidence, and the judgment is therefore affirmed.

We concur: BURNETT, J.; HART, J.

(40 Cal. App. 508)

MacFARLAND v. WALKER et al.

(Civ. 2714.)

(District Court of Appeal, First District, Division 2, California. April 1, 1919.)

1. APPEAL AND ERROR 🔑672 — QUESTIONS REVIEWABLE—JUDGMENT ROLL.

Where appeal is upon judgment roll alone, review is confined to facts presented by findings and admitted by pleadings.

2. DEEDS 🔑95—CONSTRUCTION.

The intent of parties to a deed should be obtained, if possible, by giving every word in deed its usual meaning.

3. DEEDS 🔑95 — CONSTRUCTION — TECHNICAL WORDS.

Under direct provisions of Civ. Code, § 1645, technical words in a deed should, unless clearly used in a different sense, be given meaning by which they would be understood by persons in profession or business to which they relate.

4. DEEDS 🔑96 — CONSTRUCTION — RECITAL.

Under direct provisions of Civ. Code, § 1068, it is only when operative words of grant are doubtful that recourse may be had to its recitals for purpose of construction.

5. DEEDS 🔑121 — CONSTRUCTION — "GRANT."

Civ. Code, § 1068, relating to construction of grants, applies to quitclaim deeds, since "grant" includes all sorts of conveyances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grant.]

6. DEEDS 🔑92 — CONSTRUCTION — STATUTE.

Civ. Code, § 1070, providing that, if several parts of a grant are irreconcilable, the former part prevails, must be construed with section 1068, providing when recitals in grant may be referred to, and section 1069, requiring grants to be interpreted in favor of grantee.

7. DEEDS 🔑100 — CONSTRUCTION — STATUTE.

Under direct provisions of Civ. Code, § 1066, grants are interpreted as are other contracts, and, under section 1647, may be explained by circumstances under which they were made and matter to which they relate.

8. Mines and Minerals 🔑55(7)—Mortgages 🔑304 — Quitclaim Deed—Construction.

Where conveyance reserved mineral rights, and grantees gave a mortgage back, a subsequent deed to grantees reciting grantees' desire to have mortgage released and quitclaiming grantor's interest in premises, released not only the mortgage, but also conveyed reserved mineral rights to grantees, especially where such construction was not challenged for nearly 50 years.

9. Appeal and Error 🔑907(1)—Presumptions—Judgment Roll.

Ordinarily, where case is appealed upon a judgment roll, facts necessary to support trial court's findings will be presumed to have been presented to it.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Suit to quiet title by A. C. MacFarland, administrator of the will annexed of the estate of Thomas A. Scott, deceased, against Jesse Walker and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. C. MacFarland, of Sacramento, for appellant.

G. W. Hunter, L. M. Burnell, and J. S. Burnell, all of Eureka, for respondents.

BRITTAIN, J. The plaintiff appeals on the judgment roll alone after trial of a suit to quiet title to certain minerals or mineral rights, and the right to enter upon the defendants' lands, there to dig, bore, and mine for the subterranean substances. He maintains the findings do not support the judgment, because he claims all of the elements of adverse possession on the part of the defendants do not appear, and because a certain instrument set forth in the findings was, as he urges, merely a release of mortgage, and not a conveyance of the minerals and mining rights.

In 1869 the plaintiff's testator, by an attorney in fact, conveyed certain lands in Humboldt county to the predecessors in interest of the respondents by deed in terms a grant, reserving and excepting therefrom the subterranean oils and minerals and the right to enter upon the grantees' lands to dig, bore, or mine for the subterranean minerals, paying to the grantees such damages as they might sustain by reason of such entry. Upon the day the grant was made the grantees mortgaged to the grantor the land conveyed to secure the payment of a promissory note payable August 31, 1870, for $1,880, with interest at 10 per cent. During the month of August, 1870, before the note became due, the instrument in question was executed. It recites the fact of the making and recordation of the mortgage, giving the book and page of record, and describes the lands, making no reference to the reservation in the original deed. It further recites that—

> "Whereas the said John Walker and Jesse Walker are desirous of having their said tract of land relieved from the operation of said mortgage; now, therefore, I, ——, in consideration of the premises and of the sum of one dollar, the receipt whereof is hereby acknowledged, remise, release, and forever quitclaim unto the said John Walker and Jesse Walker their heirs, executors, administrators, and assigns, the aforesaid premises and all the right, title and interest, both in law and equity, which I have in and to the same."

The appellant maintains that by the reservation in the original grant the grantor created two separate and distinct estates in the land, one being of the surface, or soil, and the other of the oil and similar substances below the surface, together with the right to remove them. Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289. He argues that the clear intent of the instrument is indicated by the recital, "Whereas the said John Walker and Jesse Walker are desirous of having their said tract of land relieved from the operation of said mortgage," and that "nowhere in the instrument can be found the slightest evidence of intention to reconvey any oil lands."

The case of Barnstable Savings Bank v. Barrett, 122 Mass. 172, relied upon by the appellant, was a case where the operative words indorsed on the back of the mortgage itself were:

> "Having received full payment and satisfaction of the within mortgage, I do hereby cancel and discharge the same, and release and forever quitclaim unto the within named G., his heirs and assigns, all my right, title and interest in and to the within described premises. To have and to hold," etc.

At the time the mortgagee's interest under the mortgage was the only interest he had, although he theretofore had another mortgage on a portion of the land, which he had assigned to one Flagg several months prior to the release. The mortgagee's assignment to Flagg was not seasonably recorded, and to defeat Flagg's interest it was sought to extend the instrument beyond its clear meaning. The court properly held this could not be done.

In Donlin v. Bradley, 119 Ill. 412, 10 N. E. 11, immediately after the description of the land in the deed in question was the provision, "This deed is made for no other purpose except to release a certain trust deed," describing it. The court held that the deed was limited to the purpose stated.

In Barr v. Foster, 25 Colo. 28, 52 Pac. 1101, where the quitclaim deed specifically referred to the interests of the grantors arising out of a certain contract, it was held that it did not release a deed of trust, of which the grantors were the beneficiaries. In each of these cases the operative words of quitclaim themselves contained a limitation upon the interest conveyed.

[1-3] The appellant maintains that, if the language of the instrument is given its full and most stringent construction, it cannot by any means refer to the oil rights. A serious argument presented by able counsel in support of the two constructions to be given the instrument demonstrates, if not its ambiguity, at least a repugnance between the recital and the operative words. Since the appeal is upon the judgment roll alone, this court is limited to a consideration of the facts presented by the findings and admitted by the pleadings. The court is confined to those fundamental rules of construction, which all lawyers find so easy to state, and which the reports of adjudicated cases show no two lawyers on opposite sides of a controversy can agree to apply in the same way. The first of these rules is to ascertain the intent of the parties by taking the instrument by the four corners, and, if possible, giving effect to every word in it in accordance with its usual meaning. In the Civil Code are codified the rules of interpretation. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. Civ. Code, § 1645. The operative words in this instrument, "remise, release, and forever quitclaim all my right, title and interest, both in law and in equity," whether considered as technical words of conveyancing or words understood in their ordinary and popular sense, are the most apt which could have been selected to convey to the Walkers both the equitable interest of the mortgagee and the legal interest in the minerals and mining rights. These words, standing alone and constituting the entire operative clause of the instrument in themselves, are entirely unambiguous. If they had been written without any recital having been made, there could be no question as to their legal effect. No evidence could have been introduced and no inference drawn to limit them simply to a release of the mortgage. They were not coupled in the operative clause with a limitation to the mortgage interest as were the operative clauses in the Barnstable Savings Bank case, in Donlin v. Bradley, and in Barr v. Foster, cited by the appellant.

[4-6] The appellant maintains that, notwithstanding the lack of ambiguity in the operative words of the instrument, the intent of the grantor was shown by the recitals in the preamble. If his contention were sound, no matter how broad was the language used, it would not be extended beyond the clear intent of the parties. Civ. Code, § 1648. It is only when the operative words of grant are doubtful that recourse may be had to its recitals to assist in the construction. Civ. Code, § 1068. The recitals in an instrument may be operative in the sense that they may bind either or both parties to the truth of the facts stated, or they may be examined for the purpose of resolving an ambiguity in the operative words of the grant itself, but where the words of grant are clear, the recitals cannot be resorted to for the purpose of imparting an ambiguity to the entire instrument by which clear words of grant may be limited in their effect. It may be contended that a quitclaim deed is not a grant, and that section 1068 of the Civil Code applies only to technical grants. But the word "grant" includes all sorts of conveyances, including quitclaim deeds. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256. If several parts of a grant are absolutely irreconcilable, the former part prevails (Civ. Code, § 1070), but this section must be read in connection with section 1068, and with section 1069, which provides that it is to be interpreted in favor of the grantee.

[7, 8] Grants are to be interpreted as other contracts (Civ. Code, § 1066), and they may be explained by the circumstances under which they were made and the matter to which they relate (Civ. Code, § 1647). An examination of the surrounding circumstances in making the instrument in question supports the conclusion that, under the rules of construction of the language of the instrument, the operative words must be given their full significance.

The appellant maintains that the external circumstances show the instrument was intended merely as a release. An examination of all the circumstances before the court gives little support to this contention. Thomas R. Bard, as the attorney in fact of Thomas A. Scott, of Philadelphia, in 1869 was authorized to bargain and sell Scott's lands in Humboldt county, to make deeds of quitclaim, special warranty, and general warranty, to accept mortgages, to collect moneys due Scott, and to compound the same, to execute and to satisfy of record releases of mortgages, and to give acquittances and releases. When the instrument in question was executed under this power, Bard knew that he was authorized to make quitclaim deeds and to release mortgages. He also knew that on the same day the mortgage was made he reserved what the appellant maintains was a legal estate out of the mortgaged premises, consisting of rights under the surface of the lands mortgaged. He knew, therefore, that his principal had both legal and equitable interests in the lands. The instrument was made before the mortgage debt became due. It is significant that it does not recite the fact of payment of the debt. It does recite that the owners were desirous of having the lands relieved from the operation of the mortgage, and in consideration of that desire, and for a further consideration, Bard used the language necessary to convey both the legal and the equitable interests of his principal. He did not use the language he was expressly authorized to use in the event of the payment of the mortgage debt.

These transactions occurred nearly 50 years ago. The original grant from Scott to the Walkers was made in November, 1869. The instrument in question was made in 1870. Scott lived for 21 years after the instrument in question was executed. During that period the Walkers dealt with the property in all respects as their own. Deeds between the original grantees and from the original grantees to their successors were executed and recorded, and a few months before Scott's death successors of one of the Walkers in terms leased to one Graham a portion of the lands included within the original deed for the express purpose of drilling, digging, boring, and removing petroleum, oil, and similar substances therefrom. Scott died in 1891. Between that time and 1903 numerous other conveyances and leases of the lands and parts of them were recorded, some of them reserving in the grantors named in these latter conveyances, and others transferring to the grantees named therein, the oil and similar products with the right to extract the same. All these instruments, some 15 in number, were matters of public record more than 12 years before the plaintiff was appointed the administrator of the estate of Scott with the will annexed. His appointment was not until 23 years after the death of Scott. The appointment was made in 1914, and this suit was brought shortly thereafter. Notwithstanding the appellant's claim that during this period of half a century Scott and his estate have held an estate in the lands of which they could not be divested by nonuser, that interest in the lands was never assessed, at least before 1909, to either Scott or Scott's estate. The entire interest in the property was assessed to the holders claiming under the instrument in suit, and all taxes were paid by them. Their property was fenced and held by them openly as their own. Even though all the elements of adverse possession of such an estate as the appellant claims do not appear, for the reason that the clock would not begin running until Scott or his representatives were denied the right to exercise the privileges reserved in the original deed, in view of the notice imparted by the recordation of the instruments during a long period of years showing the adverse claims of the Walkers and their successors, coupled with the fact that at the expiration of 45 years after the instrument in suit was executed the plaintiff, as the representative of Scott's estate, deemed it necessary to bring a suit to quiet those adverse claims, the principle that equity does not look with favor upon stale claims might well be applied. Whether this principle would be conclusive or not, the dealings of the Walkers and their successors with the land after the execution of the instrument in suit and the silence on the part of Scott and the representatives of his estate in regard to the clouds upon his title, if he still retained title, would indicate that the parties to the instrument had themselves considered the operative words to mean exactly what they say.

[9] Respondent urges that, apart from any question of construction of the instrument or of adverse possession, the court made the ultimate findings of fact of ownership in the defendants and lack of ownership in the plaintiff, and that these findings fairly sustain the judgment. This rule directly applies to the present case, unless the findings of the probative facts regarding possession and the construction of the instrument in suit are at variance with the finding of ownership in the defendants. McArthur v. Goodwin, 173 Cal. 499, 160 Pac. 679. In support of the construction given to the instrument in suit by the lower court, there may have been additional facts before the lower court not presented by the judgment roll. Ordinarily the existence of whatever facts might be necessary to support the finding of ownership in such a case would be presumed to have been presented to the lower court in support of its action. Upon the facts before this court, Scott's title was divested in 1870, since which time the defendants and their predecessors in interest have been, as they still are, the owners of the lands in fee.

Judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

40 Cal. App. 603

CRENSHAW BROS. & SAFFOLD v. SOUTHERN PAC. CO. (Civ. 1950.)*

(District Court of Appeal, Third District, California. April 8, 1919. Rehearing Denied by Supreme Court June 5, 1919.)

1. Carriers 🔑150, 158(3)—Limitation of Liability—Loss or Damage from Negligence.

A provision in a bill of lading that amount of any loss or damage for which carrier shall be liable shall be computed on basis of value of property (being bona fide invoice price to consignee, including freight charges if prepaid) at place and time of shipment under the bill of lading, whether or not such loss or damage occurs from negligence, is not void as against sound public policy.

2. Carriers 🔑115—Damage to Shipments—Refrigeration.

Loss to fruit from imperfect refrigeration was damage for which a carrier was liable under a provision in bill of lading that the amount of "any" loss or damage for which it was liable should be computed on basis of value of property at place and time of shipment.

3. Carriers 🔑135—Injuries to Shipment—Measure of Damages.

Under a bill of lading providing that amount of any loss or damage for which carrier was liable should be computed on basis of value of property being bona fide invoice price to consignee, including freight charges if prepaid at place and time of shipment, the extent of damages is measured by the actual loss, which is determined by the difference between the invoice price, with the freight and refrigeration charges added, and the selling price, and it is immaterial what the fruit might have sold for at point of destination.

4. Courts 🔑97(5)—Precedents—Federal Questions.

The interpretation of a uniform bill of lading issued in accordance with a schedule of freights and fares filed with the Interstate Commerce Commission, in pursuance of acts of Congress relating to interstate shipments (see U. S. Comp. St. § 8604a et seq.), and the consideration of liability of shipper thereunder, involve federal questions concerning which the decisions of the federal courts are supreme.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Crenshaw Bros. & Saffold, a copartnership consisting of John A. Crenshaw, Ira A. Crenshaw, J. B. Saffold, and C. G. Hilderley against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton, for appellant.

L. T. Hatfield, of Sacramento, for respondent.

BURNETT, J. The action was brought to recover damages for breach of contract in relation to the shipment of three separate and distinct consignments of grapes from three different points in California to Tampa, Fla. Briefly stated, the damage claimed was due to imperfect refrigeration, rough handling of the fruit, and unnecessary delay in transportation. The court found in favor of plaintiff, and the appeal is taken from the judgment on a bill of exceptions. Only one question is open for consideration in this court, and that is, What is the measure or standard by which the amount of compensation is to be determined? Every other question was waived by appellant in the court below, and, of course, on principle as well as authority, we must accord full significance to that waiver.

[1] The controversy revolves about this provision in the bill of lading:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under the bill of lading. * * * whether or not such loss or damage occurs from negligence."

There is no dispute that the transaction involved interstate commerce, or that appellant had filed with the Interstate Commerce Commission its schedule of rates, fares, and charges for transportation as required by the interstate commerce law. Nor is it claimed that any fraud or want of good faith characterized the execution of the contract between the parties for the shipment of the fruit. Respondents, however, do make the contention that said provision is void because against sound public policy.

A detailed consideration of the various objections to the legal operation and effectiveness of the provision is not required since the validity of such contract has been so directly and positively affirmed by the courts, including the Supreme Court of this state and the United States Supreme Court, that the question is no longer open to discussion. Of course, the circumstances and conditions of each particular case must be regarded in the interpretation of the contract, but it cannot be regarded as unlawful or inoperative.

In Kansas City S. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, a box of household goods was lost in transportation, and the shipper sued to recover its value. The main defense was that the liability was limited to the sum of $5 per hundredweight, the value agreed upon at the time and place of shipment. Many cases are reviewed in the opinion, and the court declares:

"But when a shipper delivers a package for shipment and declares a value, either upon re-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Amendment of remittitur and correction of judgment denied 183 Pac. 208.

quest or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped, upon plain principles of justice, from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. * * * The ground upon which such a declared or agreed value is upheld is that of estoppel."

It is not important that in the case at bar the agreement did not specify the value. It left that to be ascertained, but limited it to a particular time and place. The same principle would manifestly apply as though the parties had stated the exact value. Indeed, as we shall see hereafter, there is no controversy as to the value of the property at the time and place of shipment. Nor is there any dispute that the shipper had the option to demand, on the condition of paying a greater rate, a more favorable contract as to the liability of the carrier.

In Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, while the main questions discussed were whether the plaintiff's exclusive remedy was against the initial carrier and whether the action was barred, the court declared:

> "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariff and regulation."

In Pennsylvania R. R. Co. v. Olivit Bros., 243 U. S. 574, 37 Sup. Ct. 468, 61 L. Ed. 908, the validity of such provision was conceded by both parties, the controversy being over the questions as to the meaning of the phrase "lawful holder" in what is known as the Carmack Amendment to the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]), whether there was any evidence of negligence on the part of the defendant, and whether plaintiff was entitled to recover the freight paid by it; the court, however, after quoting said provision from the bill of lading, said:

> "Some of the bills of lading do not contain this provision, but it was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment, and that such measure should be read into all of the bills of lading. As plaintiff further says, to recover the damages sustained by it based upon this value, plaintiff must receive from defendant the difference between this value and the proceeds of the sale and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight."

Gulf, Colorado & Santa Fé Ry. Co. v. Texas Packing Co., 244 U. S. 31, 37 Sup. Ct. 487, 61 L. Ed. 970, involved the shipment of poultry, the goods having been damaged by reason of the negligence of the carrier, and sold by the shipper at the point of destination. One of the vital questions considered was whether the trial court erred in giving to the jury the following instruction:

> "If you find for the plaintiff you will assess the damages at the difference between the invoice price of said poultry, to wit, the sum of $22,238.56, and the value of said poultry at the time the same was delivered to plaintiff or its agents, the Western Cold Storage Company in Chicago, by the carrier, with 6 per cent. interest per annum, from January 15, 1911."

The court declared:

> "We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. * * * We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. * * * Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. New York, Lake Erie & W. R. R. Co. v. Estill, 147 U. S. 616 [13 Sup. Ct. 444, 37 L. Ed. 292]. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damage."

The case of Boston, Maine Railroad v. Piper, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, is not opposed to the foregoing. Therein it was held that a provision exonerating the carrier from losses incurred by the shipper in consequence of the negligence of the former is illegal and not binding upon the shipper, and "is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate."

In no decision, to which our attention has been called, has the subject received more careful and thorough consideration than in Zoller Hop Co. v. Southern Pacific Co., 72 Or. 262, 143 Pac. 931, decided by the Supreme Court of Oregon. Therein it is said:

> "It is reasonable and natural that the care and risk involved in the carriage of goods should be in proportion to their value. It is proper and legitimate that, the greater the risk and responsibility, the greater should be the recom-

pense to the one incurring them. The converse is equally true, so that consequent damages are reduced in proportion to the lesser responsibility for the goods. The risk and the rate have a logical and corresponding relation to each other, based upon the value of the property intrusted to the carrier. If it is lawful to agree in advance upon a more or less conventional value of the chattels for the purpose of securing cheaper rates in favor of the shipper, it is quite as proper to use the same value as a basis upon which to compute damage for the breach of the contract. * * * It accords with sound doctrine, therefore, that at the outset the parties may in good faith fix upon the value of the property for all contingencies likely to arise in the transaction, and this does not in any way relieve the carrier from the results of his own negligence."

In 10 Corpus Juris, 57, it is said:

> "Before the enactment of the Carmack Amendment the greatest confusion existed as to whether a limitation of the carrier's liability for loss or injury to a specified value was valid in case the shipment was lost or injured by reason of the negligence of the carrier. * * * The effect of the Carmack Amendment is, of course, to make the rule uniform in all jurisdictions of the United States, so far as interstate shipments are concerned, and to render valid a limitation of the character under consideration, whether the loss or injury was due to the carrier's negligence or not."

Furthermore, it is said that even in states where such a contract is held void under statutes prohibiting carriers from limiting their common-law liability, "a contract for an interstate shipment, made in a state where such a statute is in force, is valid under the Carmack Amendment, inasmuch as the decisions of the federal courts prior to the amendment held such contracts valid."

Our own Supreme Court has also directly upheld the validity of such agreement.

In Pierce v. Southern Pacific Co., 120 Cal. 156, 52 Pac. 302, 40 L. R. A. 350, it was declared that effect must be given to the contract of the parties making the invoice price at the point of shipment the measure of damage, "and where no invoice price was actually made out and agreed upon, that expression must be understood as indicating the actual value of the trees at the point of shipment, when loaded and ready for transportation."

The question was fully considered in Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118, involving the shipment of horses, and the court said:

> "The contract is one in which the valuation of the property was agreed to for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability. It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to, and, of course, the agreed valuation must be deemed to be the actual valuation of the property—its actual valuation for all purposes of the contract."

[2] Nor do we understand how this covenant in the contract is affected in the least by the fact that there was a separate and distinct charge for the refrigeration. The charge was distinct, but the refrigeration itself was inseparably connected with the transportation of the fruit, and was an essential part of the transaction. The loss from imperfect refrigeration was damage for which the carrier was liable on that bill of lading, and the condition to which we have reference applied "to any loss or damage for which the carrier is liable." The fact that there was only one rate for the refrigeration does not derogate from the validity of the contract, since the difference in the rate for the transportation would be a sufficient consideration to uphold it.

Another important question is involved in the construction and application of this provision of the contract.

As to the first count in the complaint the court found that the grapes were sold to the best advantage for the sum of $980; that the amount of the freight charge was $496.12 and of the refrigeration was $95; that the invoice value was $783; that if the fruit had arrived in time and uninjured, it could have been sold for $1,957.50. The court concluded that the plaintiffs suffered damage to the extent of the difference between said $1,957.50 and $980, to wit, the sum of $977.50, for which judgment was allowed.

As to the second count, the court found that the fruit was sold for the sum of $1,097.75, and that if it had been received on time and in a marketable condition it would have brought the sum of $1,860. It was also found that the invoice price was $930, the freight charge $494.97, and the refrigeration charge the sum of $95. The damage allowed was therefore the sum of $762.25.

In reference to the third shipment, it was found that it was sold for $1,133.75; that if there had been no breach of the contract, it could have been sold for $2,557.50; that the invoice price was $1,255.50, the charge for transportation was $494.97, and for refrigeration was $95. The court allowed as damages the difference between the selling price and what it would have brought, to wit, the sum of $1,423.75.

[3] It is the claim of appellant that, in any event, under said provision of the bill of lading the extent of the recovery is measured by the actual loss, which is determined by the difference between the invoice price with the freight and refrigeration charge added and the selling price, and that it was entirely improper for the court to consider what the fruit might have sold for at the point of destination. Under this view, for

the first-mentioned shipment, the account would stand as follows:

Actual cost of fruit	$ 783 00
Freight paid	591 12
	$1,374 12
Fruit brought	980 00
Loss	$ 394 12

For the second cause of action we would have:

Cost	$ 930 00
Freight paid	589 97
	$1,519 97
Fruit brought	1,097 75
Loss	$ 422 22

The third would stand as follows:

Cost	$1,255 50
Freight paid	589 97
	$1,845 47
Fruit brought	1,133 75
Loss	$ 711 72

Another view of the construction of said provision, which supports the conclusion of the lower court, suggested by respondents, is that said invoice price simply provides the maximum amount to be recovered in case of loss, but does not prevent the recovery of the difference between the selling price and what the goods could have been sold for if there had been no injury, provided such difference does not exceed said invoice price. Such seems to be the view taken by the Supreme Court of this state in the very recent case of Olcovich v. Grand Trunk Ry. Co. of Canada (Sup.) 176 Pac. 459. Therein it is said:

> "While there are late cases holding that the measure of damages under such a bill of lading as that herein is the difference between the cost price at the shipping point and the selling price of the injured freight at the point of destination, * * * we prefer to follow the general view above stated."

The general view to which the court thus refers is expressed in the earlier part of the opinion as follows:

> "While the exact question has never been determined in this state, in the case of a partial loss with such a contract it has been determined, in harmony with the general view, that the loss is limited by the value stated and agreed upon in the bill of lading in the case of a total loss. Pierce v. Southern Pacific Co., supra. If this limit is valid as to a total loss, there seems to be no reason why it should not also be considered as a limitation upon the damage in the case of a partial loss."

It is declared further that the authorities are not in accord as to the question, but the Supreme Court approved the view announced in 10 Corpus Juris, § 612, and 3 Sutherland on Damages, 3391.

In the Pierce Case, supra, it is to be observed that the bill of lading provided "that the actual invoice cost at point of shipment will be taken as measure of damages," language of somewhat different import from that to be construed herein. It was also held that it was error for the lower court to permit the market value of the trees at Riverside, the point of destination, to be shown, and that the injury should have been limited to what was the value in Florida, the shipping point. It was therefore in effect held that the value in Florida was not only the measure of the damages that could be recovered, but that it was the only basis upon which such damage could be computed. It may be added that obviously it would have made no difference in the result in that case whether said value was considered as the measure of the recovery or the basis upon which the damages should be computed, since there was a total loss.

In Corpus Juris, supra, the rule is stated as follows:

> "The parties may, by express provisions to that effect, stipulate that in case of partial loss, the damage shall be proportioned on the basis of the sum named as the maximum limit; but where this is not done the question becomes one of construction, and very generally the view is entertained that such stipulations are to be considered as permitting recovery for the damages actually done, the amount recoverable not to exceed the amount agreed on as compensation for a total loss."

As stated in Sutherland, supra:

> "Where a statute authorizes a limitation of liability by contract and a contract is made limiting liability for loss of live stock to the actual cost at point of shipment and in no event to exceed a stipulated sum per head, the measure of damages for injuries to the animals in transit due to negligence is the amount that each has depreciated in value, but in no event to exceed the actual cost at point of shipment as shown by the market value there or the stipulated value."

An examination of the cases cited by Corpus Juris and Sutherland, supra, in support of the text shows that the phraseology of the respective bills of lading is somewhat different from the language involved herein, and it lends itself more easily to the construction that the invoice price was intended to be the measure rather than the basis of the amount recoverable.

It may be said, also, of the Olcovich case, supra, that it arose prior to the adoption of the uniform bill of lading in 1908. The corresponding provision, though, in the bill of lading involved in said case was:

> "The amount of any loss or damage for which the carrier becomes liable shall be computed at the value of the property at the place and time of shipment"

—being substantially the same in that respect as the bill of lading herein. Said decision undoubtedly, therefore, favors the conclusion of the trial court in this case, since the damages awarded for each shipment are less than the amount of the invoice value and freight.

However, we cannot reconcile this view with the decision of the United States Supreme Court in the Texas case, in 244 U. S. 31, 37 Sup. Ct. 487, 61 L. Ed. 970, supra.

[4] The interpretation of the uniform bill of lading issued in accordance with the schedule of freights and fares filed with the Interstate Commerce Commission in pursuance of the act of Congress and relating to an interstate shipment, and the consideration of the liability of the shipper thereunder, involve federal questions concerning which the decisions of the federal courts are supreme. Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; Georgia, Florida & Alabama R. R. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; A., T. & S. F. Ry. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050.

In the Prescott Case it is said:

> "Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the divers requirements of state legislation and decisions"—citing a large number of cases.

The case of Detroit & M. Ry. Co. v. Fletcher Paper Co., 248 U. S. 30, 39 Sup. Ct. 13, 63 L. Ed. —, involves an entirely different question.

Therein the suits were brought to recover the difference between the rates fixed by the Michigan Railroad Commission on logs carried wholly within the state and the higher rates that the defendant actually charged. The court held that the determination of the merits of the controversy depended upon the construction of the state laws, as to which the state "has the last word." It was expressly stated that the cases did not involve interstate commerce.

We see no escape from the conclusion that under the decisions of the highest court of the land the award of the trial court was too high.

To state it sententiously: The United States Supreme Court holds that under this form of contract the shipper can recover only his actual loss instead of his full compensatory damage.

It is not necessary, though, to reverse the case, since the findings of fact are complete. The judgment is modified so as to provide that:

> "Plaintiffs do have and recover of and from the Southern Pacific Company, a corporation, the defendant, the sum of $1,528.06, with interest thereon at the rate of 7 per cent. per annum, as follows: On the sum of $394.12 from the 21st day of October, 1913; on the sum of $422.22 from the 23d day of October, 1913; and on the sum of $711.72 from the 14th day of November, 1913"

—and, as thus modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(40 Cal. App. 537)

MILEKOVICH v. QUINN et al. (Civ. 2709.)

(District Court of Appeal, First District, Division 2, California. April 3, 1919. Rehearing Denied by Supreme Court June 2, 1919.)

1. Divorce 🔑252 — Husband and Wife 🔑272(1) — Community Property — Property Division.

Divorce dissolves the community, and, unless the parties agree to a division of the community property, it is the duty of the court, in divorce suit, to determine their respective interests.

2. Divorce 🔑245(2)—Stipulation for Division of Property—Fraud—Subsequent Suit to Recover Share of Community Property.

In a suit by divorced wife against her former husband for her share of community property kept from her by the fraud of the husband in making a property settlement before divorce, where the wife did not seek a new valuation for the purpose of redivision, but only the secreted one-half of the property, it was not necessary that she offer to return to the defendant property received under the settlement.

3. Divorce 🔑245(1) — Fraud in Settlement of Property Rights.

In suit by divorced wife against her former husband for her share of community property kept from her by husband's fraud in property settlement before divorce, which settlement was followed by the terms of the divorce decree, it was not necessary that the divorce decree be set aside in its entirety, if at all.

4. Judgment 🔑443(1) — Setting Aside — Deception of Court—False Statements.

False statements made upon the record, sworn to in an answer, will not warrant the setting aside of the judgment because the court was deceived by them.

5. Divorce 🔑245(3) — Subsequent Suit for Relief from Decree — Community Property—Property Agreements Secured by Fraud—Intrinsic Fraud.

In a subsequent suit by plaintiff in divorce, her complaint asking to be relieved from a portion of the decree relating to community property on the ground that she was deceived by defendant's answer and cross-complaint as to the amount of community property, and thereby induced to make a property settlement stipulation, does not show intrinsic fraud, since she does not ask relief based on a judgment founded on perjured testimony, but because she was induced by false statements to enter into a contract out of court precluding her from submitting to the court questions of fact on which she now seeks adjudication.

6. FRAUD 🔑1—DEFINING FRAUD.

Equity will not attempt to define just what form of deceit is fraudulent.

7. DIVORCE 🔑245(2) — PROPERTY SETTLEMENT—COMMUNITY PROPERTY — FRAUD AND DECEIT—ADJUDICATION—RELIEF.

Although a judgment entered into upon the stipulation of the parties is as sacred and unimpeachable as any other judgment, yet, where an agreement between husband and wife in settlement of community property previous to divorce expressly provided that its provisions be incorporated in the judgment, it withdrew from judicial consideration matters so stipulated, and the court has power to grant relief to the wife where such agreement was secured by the husband's fraud or concealment of community property.

8. DIVORCE 🔑245(2) — PROPERTY STIPULATION—COMMUNITY PROPERTY—FRAUDULENT STIPULATION—EQUITABLE RELIEF.

Where a fraudulent stipulation in a divorce suit effectually withdrew issues as to community property from consideration of the court, by an express provision that findings and decree should accord therewith, equity, regarding the substance rather than the form, will relieve against the part of the decree affected by the fraud.

9. DIVORCE 🔑245(2) — COMMUNITY PROPERTY—FRAUDULENT PROPERTY STIPULATION —SUBSEQUENT SUIT—DILIGENCE—FAILURE TO CROSS-EXAMINE DEFENDANT.

Where plaintiff in divorce suit was prevented from cross-examining defendant as to the amount of community property accumulated by the fraud of defendant misrepresenting the amount thereof in the answer and cross-complaint and his securing from her by such fraud a stipulation for property settlement, plaintiff was not guilty of lack of diligence in failing to cross-examine defendant as to the amount of such property so as to bar her from subsequent suit to secure her share of the community property.

Appeal from Superior Court, City and County of San Franciso; Thos. H. Graham, Judge.

Suit by Delia Milekovich against Patrick P. Quinn and others. Judgment for plaintiff, and defendants appeal. Judgment affirmed.

John L. McNab, Timothy Healy, and Byron Coleman, all of San Francisco, for appellants.

Frank W. Sawyer, of San Francisco, for respondent.

LANGDON, P. J. Plaintiff and respondent in her suit sought to be relieved of that portion of a prior decree of divorce by which the property rights of the parties to the divorce suit are claimed by the appellants to have been finally adjudicated. The essential facts are admitted. In the interim between the divorce decree and the commencement of this action the plaintiff had remarried. When the divorce action was brought, a restraining order was made on the ex parte application of the plaintiff prohibiting the defendant in the divorce action, Patrick P. Quinn, from disposing of any portion of the community property. On the following day Quinn, upon an ex parte application, caused the restraining order to be set aside. Immediately thereafter he withdrew from his safe deposit box bonds of the par value of $45,000, and delivered them to one Brady for the purpose of secreting them from the knowledge of Mrs. Quinn, her attorneys and the court in which the divorce action was pending.

In her complaint for divorce the plaintiff made allegations concerning the community property, and, among other things, upon information and belief, that the defendant had securities of the value of $60,000, a part of the community property. In his answer the defendant denied all the substantial allegations of the complaint, and denied that he had securities of the value of $60,000, or of any sum or amount in excess of about $2,000, admitting, however, the ownership of other community property, to which further reference will be made. In the cross-complaint the defendant set up a cause of action against the plaintiff for divorce on the ground of willful desertion, and a second cause of action based upon alleged cruelty of the plaintiff. Upon receiving notice of the application for alimony during the pendency of the suit, Quinn made an affidavit expressly referring to the statements set forth in his answer and cross-complaint in regard to the community property and closing with the statement:

"In relation to said assertions about defendant's great wealth, defendant says that at the time of the great fire in San Francisco he had the home above mentioned, that the other lot of the community was unimproved, and that he had less than $3,000 in cash. Since that time he has earned the money necessary to erect the said flats amounting to $20,000 and has paid for all of the street work in connection therewith, amounting to $5,000, and to buy the Stevenson street property for $3,500, making a to-

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tal accumulation made by the defendant in that time of $32,700, which defendant submits is all that he could be expected to accumulate in that short space of time in consideration of his age and bodily condition."

About the time the answer was filed and the affidavit served on plaintiff, negotiations were opened for the settlement of the property interests of the parties to the divorce suit. It does not appear whether negotiations were pending when the answer was filed or whether they were opened shortly after. The negotiations were carried on between the attorneys of the respective parties and extended over a period of from one to two months. During the negotiations some five or six offers of settlement of the property interests were made on behalf of Quinn, and they were successively rejected by Mrs. Quinn. On the trial of this case the rule excluding evidence of confidential communications between attorneys and clients was rigidly applied to the evidence of the attorneys of both parties. It appears, however, that no direct representation was made either by Quinn or by his attorney to Mrs. Quinn or any one in interest with her in regard to the amount of community property unless the representations made in the answer and cross-complaint and in the affidavit served upon Mrs. Quinn or her attorneys can be so construed. The only statement ascribed to the attorney for Quinn during the negotiations was, "Your client says one thing and my client says another." Whereupon the attorneys for both parties continued to deal in view of the community property known by the attorneys for the plaintiff to exist. Despite the fact that Mrs. Quinn repeatedly told her attorneys that she believed Quinn had some $60,000 worth of securities, Quinn's deposition was not taken, nor was any direct inquiry made of him, nor, so far as the record shows, of his attorneys in regard to the discrepancy between the belief of Mrs. Quinn and the statements of Quinn in his answer and cross-complaint. After rejecting many offers of settlement, the plaintiff entered into a stipulation which is attacked in the present suit. The property agreement embodied in the stipulation was made upon the assumption that under it each of the parties should receive one-half of the community property. The stipulation was for a division of all the community property. It provided that a certain lot was the property of Nellie Riley, a married daughter of the parties; that plaintiff Delia Quinn, now Delia Milekovich, should receive a lot in San Francisco, 60 by 120 feet, improved by a building containing six flats, and another lot 25 by 95 feet, together with the family dwelling house thereon and its contents, except personal belongings of the husband; that "all of the remainder of the community property of said community shall be awarded to and be the sole and separate property of the defendant Patrick P. Quinn including the following described real property," after which followed a description of a lot 75 by 95 feet, another lot 27 feet 6 inches by 85 feet, a lot in San Leandro, in Alameda county, "and also all personal property of every kind and description of said community other than the contents of said Ninth avenue dwelling house."

It is further stipulated that—

> "The foregoing division of the community property is in absolute, entire, and complete satisfaction and discharge of all claims which either party to said action might assert against the other whether on account of property rights, interest in community property, or rights to maintenance, alimony, costs, and counsel fees."

In consideration of the "foregoing statements and compromise," the parties mutually released each other from all claims and demands and bound themselves to execute such conveyances as might be proper to effectuate the settlement. The stipulation closes as follows:

> "It is furthermore stipulated and agreed that in case the above-entitled court shall make and enter any decree in the above-entitled action awarding a divorce to the plaintiff or to the defendant in said action that the said court shall find that all of the property hereinbefore referred to is community property of plaintiff and defendant, and shall divide the same between them in accordance with the terms of this stipulation."

The interlocutory decree, after adjudicating the divorce, adjudicated and decreed that the real property of the community belonged to and should vest in the respective parties, following the provisions of, but not referring to, the stipulation, and the decree contained the following statement:

> "It is further ordered, adjudged, and decreed that the foregoing division of the community property is an absolute, entire, and complete satisfaction and discharge of all claims which either party to said action might assert against the other whether on account of property rights, interest in community property, or right to maintenance, alimony, costs, and counsel fees."

The deeds to the real property were executed in accordance with the terms of the stipulation and decree. Shortly after discovering the fraud practiced upon her by Quinn, plaintiff commenced the present action. The other parties alleged to have been custodians of a portion of the bonds or their proceeds were joined as parties to the suit. In the complaint the history of the divorce action is set forth at considerable length, and it is alleged that, in reliance upon the statements made in the answer and cross-complaint, and in the affidavit of Quinn, the property settlement was made; that the statements were untrue, and the settlement would not have been made but for the statements. As stated before, the essential facts are admitted either directly in the pleadings of the defendants or by statements of the defendant Quinn on the witness stand. In the complaint it is not in terms stated that the plaintiff desires to subject herself to any order which might be made in a court of equity, nor that she desires to do equity. There is no allegation nor was there any evidence of rescission or attempted rescission. The plaintiff prayed judgment "canceling, annulling, and setting aside" the agreement in the divorce action, the deeds from the plaintiff to Quinn, from the plaintiff and Quinn to Mrs. Riley, from Quinn to the plaintiff, and the interlocutory decree "so far as it affects the property"; that it be further adjudged and decreed that certain real property is the separate property of the plaintiff, and that all other property described in the complaint and "now standing in the name of the defendant Patrick P. Quinn, as well as that standing in the name of defendant Nellie E. Riley, is community property," and that Nellie E. Riley and Quinn be declared trustees of a trust in which the interest of the plaintiff should be determined; that the defendant should be required fully to account and the court decree the plaintiff to be the owner of one-half of the property in the possession or under the control of Quinn or Mrs. Riley; that the exact value of the property "wrongfully and fraudulently concealed" be determined as of the time of the settlement of the property rights in the divorce action, and the plaintiff decreed to be entitled to one-half thereof; and for general relief.

The findings and decree were very lengthy and determined that the plaintiff is entitled to $22,500, the value of one-half of the bonds and securities, with legal interest from the date of the interlocutory decree; that the recitals in the decree that the remainder of the community property should be awarded to Quinn and that the division was in absolute, entire, and complete satisfaction were made by reason of a settlement made out of court and obtained by Quinn from the plaintiff through fraud, by which the plaintiff was prevented from presenting to the court and obtaining a judicial investigation of the true facts; that the stipulation be annulled; that the plaintiff, in addition to the recovery of $22,500, be given a lien upon all of the personal and real property owned and possessed by the defendant Quinn; that Quinn and Fred J. Riley are involuntary trustees for the plaintiff of the real and personal property described in the decree as belonging to Quinn; that the plaintiff is the owner of the lot containing the six flats; that the plaintiff has no right in the property standing in the name of Mrs. Riley; that Quinn is the owner of the lots he took under the stipulation, charged with the trust for the payment of the $22,500; that the defendant is the owner of a certain lot to which the plaintiff has no right. The decree further appointed a commissioner to take possession of and sell the property, subject to the trust.

The appellant maintains that many of the findings are not supported by the evidence, and calls particular attention to the finding to the effect that, by means of the false pretenses, representations, answer, affidavit, and wrong concealment with intent to cheat and defraud the plaintiff, Quinn prevented the plaintiff from obtaining a judicial investigation and trial of the issue of property, upon which argument is made that the fraud in the present case was intrinsic in nature and not such fraud as equity will relieve against. This argument is made more fully by the appellants in another connection and will be considered with the point upon which it is most fully developed by the counsel for the appellant. Objection is made to a finding against the defendant in the matter of his alleged meritorious defense to the divorce action, and it is argued either that no such finding should have been made, or that there was no evidence to support the finding. A portion of the appellant's argument is based upon the question of whether or not relief in such a case as this can be given without setting aside the entire divorce decree. The argument upon this point presented upon behalf of the appellant will be considered in connection with that contention. Objection is made to the finding that one of the parcels of land was the separate property of the plaintiff, and it is argued that in such a case as this, under the general rule that the parties must be replaced in the respective positions they occupied at the time of the fraudulent agreement, if for any reason they cannot be so restored, equity is powerless to relieve against an admitted fraud. This also is more fully argued under other points made on behalf of the appellant.

[1] Appellant maintains that, since the property in issue in this action was community property, there was no issue upon which a finding could be made and no evidence to support a judgment quieting the plaintiff's title to the undivided one-half interest in the fee in any of the property. It is argued that, since the community property is under the absolute control of the husband, and the wife during the existence of the community has only an inchoate right to any of the property, it is beyond the power of the court in this suit to determine her interest in the property of the community. The community no longer exists. If in a divorce case the parties agree to a division of the community

property, it is unnecessary for the court to adjudicate upon their respective interests in the former community property. If no such agreement is made, it is the duty of the court in which the divorce proceeding is pending to determine the relative interests of the spouses in their common accumulation. In this case the parties did in form agree upon substantially an equal division of the community property between them. The wife claims in this suit that in entering into the former agreement she was deluded and defrauded of her one-half interest in the $45,000 worth of securities secreted by the husband. The lower court awarded to her this one-half interest, and declared that the property of the former husband was burdened with a trust to pay her the amount of the award. If there was jurisdiction in the court to grant relief to the defrauded wife, under a well-established rule the court might make any decree within those principles of good conscience and fair dealing which are recognized as controlling the discretion of the chancellor.

[2] Under the rule of rescission, the appellant contends that, since the plaintiff did not offer to return to the defendant the property received by her under the stipulation, she has failed to bring herself within the requirement that one who seeks relief at the hands of a court of equity must first do equity. It is further argued that, since the attack is upon the divorce decree, the decree must be set aside in its entirety, if at all, and because the parties cannot be restored to their original positions, a court of equity can give the defrauded wife no relief. The fallacy of the first of these contentions is that in this suit the wife was not seeking to have any new evaluation made of the property which had been divided, for the purpose of redivision, but was seeking only one-half of the property which had been secreted. Nothing would have been gained by undoing what had been done in regard to the property divided, and the law does not require idle things to be done. The result would have been the same if she had herself deeded back the property she received, or if the court, upon the evidence submitted to it, had decreed that she owned the property she had formerly received and was entitled to $22,500 more.

> "It is not an invariable rule that rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in statu quo. * * * Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. * * * Restoration is not exacted on account of any feeling of partiality in regard to the fraudulent party. The law cares very little what his loss may be and exacts nothing for his sake." Green v. Duvergey, 146 Cal. 379, 389, 390, 80 Pac. 234, 238.

[3-5] In regard to the second contention under this point:

> "The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in her behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity, or apparent validity, that the plaintiff requires to be relieved from it." Eichhoff v. Eichhoff, 107 Cal. 48, 40 Pac. 25, 48 Am. St. Rep. 110.

It is not necessary, under the rule announced in Green v. Duvergey, supra, that a divorce decree be set aside either in whole or in part. The sole question is whether or not, under the facts of the present case, the court had power to grant relief to the defrauded wife. This question is the one raised by the general demurrer of the defendant, his motion at the opening of the trial to exclude all evidence in support of the allegations of the complaint, and his attack upon the judgment here. All of his other contentions merge in the determination of this contention. In reliance upon United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and a long line of decisions announcing the same principle, the appellant maintains that no relief can be granted the plaintiff in this action because the admitted fraud was intrinsic and should have been uncovered in the original suit. Lengthy quotations are made in the appellants' brief from these cases. There could be no question in regard to the application of the rule if the fraud in the present case were intrinsic. The appellant forcefully argues that, because the plaintiff claims she was deceived by the statements in the answer and cross-complaint filed in the divorce suit, and in the affidavit made by Quinn, the fraud was necessarily intrinsic, and says that, "if a party may be allowed to litigate anew the matters in controversy on the ground that she relied on her adversary's pleading, then trials might be dispensed with altogether, for their functions would have ceased." This position of appellant cannot be maintained. The statement of its corollary shows its fallacy as applied to the facts here. If the statements made by Quinn had not been made in his pleading or in his affidavit filed in the suit, but had been made to the plaintiff out of court, under the contention of the learned counsel for the appellant, they might have furnished a reason for a court of equity relieving the plaintiff from the fraud practiced upon her. Can it be said that untrue statements by which the plaintiff was deceived lost anything of their effect by having been sworn to and filed in the pending divorce action? To answer this question in the affirmative would be to suggest a ready means for dishonest persons to accomplish fraudulent results. The rule is that false statements made upon the record will not warrant the setting aside of the judgment because the court was deceived by them. Here there is no contention made that the court was deceived, but that the respondent was deceived, and induced thereby to enter into the fraudulent agreement. The false statements were made. The lower court found upon evidence to that effect that the plaintiff relied upon the statements and entered into a contract which was made out of court. The plaintiff claimed the aid of a court of equity, not because the false statements were sworn to, but because they were false. She does not seek relief from the judgment because it was based on perjured testimony, but because she was induced by false statements to enter into a contract out of court by which she was precluded from submitting to the court the very questions which but for the contract would have been submitted to judicial investigation. In the leading case in this state, Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 13 L. R. A. 336, 25 Am. St. Rep. 159, where a judgment was rendered upon perjured evidence induced by bribery, the court, in holding that equity would not relieve from such a fraud, in its opinion asked and answered the question of what is an extrinsic or collateral fraud within the meaning of the rule.

> "Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. * * * In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary from having a trial; but, when he has a trial, he must be prepared to meet and expose perjury then and there." Pico v. Cohn, 91 Cal. 139, 25 Pac. 971, 13 L. R. A. 336, 25 Am. St. Rep. 159.

In this case, by the fraudulent contrivance of Quinn, the lower court found the plaintiff was prevented from having a trial upon the issue raised by the pleadings in regard to the amount of the community property.

[6] It has too often been stated to require the citation of authority that equity will not attempt to put a fence around fraud nor to define just what form of deceit is fraudulent. The suggestion in Pico v. Cohn of certain things which had been determined to be collateral fraud was never intended to be and was not a recital of all of the devices in which dishonest men may engage to prevent the trial of issues of fact.

[7] It is argued that because the court found, pursuant to the fraudulent contract, that the division of community property in accordance with its terms was in absolute, entire, and complete satisfaction and discharge of all claims which either party might assert to the other, there was an adjudication beyond the reach of the court of equity because, as well stated by counsel for the appellant, a judgment entered into upon a stipulation of the parties is as sacred and unimpeachable as any other judgment. It is equally true that such a judgment is no more sacred than any other judgment. Counsel say:

> "If the property rights of the parties to the divorce action had been withdrawn entirely from the case, a different question might have arisen. If the decree had been silent as to property, a different question might have arisen."

They were withdrawn. The stipulation, as has been shown, expressly provided that they be incorporated in the judgment as agreed upon, and the judgment expressly incorporated them. There was no trial upon the property issues. The stipulation itself shows there was no judicial examination of the facts regarding the property issues. These matters were as effectually withdrawn from any judicial consideration as if they had been expressly withdrawn by the stipulation. If the statement of counsel be true that a different case would have been presented if the stipulation had declared what was the fact—that the court was not to adjudicate upon the property issues, but to enter a decree in accordance with the agreement of the parties—it follows that all that a dishonest party litigant need do to make his fraudulent contract effective is to go one step further in his scheme of fraud and stipulate that the court in its decree shall follow the language of the fraudulent stipulation. Such a conclusion would be intolerable. The case falls within that class where chancellors have repeated in every conceivable way that the effort on the part of the fraudulent actor more securely to bind his victim is itself one of the most convincing evidences of fraud.

[8] As was said by the Supreme Court, speaking by Mr. Justice Crockett:

> "It would be a reproach to the administration of justice if such transactions were beyond the reach of a court of equity, whose peculiar province is to strip off the flimsy disguises in which fraudulent actions are so often clothed, and to regard the substance, rather than the form." Perkins v. Center, 35 Cal. 721.

From the appellant's brief it appears that after this case was argued and submitted in the court below the Court of Appeal, First Appellate District, decided the case of Vragnizan v. Savings Union, etc., Co., 31 Cal. App. 709, 161 Pac. 507, and that the respondent relies upon that case. It is sought to distinguish that case from the present one because the fraudulent stipulation in that case expressly withdrew from the consideration of the court the issues in regard to community property. But in this case the fraudulent stipulation just as effectually withdrew those issues from the consideration of the court, and expressly provided that the court should find and make its decree in accordance with the fraudulent recitals in the stipulation. There is no difference in principle between the two cases.

[9] The appellant argues that, under the rule by which equity denies relief in those cases where the adverse party has been guilty of negligence or lack of diligence, the plaintiff in this case was armed with the strongest weapon—that of cross-examination of the defendant—and because she failed to exercise it she should be denied relief in this suit. In the larger object of defrauding the plaintiff the very purpose and effect of the stipulation was to cause her to lay down this strong weapon of defense. By reason of the fraudulent stipulation the plaintiff was deprived alike of her privilege of cross-examination of defendant and of her right to have a judicial determination in regard to the amount of the community property. Because of the defendant's fraud, he was subjected to examination in the present case, and the court did investigate the question of the amount of community property and determined that the plaintiff was entitled to one-half of that which, in this case, the defendant admitted he had fraudulently secreted.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

40 Cal. App. 407

DREISBACH et al. v. BRADEN, Sheriff, et al. (Civ. 1909.)

(District Court of Appeal, Third District, California. March 22, 1919.)

1. Sheriffs and Constables 🔑137(2) — Failure to Deliver to Execution Sale Purchaser—Pleading.

In execution sale purchaser's action against sheriff for failure to deliver goods purchased, answer denying that sheriff "has failed and neglected, or failed or neglected, or refused, in any manner or at all, to deliver," *held* sufficient denial of failure to deliver, notwithstanding admission that actual possession was not delivered, where property was alleged to be incapable of actual delivery.

2. Trial 🔑404(1) — Findings — Construction.

In execution sale purchaser's action against sheriff for failure to deliver, court *held* to have found that the property was taken possession of by the sheriff, where it found that allegations of a paragraph of the complaint were true, and where such paragraph of the complaint alleged that sheriff took possession of the property.

3. Trial 🔑404(1) — Findings — Construction.

In execution sale purchaser's action against sheriff for failure to deliver property purchased, finding that property was delivered to purchaser was a sufficient finding upon the question whether the property was capable of manual delivery.

4. Sheriffs and Constables 🔑107—Execution Sale — Property Incapable of Manual Delivery.

Where 50 tons of chrome ore were sold at execution sale, the sheriff was not required to make actual delivery to the purchaser where no request therefor was made by the purchaser at the time of delivery of the certificate of sale, under Code Civ. Proc. § 698, such ore being incapable of manual delivery within section 699.

5. Sheriffs and Constables 🔑107 — Execution Sale—Duty of Sheriff—Disposition as to Possession of Property.

It is not the sheriff's duty to settle disputes arising after execution sales and delivery to purchaser of certificate of sale, between the purchasers and third parties, as to right of possession of the property.

6. Sheriffs and Constables 🔑22—Execution Sale—Attachment of Goods.

In execution sale purchaser's action against sheriff for failure to deliver goods purchased, where the goods were situated in the shed of a third party claiming a lien thereon for transportation charges, but sheriff in attaching goods had placed deputy sheriff in charge thereof, such third party was not the custodian of the goods under the sheriff's authority.

Appeal from Superior Court, Plumas County; H. D. Burroughs, Judge.

Action by F. M. Dreisbach and E. A. Dickey, copartners doing business under the name of Zenith Chrome Mining Company, against Louis A. Braden, as sheriff of the county of Plumas, state of California, and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. L. Colvin, of Oakland, for appellants.

M. C. Kerr and H. B. Wolfe, both of Quincy, for respondents.

HART, J. The defendant Braden, as sheriff of Plumas county, and the National Surety Company, as the surety on his official bond, were sued by plaintiffs for the sum of $1,050, the alleged value of about 50 tons of chrome ore which they had purchased at an execution sale, and which they alleged the sheriff had not delivered to them, and for damages caused to them by his failure so to deliver said ore. Defendants had judgment, from which plaintiffs prosecute this appeal.

The first finding of the court was: That all the allegations in plaintiffs' complaint in paragraphs 1 to 11, inclusive, are true.

Said paragraphs of the complaint, briefly, are: That plaintiffs at all times mentioned were copartners under the name of Zenith Chrome Mining Company, and have complied with the laws of the state relative to copartnerships; that the defendant National Surety Company is a corporation organized under the laws of the state of New York, and authorized to do business in the state of California; that defendant Braden is the sheriff of Plumas county, and that he executed an official bond, with the usual covenants, with the defendant National Surety Company as surety, which was duly approved as required by law; that on or about the 22d day of July, 1916, plaintiffs brought an action in the superior court of Plumas county against one C. W. Adams for the recovery of a sum of money alleged to be due and owing to them from said Adams; that at the time of filing said complaint plaintiffs filed the usual affidavit for the issuance of an attachment, and that an attachment was issued and placed in the hands of the sheriff, which he served by attaching about 140 tons of chrome ore by taking the same into his custody and putting a keeper in charge thereof; that on the 31st day of July, 1916, the sheriff made a return on said writ in which he certified that he had levied upon and taken possession of said 140 tons of ore; that on December 13, 1916, a judgment was rendered in said action in favor of plaintiffs and against said C. W. Adams for the sum of $305 and costs; and on the same day execution was issued on said judgment, directing the sheriff to make the same out of property belonging to said Adams; that the sheriff levied upon about 90 tons of chrome ore, being a portion of the 140 tons attached, and on December 27, 1916, he sold the same after due and regular notice of such sale.

The court then found that defendant Braden, as sheriff, "did deliver the possession of all property sold under execution to said plaintiffs as required by law."

Appellants complain of this last finding, urging that it is contrary to the evidence, and also that it is insufficient as a finding upon further allegations of the complaint.

The twelfth paragraph of the complaint was that at said execution sale plaintiffs became the purchasers of the said 90 tons of chrome ore from the said sheriff; that at the time of the said purchase the property so purchased was in the possession and under the control of the sheriff; that plaintiffs, as such purchasers, paid the sheriff the full amount of the purchase price and demanded delivery of the property; that the sheriff did deliver to them about 34 tons of the property purchased by them; but failed and neglected to deliver about 50 tons thereof.

In the thirteenth paragraph it is alleged that plaintiffs were the highest bidders for the property so purchased at said sale, and that the sheriff delivered to them a certificate of sale of about 90 tons of chrome ore. Written demand upon the sheriff to deliver said property was alleged and his refusal so to do, and that he has converted 50 tons to his own use. There were allegations as to the value of the property and the amount expended by plaintiffs in pursuit thereof.

The answer of defendants contained the following affirmative allegations: That the sheriff "levied upon about 34 tons of chrome ore then upon and under the depot station of the Western Pacific Railway Company's depot at Keddie, Plumas county, Cal., then represented by plaintiffs to defendant Braden as the property of said C. W. Adams, and thereupon placed a keeper in charge thereof; that at said time and pursuant to said writ said defendant Braden levied upon * * * about 50 tons of chrome ore situated in the barn of one W. C. Lawrence at Keddie, * * * at which time, and in the presence of plaintiffs, and of their attorney, L. N. Peter, the said W. C. Lawrence claimed said ore, and claimed and asserted a lien thereon for and on account of transportation of the same from the place where mined to the place where stored, and claimed to be and was then in possession thereof."

It appears that the plaintiffs brought two actions against the sheriff, one for the value of the property sold, the other for a failure to make a return to the execution. By stipulation both cases were tried together. A motion for a new trial was made in each case, and the same bill of exceptions was used on both. The result is that there is considerable testimony in the record which does not apply to the case before us.

Preliminarily, certain points made as to the issues tendered by the answer and as to the findings should be considered and disposed of.

[1] The appellants are in error in the statement in their opening brief that the answer does not deny that the sheriff failed to deliver to the plaintiffs the ore in the Lawrence shed, and in the further statement that "all through the answer it is virtually admitted that he did not deliver the property." In paragraph 8 it is denied that "defendant Braden, as sheriff, has failed and neglected, or failed or neglected or refused, in any manner or at all, to deliver all the property set forth and described in said certificate of sale." The answer, it is true, admits that the actual possession of the property was not delivered to the plaintiffs, but declares that said property was not capable of manual delivery. The answer, it may well be admitted, is not a model pleading of the "negative" kind, but there was no demurrer thereto, and the denial referred to was sufficient to raise the issue as to the delivery of the property to the plaintiffs.

[2] It is next asserted that the court fai-

ed to find upon the question whether, at the time the property was purchased by the plaintiffs, the property so purchased was in the possession and under the control of the defendant Braden. The contention is unfounded. Paragraph 7 of the complaint alleges that at the time of the purchase of the property by the plaintiffs said property was taken into possession by said Braden and a keeper put in charge thereof by him. The court found that all of the allegations of said paragraph 7 of the complaint are true.

[3] The objection that the court failed to make a specific finding upon the question whether the property was or was not capable of manual delivery is without merit in view of the finding that the property was delivered to the plaintiffs.

There are other objections with respect to the findings which do not call for special notice.

We will now proceed to a consideration of the merits of the case.

The whole controversy here rests, in the main, upon the solution of the question whether the property sold by the sheriff to the plaintiffs was capable of manual delivery. Another point which the appellants attempt to sustain is that the sheriff, upon attaching the ore, made one Lawrence the custodian of a certain portion of the seized property, and that, upon the sale under the execution taking place, said Lawrence refused to deliver the ore to the plaintiffs. Thus it is claimed, as the complaint charges, the defendant Braden converted the ore to his own use.

The circumstances attending the seizure of the property by attachment and the subsequent sale thereof under the execution by the sheriff are these: The defendant, as sheriff at the time of the issuance of summons in the case of the plaintiffs against the said C. W. Adams, levied, under written instructions from the attorney of the plaintiffs, an attachment on about 140 tons of chrome ore, about 40 or 45 tons of which were situated at the time of the levy in a wagon shed on the premises of one W. C. Lawrence; that the sheriff, upon making said levy, placed in charge of the chrome ore so attached, as keeper, one L. P. McIntyre, a deputy sheriff under the defendant Braden; that at about the moment of time the levy was made on the ore situated in the shed of said Lawrence the latter put in an appearance, whereupon he was asked by L. N. Peter, attorney for the plaintiffs, who, with the plaintiffs, was present when the levy was made, whether he (Lawrence) had any claim on the ore in the shed, and he replied that he had, the same being due for hauling or transporting the ore from the mine; that the sheriff then said to Lawrence that he would have to attach the ore, to which statement Lawrence replied: "You can go ahead and attach it, but you cannot move it. I hold a lien against it for hauling it from the mine." As stated, McIntyre, as the defendant Braden's deputy, was placed and left in charge of the ore as the sheriff's keeper, and so remained until judgment was obtained and execution thereupon issued in the case. What occurred after the writ of execution was issued and placed in the hands of the sheriff may best be told by the testimony of that official and also that of McIntyre. The sheriff testified, in part, as follows:

> "I made a sale of the ore on the platform and also that in the shed. I do not think that Mr. Lawrence was present. I do not think that it was physically possible for me to make a delivery of the ore at the time of the sale. I would have had to get a team and horse. I might have done it in time. The weight of the ore in the shed was about 40 tons. The sale took place at Keddie, near the depot. * * * Mr. Nutting was there at the time. He was there as attorney for the plaintiffs. No demand was made by him for actual delivery. I made the sale. The money was turned over. We came back to town, and I gave him a certificate of sale. Mr. Nutting was present at that time, and Mr. Dickey. At that time there was no objection made, nor any demand for actual delivery. That property is not in my possession at the present time. I have not had control nor possession of the property since the sale. * * * I do not think that he (L. P. McIntyre) ever delivered it over to the purchasers, because Lawrence had a claim against it, and would not let it go. Lawrence never gave me any written claim. * * * I do not know what became of the ore in Lawrence's shed. I did not have anything to do with it after I sold it. I discharged McIntyre at the time of the sale." The sheriff further testified that, while in the first instance Lawrence claimed that he had a lien on the ore in his shed for services performed in hauling said ore from the mine, he later notified the sheriff to remove it from the shed, as he was in need of the use of the shed for other purposes and did not want the ore to be kept therein any longer. This conversation (said the sheriff) occurred a short time prior to the sale under the execution. At that time Lawrence said nothing about claiming a lien on the ore. The reason the sheriff gave for not removing the ore from Lawrence's shed was that a Mr. Nutting, who was also an attorney for the plaintiffs, advised him to do nothing in that regard "until I heard from him."

L. P. McIntyre, the deputy sheriff, who was made keeper of the attached property by the defendant sheriff, testified:

> "I was put in charge of the ore. I was in charge of it from the day of the attachment until the day of the sale. That was from somewhere in the latter part of July until the first part of January or the latter part of December. I was there at the time of the sale. Mr. Dickey, Mr. Braden, and Mr. Nutting were there. There was no demand made by Mr. Dickey or Mr. Nutting on Mr. Braden that manual delivery be made of the ore in Lawrence's shed. I never heard them make any demand for any such thing. * * * I considered I was discharged from custody when the sale of the ore

was made. I did not regard it as the proper thing to deliver the ore to the purchasers. I would not deliver that ore to any one."

It appears that the plaintiffs, neither at the time of the sale nor when the sheriff delivered to them the certificate of sale, demanded of that officer manual delivery of the ore. Indeed, it is clear from the evidence that they were perfectly satisfied with the situation after the sheriff's certificate was delivered to them until the time when Lawrence refused to permit them to take or remove the portion of the ore purchased by them which was at all times, from the date of the levying of the writ of attachment, situated in his (Lawrence's) shed.

The foregoing embraces a statement of the facts sufficient for the purposes of the decision of the point presented.

The contention of the appellants is that it was the duty of the sheriff to deliver the ore to them by manual tradition, while the respondents maintain that the property sold is of a character which rendered manual delivery thereof impossible, or, at least, impracticable, and that, therefore, the mere execution and delivery by the sheriff to the appellants of a certificate of sale was as far as that officer could go, or, in fact, that could practicably be done by him with personal property of the nature of that which was the subject of the sale.

Section 698 of the Code of Civil Procedure requires an officer making a sale of personal property under an execution, where the same is capable of manual delivery, to deliver such property to the purchaser upon the payment of the purchase money by the latter. If desired, the officer must also execute and deliver to the purchaser a certificate of sale. Where, however, personal property so sold is not capable of manual delivery, the officer making the sale is, by the terms of section 699 of the same code, required only to execute and deliver to the purchaser, upon payment of the purchase money by the latter, a certificate of sale. In either case the certificate so executed and delivered conveys all the right the debtor had in such property on the day the execution or attachment was levied.

1. It has been held that where personal property levied upon by attachment is of such a ponderable character as that its actual possession cannot be taken, and its removal for that purpose effected by the officer levying the writ without injury to such property or great expense, the taking of actual possession by the officer or its removal to effectuate such possession may be dispensed with. It has frequently been held that "with regard to heavy and unmanageable articles there seems to be no necessity for an actual handling to constitute an attachment." See cases and other authorities cited in footnote of Hollister v. Goodale, 21 Am. Dec. 680. For further illustration, it has been held, under statutes similar to our own, that a stack of grain may be levied upon by going to it and making a formal levy, and forbidding the defendant from touching it. Gallagher v. Bishop, 15 Wis. 276. Again, a similar levy upon hewn stones (Hemmenway v. Wheeler, 14 Pick. [Mass.] 408, 25 Am. Dec. 411; Polley v. Iron Works, 4 Allen [Mass.] 329), on iron ore (Mills v. Camp, 14 Conn. 219, 36 Am. Dec. 488), and on mill logs (Bicknell v. Trickey, 34 Me. 273), has been upheld as sufficient.

In the case at bar the validity of the seizure by attachment is not challenged. Nor is it questioned that the sheriff, upon levying the writ of attachment, took legal possession of the ore and continued in such possession to the time of the sale of the property under the writ of execution. Indeed, the appellants themselves insist throughout their whole argument that the sheriff took and had such possession. But, as has been observed, they say that, upon the sale being made to them under the writ of execution, it was the legal duty of the sheriff to have made an actual physical delivery of the ore into their possession.

[4] We believe the property so sold to them was of a character that manual delivery thereof could not conveniently and without great expense be made by the sheriff. That officer could not nor was it expected of him to attempt so impracticable, and, indeed, so preposterous, an act as to deliver the ore to the plaintiffs piece by piece. The most he could have done would have been to have loaded the ore on a wagon or truck, and by such means have hauled, or caused it to be hauled, and so delivered, to some place or point designated by the plaintiffs. He was not asked by the plaintiffs to do this, nor do we think he was required to do it; for, as stated, it would obviously have involved great expense to do so, thus adding to the costs, and so creating an additional burden which ultimately would fall on the shoulders of the debtor. Having made the sale to the plaintiffs and delivered to them the certificate of sale, the latter thereby acquired all the right the debtor had in the ore. They knew where the ore was situated and it was up to them to take possession of it. As to the claim that Lawrence made to a lien on the ore in his shed, it is to be remarked that the plaintiffs were at all times, from the time the writ of attachment was levied on the ore, aware of said claim. With such knowledge they accepted the certificate of sale without then making a demand on the sheriff for a manual delivery to them of the ore, and only made such demand after Lawrence had refused to deliver to them the ore that was in his shed at the time of the levy.

[5] Obviously, it was not incumbent on the sheriff as a legal duty to settle any disputes which might, after the sale and the de-

livery by him to the plaintiffs of the certificate of sale, arise between plaintiffs and third parties as to the right to the possession of the property. But however this all may be, it is, as above declared, clear to our minds that the property is of that character and of such bulk in quantity that it was not capable of manual delivery, and that the sheriff, in the sale thereof under the execution sale, did all that the statute required of him by making symbolical delivery thereof to the plaintiffs. Indeed, we can conceive of no case where section 699 of the Code of Civil Procedure would be more applicable than it is to the facts of this case.

[6] 2. The proposition that Lawrence was the custodian of the ore situated in his shed as the appointee and agent of the sheriff is not supported either by the evidence or the findings. McIntyre, the deputy sheriff, was by the sheriff placed in charge of all the ore seized by the latter under the writ of attachment, and remained in the capacity of keeper of the property until it was sold to satisfy the judgment against Adams. It is true that the ore attached in the shed of Lawrence was allowed to remain there, but it was at all times in the legal custody of the sheriff through his keeper. There is not a word of testimony that Lawrence acted or was ever authorized to act as custodian of the ore for the sheriff.

The case of Aigeltinger v. Whelan, 133 Cal. 110, 65 Pac. 125, cited by appellants, in its facts bears no resemblance to this case. There the sheriff levied an attachment upon certain personal property, and placed the same in a warehouse in charge of a keeper. Nearly two years later judgment was given in favor of the defendants and against the plaintiff in the action in which the writ of attachment was issued. Thereupon one of the defendants demanded of the sheriff that he return the property taken by him under the attachment, but the sheriff answered that he did not have the property, but that he had stored it in a warehouse, and that the warehouseman had sold it for storage. The sheriff made no claim of lien on the property for any costs, charges, or keeper's fees. All these facts were proved at the trial, and it was held by the Supreme Court, in sustaining the judgment of the court below against the sheriff, that the latter, being charged with the duty of safely keeping the seized property and restoring the same to the defendant on his recovering judgment (Code Civ. Proc. §§ 540, 553), violated the duty so enjoined upon him by allowing the property to be sold or so disposed of. Thus it will readily be perceived that that case has no pertinent application to the facts of the instant case.

Our conclusion is that the plaintiffs have failed to make out a case against the sheriff, and the judgment is accordingly affirmed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

(180 Cal. 376)

HARTFIELD v. HOWARD et al.

(L. A. 4949.)

(Supreme Court of California. May 14, 1919. Rehearing Denied June 12, 1919.)

MECHANICS' LIENS ⚷279—PRIORITIES—BURDEN OF PROOF.

Where plaintiff alleged upon information and belief that defendants' claims are subject to and subservient to plaintiff's, and defendants' answer alleged that their interest is prior and superior to that of plaintiff, defendants had the burden of establishing prior claim; and, where they introduced no evidence as to their interest or title, the court erred in adjudging plaintiff's mechanic's lien subject to interest of a defendant.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by A. J. Hartfield against Charles W. Howard and others. From the judgment rendered, plaintiff appeals. Judgment modified, and as modified, affirmed.

S. C. Schaefer, of San Pedro, and A. R. Holston, of Los Angeles, for appellant.

Milton K. Young, of Los Angeles, and Byron Coleman, of San Francisco, for respondents.

WILBUR, J. Judgment was rendered in favor of the plaintiff foreclosing his mechanic's lien. He appeals from that portion of the decree adjudicating his lien to be subsequent to the interest of the defendant Title Guarantee & Trust Company. The complaint contained the allegation:

> "That all of the defendants claim to have some interest or estate in said property and parcel of land, but this plaintiff is informed and believes, and therefore alleges on information and belief, that said claims are subject to and subservient to plaintiff's claim."

The defendants Title Guarantee & Trust Company and Fidelity Savings & Loan Association joined in an answer containing the following allegation:

> "Said defendants Title Guarantee & Trust Company and Fidelity Savings & Loan Association, admit that they have and claim to have some interest in the real property described in plaintiff's complaint, and allege that the interest of said defendants therein is prior and superior to that of said plaintiff."

Findings were waived. No evidence was introduced upon the subject of the interest or title of the Title Guarantee & Trust Company in the premises. Appellant claims that, as the burden of proof was upon this defendant to establish its prior claim, the portion of the judgment appealed from is erroneous. This conclusion is sustained by the opinion in Harmon v. Ashmead, 68 Cal. 321, 9 Pac. 183, wherein, under similar circumstances, it was said:

> "Conceding that the denial of the defendants raised an issue, we think it was one of which they had the affirmative, and as they introduced no evidence to support it, the court was justified in finding that their lien was subordinate and subject to the plaintiffs'."

It was in that case conceded, for the purposes of the case, that the denial of the allegation that the claims of the defendants were subordinate to the plaintiff's lien raised a material issue. That matter has since frequently been considered by this court, and it has been held that the denial of such a general allegation does not raise an issue. Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118, was a suit to quiet title, in which the defendant claimed that as the plaintiffs had been made parties defendant in a previous foreclosure suit, and the court had decreed in that action that their rights and interests in the mortgaged premises were subsequent to the mortgage, they were thereby estopped from asserting any claim therein adverse to the title derived by defendants by the foreclosure sale. The court there said with reference to such a general averment in the complaint:

> "Such averment is not material to the plaintiff's cause of action, nor is it an issuable fact, and whether the court rendered judgment upon the default of the defendant, or upon an issue created by his denial of this averment, without setting forth the character of his interest, any prior interest held by him is not affected by such judgment"—citing Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Frost v. Koon, 30 N. Y. 428; Smith v. Roberts, 91 N. Y. 470; Payn v. Grant, 23 Hun, 134; Elder v. Spinks, 53 Cal. 293; Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

In applying that principle to the case, it was further said:

> "It does not appear that in the foreclosure suit there was any adjudication upon the title of the plaintiffs which is set forth in the complaint herein, or that their claim that their interest in the mortgaged premises is superior to that derived under the mortgage was submitted to that court for determination, or was determined by it. The allegation in the complaint therein that they claimed an interest in the mortgaged premises, and that this claim was subsequent and subordinate to said mortgage, did not present this issue for determination. The averment that their claim was 'subordinate' to the mortgage was but a legal conclusion, and the allegation of fact upon which that conclusion depended—that the claim was subsequent to the mortgage—negatived any claim that it was prior thereto. The answer of these plaintiffs was but a denial of these allegations, and their admission that they had an interest in said premises as purchasers was not only consistent

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

with the allegations of the complaint and the object of the foreclosure suit, but failed to present any issue upon a claim of title superior to that covered by the mortgage, or upon the validity of such title. No facts were alleged, either in the complaint or in their answer, by which an issue upon their title or claim was presented to the court or made a subject for its determination, * * * and its finding and decree thereon that their claim and interest were subsequent and subordinate to said mortgage is of no higher force than if made upon their default."

Later, in an appeal from a decree of foreclosure, in the case of Wardlow v. Middleton, 156 Cal. 585, 105 Pac. 738, the court had under consideration the findings and judgment wherein it was declared that the interest of the two Tuckers, defendants and appellants, was acquired after the giving of the mortgage to the plaintiff. The complaint contained the usual allegation in regard to the interest of the Tuckers being subsequent to the mortgage lien. They answered, denying the nonpayment of the mortgage, but not traversing the allegation that their interest was subsequent to the mortgage. The court disposed of the appellants' claims on appeal by saying:

> "It is objected that his finding and recital is not sustained by any evidence. There is no evidence on the subject. None was necessary, the allegation of the complaint thereon being admitted by the pleadings. The finding could neither add to nor detract from its force. The effect of such an admission, where the party by cross-complaint or otherwise does not present any prior claim, is that the foreclosure judgment and sale will bar all liens, rights, and interests acquired from the mortgagor after the execution of the mortgage, but will not bar rights or claims prior and superior to the mortgage. McComb v. Spangler, 71 Cal. 424, 12 Pac. 347; Ord v. Bartlett, 83 Cal. 431, 23 Pac. 705; Sichler v. Look, 93 Cal. 608, 29 Pac. 220. The finding and recital, being outside the issues, are surplusage, and are not only not conclusive upon the appellants, but are not competent evidence against them in any other action. Collins v. Gray, 154 Cal. 135, 97 Pac. 142; Bank of Visalia v. Smith, 146 Cal. 402, 81 Pac. 542."

Where it appears from the answer of the defendants that they claim an interest prior and adverse to the plaintiff's lien, as it did in this case, the proper course for the trial court is indicated in Beronio v. Ventura Lumber Co., supra, as follows:

> "Whenever it is made to appear that the interest of a defendant is adverse or superior to that covered by the mortgage, the proper action of the court is to dismiss him from the suit. Ord v. Bartlett, 83 Cal. 428 [23 Pac. 705]; Code v. Bean, 93 Cal. 578 [29 Pac. 223]; Hoppe v. Fountain, 104 Cal. 94 [37 Pac. 894]."

Or the court could specify in its decree that it is made without prejudice to the adverse rights of the defendant. Ord v. Bartlett, 83 Cal. 428, 431, 432, 23 Pac. 705.

A decree adjudicating the priority of defendant's lien or interest without evidence or pleading justifying such decree was erroneous.

It is stated in respondents' brief that the only interest of the Title Guarantee & Trust Company was as trustee in the trust deed securing the indebtedness due to the defendant Fidelity Savings & Loan Association, which lien was by the decree declared to be prior to plaintiff's claim, and from which adjudication no appeal was taken. It appears from the bill of exceptions that the defendants introduced in evidence a contract signed by appellant, recognizing the prior existence of the trust deed, in favor of the defendant Fidelity Savings & Loan Association, and expressly agreeing that the claims of the lien claimants, including the lien of appellant, should be subject to and subordinate to the claim of the Fidelity Savings & Loan Association, but this agreement fails to disclose the name of the trustee in the trust deed. Strangely enough, appellant denies knowledge of the fact stated by respondents. We cannot therefore consider such statement in determining this appeal. For the same reason it is unnecessary to consider the argument of the respondent based upon the hypothesis that even if the Title Guarantee & Trust Company were the trustees in a trust deed securing the payment of money, such deed was nevertheless subordinate to respondents' lien. In order to correct the judgment so that there will be no adjudication upon the claim of the Title Guarantee & Trust Company, the court is directed to modify the judgment by striking out the fifth paragraph thereof and to insert in lieu thereof the following to wit:

> "And it is further ordered, adjudged, and decreed that the said claim of the plaintiff was at the time of the commencement of this action and this judgment and decree in that behalf were and are prior and superior to any right, title, interest, or estate of the defendants Charles W. Howard, Hunziker & Berger (a copartnership), E. P. Hunziker, E. C. A. Berger, Mary W. Crutsinger, Josephine Hunziker, and W. W. Paden, and each of them, in or to said premises and the whole thereof, but that said claim of the plaintiff herein and this judgment and decree in that behalf was and is subsequent and subservient to the interest of the defendant Fidelity Savings & Loan Association, a corporation, which said last-named defendant's interests are superior to said claim of the plaintiff herein; provided that nothing in this judgment shall be construed or held to prejudice or affect the rights of the Title Guarantee & Trust Company accruing prior to the date when the plaintiff's lien attached to the property."

As so modified the judgment is affirmed.

We concur: MELVIN, J.; LENNON, J.

(180 Cal. 359)

HASSON v. KOEBERLE et al. (L. A. 4828.)

(Supreme Court of California. May 12, 1919.)

1. Corporations 🔑244(4) — Donation of Shares of Stock—Collateral Attack.

Where stockholders intended to donate, and corporation intended to receive, certain number of shares of stock, and the original certificates issued were canceled and new certificates issued for the number of shares represented by the original certificates less the number of shares donated, the transfer effectively placed shares donated under the control of the corporation, and the donation must be held valid against collateral attack.

2. Corporations 🔑232(1) — Stockholders' Liability—Amount of Unpaid Subscription.

Where stock is sold for money, and the purchase price is less than the par value, the difference between the par value and the amount actually paid is the measure of the stockholders' liability to creditors.

3. Corporations 🔑232(3) — Issuance of Stock—Exchange for Property—Liability of Stockholders.

Where stock is issued for property having no generally defined value, the rule is that where the corporation and stockholders have agreed upon a given valuation for the property such valuation is binding and conclusive, unless it is fraudulent in purpose or effect.

4. Corporations 🔑232(3)—Stockholders' Liability—Stock Issued on Excessive Value of Property.

If the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, it is a constructive fraud upon the creditors of the corporation, and stock will be deemed paid only to the extent of the actual value of the property received in exchange for it.

5. Corporations 🔑232(3)—Stockholders' Liability — Mining Corporations — Rule Applicable.

The rule that, where stock of corporation is issued as fully paid in exchange for property at a known overvaluation, the creditors of the corporation, in case of its insolvency, may recover from each stockholder a sum equal to the amount unpaid upon his subscription, applies to all classes of corporations, including mining corporations, regardless of custom to fix mining shares at a purely arbitrary value.

6. Corporations 🔑232(3)—Stock Issued on Excessive Valuation of Property.

Unless the corporators knew or believed that mining claims given by them to the corporation in exchange for shares of stock were worth the par value of the stock received by them, or if their belief was reached without intelligent examination into the value by including items not really property, or by the influence of self-interest, the issuance of stock would be a violation of constitutional and statutory provision authorizing issuance to the amount of value of property.

Department 2.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Separate actions by Mrs. C. N. Hasson against J. E. Koeberle, Ludwig Gossman, and the Ord Mountain Gold Company. Actions against the two defendants first mentioned were tried together, and from a single judgment in their favor plaintiff appeals. Reversed and remanded.

Samuel H. Pardue, of Los Angeles, for appellant.

Jones & Evans and Mattison B. Jones, all of Los Angeles, for respondents.

LENNON, J. On March 7, 1907, the Ord Mountain Gold Company was an Arizona corporation, with a capital stock of 1,000,000 shares of the par value of $1 each. On that date, the directors held a meeting for the purpose of organization, and issued 450,000 shares each to T. N. Hasson and George L. Hasson, respectively, and the remaining 100,000 to one Steadman. Thereupon the Hassons each undertook to donate back to the corporation 250,000 shares by means of the cancellation of the original certificates and the issuance of new certificates for the lesser number of shares then remaining to each donor. The original issue to the Hassons was made in consideration of the transfer of certain mining properties to the corporation. On March 15, 1907, the corporation issued to the defendant Gossman 5,000 shares of stock, for which he paid $250. On March 11 and on April 30, 1907, issues totaling 4,000 shares were made to the defendant Koeberle for the sum of $200.

In 1914, the plaintiff obtained a judgment against the company for $7,518.92, and, the corporation being insolvent, execution thereon failed and the judgment remained unsatisfied. In January, 1915, the plaintiff brought separate actions against the defendants Gossman and Koeberle as shareholders in the corporation contending: (1) That the stock was issued to the Hassons for property taken at a gross overvaluation; (2) that by an application of the rule of Herron v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, the Hassons were liable to creditors of the corporation for the difference between the value of the property and the par value of the stock, and (3) that by an application of the rule of Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, the defendants, even if they are bona fide transferees for value, are liable to the plaintiff for the said difference as prorated upon their part of such stock which was subsequently issued to them after being returned to the corporation by the Hassons.

The actions were tried together, and from a single judgment in favor of both defendants

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the plaintiff brings this appeal. The theories advanced by the plaintiff resolve themselves into two main contentions: (1) That the Hassons did not in fact succeed in returning any stock to the corporation, wherefore the issue to the defendants was an over issue of treasury stock, and, as such, an ultra vires issue against which the rule of Herron v. Shaw, supra, should not apply and (2) that the rule of Herron v. Shaw, supra, should not apply against issues of stock by corporations organized solely to develop and operate mining properties where all or practically all of the stock is issued in return for undeveloped claims of a real but necessarily of an unknown and speculative value. One argument of the respondents in support of this contention is that it is a matter of such common knowledge that there is no relation between the par value of mining stock and the assets of the corporation that creditors could not be supposed to rely upon any representation that the corporation had received assets up to the par value of the stock.

[1] Considering respondents' first contention, we note the following facts: The Hassons intended to donate, and the corporation intended to receive, 500,000 shares of the stock. It was noted in the minutes of the corporation that the stock had been donated. The corporation has at no time undertaken to issue certificates representing more than the authorized capital stock. The certificates originally issued to the Hassons, each representing 450,000 shares of stock, were canceled and certificates were delivered to the Hassons, each purporting to represent but 200,000 shares of the stock. This transaction effectively placed 500,000 shares of stock under the control of the corporation. However technically imperfect the form of the donation may have been, the facts show that it was effected, and it must clearly be held valid against any collateral attack. Independently of any question of the effect of an ultra vires issue, it therefore appears that the respondents' first contention is without merit.

[2-4] Turning now to the second contention, we find the law well settled. It should be noted that, although the Ord Mountain Gold Company is a corporation organized under the laws of Arizona and doing business in California, it is to the California law that the parties have appealed in their briefs and arguments. Looking, therefore, to the California law we find it undisputed that, where stock is sold for money and the purchase price is less than the par value of the stock, the difference between the par value and the amount actually paid is the measure of the stockholders' liability to creditors, and that in cases where the stock is not sold for cash, but is issued for real or personal property having no generally defined value, "the rule is that where the corporation and stockholder have agreed upon a given valuation for the property transferred, such valuation is binding and conclusive unless it is fraudulent in purpose or effect. But if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property received in exchange for it." Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166; Herron v. Shaw, supra; Vermont Marble Co. v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143.

Cases supporting this rule decided in this jurisdiction and elsewhere are commented upon in Lucey Co. v. McMullen, 173 Pac. 1000, and in Sherman v. Harley, 174 Pac. 901. These cases do not intimate that the rule is not general in its application, or that it is subject to an exception in favor of any given class of corporations. In 1881, however, the case of In re South Mountain Consolidated Mining Co. (D. C.) 7 Sawy. 30, 5 Fed. 403, was decided in the United States District Court for the district of California. In that case the court stated the question before it as follows:

> "Does the acceptance of stock in a mining corporation, as they are usually formed in this state, create any obligation, either by contract or under the law, to pay to the corporation or to its creditors the nominal par value of the stock so accepted?"

This question was answered in the negative, the court deciding that a creditor of a mining corporation is left to the statutory liability of the stockholder for his pro rata of the corporate debts. The decision was wholly based upon an asserted difference between mining corporations, as organized in California, and other kinds of corporations. The court recited the custom of giving mining stock a purely arbitrary value, which "neither bears, nor is intended nor supposed by the public to bear, the slightest relation to the real value of the property—a value nearly always conjectural, and very often imaginary." On a review of the case in the Circuit Court of the United States (8 Sawy. 366, 14 Fed. 347), this view was upheld, the court saying:

> "Mining corporations in California are, in these particulars, sui generis. They are organized and carried on upon principles, in these respects, wholly different from banking, railroad, insurance, and like commercial corporations having a subscribed capital stock. There is no agreement, express or implied, to pay up any particular amount of stock, and no one understands that there is. Certainly none is intended by the parties."

While in the present case the record does clearly show that the Ord Mountain Gold Company was solely a mining company, the facts as revealed in the pleadings, proof, and findings, do not indicate that its capital stock was not subscribed or that there was no agreement, express or implied, to pay any particular amount of stock or that none was intended by the parties. The organization, so far as appears from anything in the record, differed in no material respect from that of an ordinary business corporation.

But, aside from these considerations, an examination of the California cases from the year 1882 to the present reveals the fact that, while the South Mountain Case has been repeatedly cited by the profession as an authority, this court has in each instance refused to do more than give it tentative recognition, and certainly has never approved the doctrine enunciated therein. See, for example, Harmon v. Page, 62 Cal. 448; Vermont Marble Co. v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Herron v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265.

[5] We are aware of no sound principle upon which the decision in the South Mountain Case can be upheld at the present day. The reasons forming the basis for the general rule stated in Herron v. Shaw and Harrison v. Armour, supra, apply as well to mining corporations as to corporations formed for other purposes. Nor do we see any reason why it would work any peculiar hardship upon a mining company, as distinguished from any other kind of corporation, to be required to take property in exchange for stock at what the corporators honestly and intelligently believe to be its actual value. If it is true that there is a custom to fix mining shares at a purely arbitrary par value having no relation to the value of the assets taken therefor, that fact cannot alter the rule of law requiring that there be such a relation. The precise question was raised in See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843, where it was urged upon the court that it was a matter of common knowledge that stock was issued by New Jersey corporations for property taken at a gross overvaluation. Pitney, V. C., admitted that the practice had been so frequently indulged in that it had brought obloquy upon the state, but asserted that whenever it had been indulged in it had involved a clear infringement of, if not a fraud upon, the letter and spirit of the laws of the state. If, therefore, it is customary for mining corporations in this state to issue stock for property which has no relation to the par value of the stock so issued, we can likewise only express our regret and point out that it has in every case involved a clear infringement of our laws.

[6] It follows that the rule enunciated in Herron v. Shaw and Harrison v. Armour, supra, is a general rule applicable to all classes of corporations, and that the rule stated in Re South Mountain Consolidated Mining Co., supra, no longer properly expresses the law in force in this state. Consequently, unless the corporators knew or believed that the Ord Mountain mining claims were worth $1,000,000, the stock is to be deemed paid only to the extent of the actual value of those claims at the time of the transfer to the corporation. We are also of the opinion upon a review of the cases that, however morally righteous was the belief of the corporators, if it was reached without intelligent examination into the elements of value or by including items not really "property" or by the influence of self-interest, the issue would be as much a violation of the statutory and constitutional provisions as though it had been dictated by corrupt motives. See v. Heppenheimer, supra; Donald v. American Smelting Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618; Gillett v. Chicago Co., 230 Ill. 373, 82 N. E. 891. It may be remarked at this point that in determining whether or not the corporators did in fact honestly and intelligently believe the Ord Mountain claims to be worth $1,000,000 the circumstances attending and following the transfer should be taken into consideration. Immediately following the transfer, shares of the par value of $1 each and of the total par value of $500,000 were returned to the corporation. A short time thereafter several thousand of these shares were sold to the respondents at 5 cents a share. These circumstances cast grave suspicion, to say the least, upon the existence of any honest and intelligent belief that the Ord Mountain claims were worth $1,000,000.

It follows from the foregoing discussion that evidence should have been received at the trial bearing on the belief of the corporators as to the value of the property, to the end that it might have been determined what that belief was, and whether it was in fact honest and intelligent. The court, however, acting on the theory that the opinion of the corporators was wholly immaterial, confined the issue to the actual value of the property at the time of the transfer to the corporation. The finding of the court on this point is as follows:

> "That at said time said mining claims had a value subsequently determined of yielding dividends on an investment of $1,000,000, that said 1,000,000 shares fully paid were not disproportionate in value to the said mining claims, and that the consideration for the issuance of said stock, fully paid up, was reasonable, just, and adequate."

The finding, in effect, rests upon the conclusion that the property was worth $1,000,000, because it would pay dividends on $1,000,000. It is not, however, found that the dividends referred to would be a reasonable or adequate return on an investment of $1,-

000,000. Moreover, it is evident that future earning capacity rather than present cash value was adopted as a standard. We do not mean to say that prospective earning capacity, properly subordinated to other modes of ascertaining value, may not be considered in determining present cash value. We are compelled to conclude, however, that the court adopted a prospective earning power as the standard of value, and did not consider it as merely some evidence of present cash value which upon a review of the cases we take to be the standard approved by them. It was the duty of the court to determine this value by ascertaining as nearly as possible what a reasonably prudent investor who contemplated spending his own money would have been willing to pay for the Ord Mountain claims under the circumstances under which the corporators acted on the date of the transfer.

That the finding in question was not based upon the application of such a standard may be demonstrated by a review of the evidence. Dr. Koebig, the plaintiff's mining expert, was asked on the cross-examination: "It might be reasonable to expect, Dr. Koebig, that that profit would run into millions, just as much as into thousands?" The doctor answered: "Well, I am not so used to figure by the millions, but certainly this property, in my judgment, was a property that could pay dividends on a very large sum of money—if you please, a million—and good dividends on such, if the indications are borne out by the future development, and my opinion was there will be." This opinion was based upon an examination made after $150,000 had been spent in developing the mine. On the other hand, the same witness at another time in the trial stated that he could best give an idea of his opinion of the value of the mine by recounting a conversation which he had had with Mr. Hasson. It appeared that, at a time after the expenditure of the $150,000 before referred to, Hasson asked Koebig whether it would be wise to accept $250,000 for the property. Koebig answered that that would be getting a "very good value" for the property. Samuel J. Paul, another mining expert called for the plaintiff, testified that at the time of the transfer of the property to the corporation he would have considered it worth between $25,000 and $35,000. This was the only testimony as to the value of the claims.

It is clear from this analysis of the evidence that the finding of the court is based upon prospective earning power as determined at a time subsequent to the transfer. The judgment cannot therefore, be sustained on the theory that the evidence shows that the actual cash value of the property, in the sense in which we have defined that term, was $1,000,000 at the date of the transfer in question.

The judgment appealed from is reversed, and the case remanded for a new trial.

We concur: WILBUR, J.; MELVIN, J.

180 Cal. 381

BUFKIN v. CLINE, Sheriff, et al.
(L. A. 4891.)

(Supreme Court of California. May 14, 1919.)

1. Appeal and Error ⚿1010(1)—Finding.

Trial court's finding, based on sufficient evidence, is conclusive upon appeal, although there was evidence from which the trial court might have arrived at a different conclusion.

2. Fraudulent Conveyances ⚿137(1) — Change of Possession—Exempt Property.

Civ. Code, § 3440, as to immediate delivery and change of possession of transferred property, by express terms does not apply to exempt property, such as is enumerated in Code Civ. Proc. § 690.

Department 2.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by Samuel Bufkin against John C. Cline, Sheriff, etc., and others. From judgment for plaintiff, defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

WILBUR, J. This is an action of claim and delivery. Plaintiff had judgment, and defendants appeal. Defendants predicate their right to the property in question upon an attachment issued October 14, 1915, against the property of Katherine Van Alstyne, levied by the defendant sheriff upon the property in question on said date. No specific description of the property is contained in the briefs other than in the findings of the court that said property consisted of household furniture and furnishings and bric-a-brac of said household. Respondent's wife died in 1900. At that time the personal property in question was the community property of himself and wife. Respondent's daughter Katherine thereafter married Van Alstyne, and the plaintiff gave the possession of said furniture to her. The property remained continuously in her possession until July 26, 1915, when it was stored in the warehouse of the Bekins Van & Storage Warehouse, and Katherine Van Alstyne executed a bill of sale thereof to plaintiff. The arrangement between the father and daughter under which she retained possession of the furniture is thus found by the court:

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"On or about the 1st day of December, 1900, upon the death of said Jane H. Bufkin (plaintiff's wife) plaintiff loaned and delivered the possession of said personal property and the whole thereof to the defendant Katherine Van Alstyne for her use during her life as long as she should desire to use the same, or upon her death or surrender of the property, the title to the same to at once be vested in plaintiff, with the right to the immediate possession thereof, reserving in himself the right to recall and repossess himself of said property, or any part thereof, at any time, and continuously between the 1st day of December, 1900, and the 26th day of July, 1915, defendant Katherine Van Alstyne continuously had possession of and used the same in her home as the household furniture of herself and family. On or about the last-mentoned date defendant Katherine Van Alstyne gave up housekeeping, surrendered the possession of said furniture to plaintiff, and as evidence of such transfer of title and possession and redelivery made, executed, and delivered to him a bill of sale, bearing date the 26th day of July, 1915, which was duly recorded July 27, 1915. That on July 26, 1915, plaintiff took possession of said property, and that the same has remained in storage with the Bekins Van & Storage Warehouse."

The court also found that there was no intention to defraud creditors in connection with the change of ownership and possession July 26, 1915. Appellant contends that the transfer of July 26th was invalid as to the defendant creditors, under the provisions of section 3440 of the Civil Code, requiring immediate delivery, followed by an actual and continued change of possession of personal property to effectuate a transfer as against existing creditors. There are two good and sufficient answers to appellants' claim. First, the court found on sufficient evidence that plaintiff was at all times the owner of the property in question, and that Mrs. Van Alstyne was entitled only to the possession thereof. It is true that there was evidence from which the court might have arrived at an opposite conclusion, but the finding of the trial court is conclusive upon us. The transaction of July 26, 1915, therefore, amounted to nothing more than a surrender by the daughter of her right of possession to her father, the plaintiff. There was, therefore, no attachable interest remaining in her. The second answer to appellants' contention is that section 3440, by express terms, does not apply to property exempt from execution. The provision is as follows:

> "Provided, however, that the provisions of this section shall not apply to the transfers of wines, etc. * * * nor to any sale, transfer or assignment of any property exempt from execution."

The reason for this provision undoubtedly is that creditors can make no claims to property exempt from execution, and its transfer, therefore, should not be deemed fraudulent as to them. Section 690 of the Code of Civil Procedure provides:

> "The following property is exempt from execution and attachment. * * * 2. Necessary household, table and kitchen furniture belonging to the judgment debtor, including," etc.

The finding of the court that there was no intent to defraud creditors on the part of Katherine Van Alstyne by said transfer may have been based in part at least upon the proposition that the property in question was not subject to execution. This point was not discussed by the parties, and for that reason will not be further discussed.

Judgment affirmed.

We concur: MELVIN, J.; LENNON, J.

40 Cal. App. 641

ADAMS v. PLETSCH et al. (Civ. 2401.)

(District Court of Appeal, Second District, Division 1, California. April 12, 1919.)

1. APPEAL AND ERROR 🔑994(3)—REVIEW—CREDIBILITY OF WITNESSES.

The weighing and reconciliation of the inconsistencies of the testimony of the defendants by accepting in part or in whole the testimony of either of them was for the trial court.

2. RELEASE 🔑53 — FRAUD — PLEADING AND PROOF.

In an action by a purchaser of stock to recover, as for money had and received, commissions agreed to be paid thereon and on all sums of money collected by one of the defendants on a certain contract, evidence of fraud in procuring from plaintiff an agreement surrendering his claim *held* not admissible, in the absence of an allegation of fraud.

3. APPEAL AND ERROR 🔑1056(1)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence as to fraud by promoters of a corporation from whom plaintiff purchased stock, in procuring an agreement of waiver from plaintiff of any claim upon commissions on property transferred by the corporation to one H., if error in suit by plaintiff to recover commissions agreed to be paid upon stock purchased and money collected by defendants on a contract with one H., was not prejudicial, where no property was ever transferred to H. nor any collections made upon H.'s contract with the corporation.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. W. Adams against Theo. H. Pletsch and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Tipton & Cailor, of Los Angeles, for appellant.

Head & Marks, of Fullerton, and Elmer I. Moody, of Los Angeles, for respondents.

SHAW, J. Plaintiff appeals from a judgment entered in favor of defendants, who were promoters of a corporation designated as the Continental Mausoleum Company and who, as agents for the sale of the capital stock of the corporation, were to receive a commission of 20 per cent. upon sales made by them. In furtherance of the business for which it was created, the corporation had made a contract whereby it agreed to purchase from William N. Holway the rights to a certain United States patent for the sum of $65,000. It appears that defendant Pletsch had a contract with Holway for the collection of this money. The defendants, thus representing both Holway and the corporation, agreed to pay plaintiff 10 per cent. commission on all stock which he might buy, and a like sum on all sales of stock in the negotiation of which he assisted, and further agreed that he should be paid 10 per cent. commission on all sums of money collected by Pletsch on the Holway contract. One count of the complaint alleged that, pursuant to this agreement, plaintiff bought stock of the corporation of the value of $3,500, upon which he was entitled to a commission of $700, and that collections of $7,000 were made upon the Holway contract, upon which he was entitled to a like sum of $700, for the total of which judgment was asked.

The court, in effect, found that as to the stock bought by plaintiff, 30,000 shares thereof, valued at $3,000, was not subject to the agreement because the same was made after the purchase; that as to the other $500 worth of stock purchased by plaintiff he received payment of his commission thereon, which fact plaintiff in his testimony admitted to be true. It was further, in effect, found that no collections upon which plaintiff was entitled to commissions had been made on the Holway contract.

[1] The chief ground upon which appellant insists on a reversal is that the evidence is insufficient to support these findings. It would be an idle waste of time for the court to make an extended review of the testimony offered touching the issues so joined. Suffice it to say that counsel for appellant concede the testimony of defendants supports the findings. Their contention is that it is contradictory. Concede so much, nevertheless it was for the trial court to weigh and reconcile such inconsistencies by accepting, in whole or in part, the testimony of either defendant. Both defendants are positive in their statements that at the time plaintiff bought the 30,000 shares of stock there had been no talk or conversation whatever in reference to allowing him any commission whatsoever thereon. They insist that the only agreement regarding commissions on stock bought by plaintiff was made after said purchase by him of the 30,000 shares.

[2] Appellant's attack upon the finding, to the effect that defendants promised to pay him the sum of 10 per cent. on all sums of money in cash collected from the Mausoleum Company by Holway, is based upon the claim that there was transferred to Holway by the company certain contracts and property of the value of $7,000. The agreement, however, as shown by the testimony of defendants, was that the 10 per cent. commission was to be paid only upon sums of money which Holway received, and not upon property which he might agree to accept in lieu of cash. It further shows that defendants consulted plaintiff with reference to the company transferring this property to Holway, at which time he was told that if Holway accepted the property for the agreed sum of $7,000, no commission would be allowed thereon, to all of which plaintiff himself admits that he agreed. Moreover, since Holway testified that upon said contract the company "never paid any money, property, or consideration whatever," it appears that such transfer was never consummated.

While plaintiff admits that he agreed, in case of a transfer of the property to Holway, he would waive any right or claim to commissions upon the value of the property, he insists that he was induced so to do by defendants agreeing to a like waiver on their part, instead of which, however, he claims that defendants obtained the entire property and appropriated it to their own use and benefit, by reason of which fact the agreement of waiver on his part was procured by fraud. The court, however, refused to receive and consider testimony tending to establish such alleged fraudulent acts and representations on the part of defendants, for the reason that the complaint contained no allegation of fraud. The action as brought was for money had and received by defendants to plaintiff's use and benefit, upon which appellant insists, on the authority of Minor v. Baldridge, 123 Cal. 187, 55 Pac. 783, that evidence showing fraud in procuring the agreement of waiver made by plaintiff was admissible. In the case cited it was held that where a condition precedent to the payment of money was falsely represented to have been performed, such fact might be shown in an action in assumpsit. The case is not applicable to the facts under consideration for the reason that here plaintiff entered into an agreement surrendering his claim and right to money which might in a certain contingency become due to him. No money had, as in the Minor Case, been paid, and if the contingency arose under which plaintiff, except for his agreement of waiver so claimed to have been procured by fraud, was entitled to commissions, the facts showing that it was so obtained should have been alleged. Otherwise defendants would not have notice of the nature of plaintiff's claim based on his repudiation of the contract of waiver. Nichols v. Randall, 136 Cal. 426, 69 Pac. 26.

[3] However, even were the alleged error conceded, plaintiff was not prejudiced thereby, for the reason that it appears without contradiction that the property was not transferred to Holway, nor were any collections made upon his contract with the company.

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

40 Cal. App. 597

CITY STREET IMPROVEMENT CO. v. SILVERSHIELD et al. (Civ. 2749.)

(District Court of Appeal, First District, Division 2, California. April 8, 1919.)

1. APPEAL AND ERROR ⟹766—BRIEFS—STATUTE.

In view of Code Civ. Proc. § 953c, requiring parties to print in their briefs such portion of the record as is necessary for the information of the court, where appellants did not print in their opening brief an appendix, and only set out as part of the record a small portion of a private contract, upon the construction of which appellants state they rely, and respondent's brief calls attention to this omission, and appellant's closing brief is also unsatisfactory, the appeal, being frivolous, will not be considered, and judgment will be affirmed.

2. COSTS ⟹260(4) — DAMAGES — FRIVOLOUS APPEAL.

Where an appellant fails to conform to the requirements of Code Civ. Proc. § 953c, requiring the parties to print in their briefs certain portions of the record, and on examination of the record it fails to disclose any merit, and appears solely to have been made for purposes of delay, a proper case exists for the imposition of damages upon appellant for taking a frivolous appeal.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by the City Street Improvement Company against Henry Silvershield and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Cowan, of Santa Rosa, for appellants.

Platt Kent, of San Francisco, for respondent.

BRITTAIN, J. The appeal, upon the alternative procedure, is from a judgment upon a private contract for street work in the city of Santa Rosa. In the opening brief there is no appendix, and the only pretense of setting out any part of the record, if indeed it is a part of the record, is a mutilated excerpt from a part of the private contract. There is a statement that one of the principal points upon which the appellants rely is the construction of the contract. The respondent's brief consists of a single paragraph, asking that the judgment be affirmed, for the reason that the appellants have not printed in their brief the portion of the record required for the information of the court, citing Code of Civil Procedure, § 953c, and Miller v. Oliver, 174 Cal. 404, 163 Pac. 357, and stating that the appeal appears to have been taken solely for delay.

In the closing brief is a statement that counsel for the appellants have been assured several times by Courts of Appeal, when presenting cases, that they always make a practice of going fully into the transcript, and, further, in order that there might be no dereliction, in the closing brief they set forth certain matter, which may or may not have been another part of the contract in suit so far as appears from the brief, consisting of three questions with their answers, which standing alone, are entirely unintelligible. There is also set forth what is designated the pretended acceptance by the city of Santa Rosa.

[1, 2] Section 953c, Code of Civil Procedure, is positive in its requirements. It has frequently been construed by both the Supreme Court and the District Courts of Appeal. Miller v. Oliver was decided more than a year before the appellants' opening brief in this case was filed. In that case the Supreme Court awarded damages of $100 against the appellant for a frivolous appeal. The disregard by the appellant in that case of the provisions of section 953c, Code of Civil Procedure, was not more marked than that of the appellants in the present case. Estate of Kieth, 175 Cal. 26, 165 Pac. 10; Welk v. Sorenson, 178 Pac. 498; Whiting-Mead Commercial Co. v. Richards, 180 Pac. 633. The record has been examined, and it fails to disclose merit in the appeal from a judgment of $108.05, interest, and costs.

The judgment is affirmed, and it is adjudged that respondent recover from the appellants the sum of $50 for the taking of a frivolous appeal.

We concur: LANGDON, P. J.; HAVEN, J.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

40 Cal. App. 685

SYDNEY v. RICHARDS et al. (Civ. 1914.)

(District Court of Appeal, Third District, California. April 16, 1919. Rehearing Denied by Supreme Court June 12, 1919.)

1. APPEAL AND ERROR ⚷1011(1)—FINDING—REVIEW.

Court finding, based on conflicting evidence, will not be disturbed on appeal.

2. MINES AND MINERALS ⚷19(1)—LOCATION NOTICE—SUFFICIENCY.

Location notices should be liberally construed, and in determining the sufficiency thereof the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty.

3. MINES AND MINERALS ⚷19(1)—LOCATION NOTICE—COMPLIANCE WITH STATUTE—EVIDENCE.

In action to quiet title to copper mining claim, question being whether prior notice of location by defendants contained a sufficient description of land sought to be located under Civ. Code, §§ 1426, 1426a, *held*, that the court below was justified in concluding that there was an honest attempt by defendants to locate said land, that there was a sufficient compliance with the requirements of the law, and that plaintiff had full knowledge of the extent of defendants' claim.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by J. L. Sydney against John Richards and others. From judgment for defendant named, plaintiff appeals. Affirmed.

F. P. Tuttle, of Merced, for appellant.
John Wall, of Mariposa, for respondents.

BUCK, Presiding Judge pro tem. This is an action to quiet title to a copper mining claim. The defendants Westfall and Beeves filed a disclaimer. The case was tried by the court sitting without a jury, and judgment was for defendant Richards, and plaintiff appeals.

The land in question was unoccupied government mineral land and at the trial plaintiff attempted to prove that she had acquired title thereto by two distinct proceedings: First, that on January 1, 1911, she and one Lisenby, through her husband, posted a notice of location upon the ground, and in 1913 performed more than $100 worth of labor. Afterwards this location was abandoned, and on September 14, 1914, while the land, as she claims, was still unlocated, she made a valid location thereon by posting the proper notice.

[1] As regards the location of January, 1911, the trial court found from conflicting evidence that the required assessment work for the year 1913 had not been done. Under the rule governing this court, this finding will not be disturbed.

As regards the location of September 1914, by plaintiff, there was offered in evidence at the trial a prior notice of location posted on the claim on March 11, 1914, by defendant, which, over the objection of plaintiff, was received in evidence and was the basis upon which judgment in favor of defendant was rendered.

The question in controversy is whether this prior notice of location by defendant contained a sufficient description of the land sought to be located under the provisions of sections 1426 and 1426a of the Civil Code. The following is a copy of the notice of location:

"Notice of Location—Quartz Claim. Notice is hereby given that the undersigned citizen of the United States has, in compliance with the requirements of the Revised Statutes of the United States this day located and claim 1,500 linear feet along the course of this lead, lode, or vein of mineral-bearing quartz, and 300 feet in width on each side of the middle of said lead, load, or vein, together with all mineral deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges thereon or appurtenant thereto, situate in the Green Mountain mining district, county of Mariposa, and state of California, and more particularly described as follows, to wit: Commencing at a stone monument about 100 feet north of an old incline shaft, thence northerly 600 feet and southerly 900 feet along the vein or lode which is the center line of the claim. The shaft is located about 600 feet west of the N. E. corner of section 4, T. 8 S., R. 18 E. M. D. M. This claim shall be known as the Sunny Side quartz claim."

[2] The recent case of Batt v. Stedman, 173 Pac. 99, decided in this court since briefs were filed herein, lays down the principles which will govern this court in considering the sufficiency of a notice of a mining location. Following other precedents, that case holds that "location notices should be liberally construed, having reference to the circumstances under which, and the character of the parties by which, they are generally made; in determining the sufficiency of the location notice, the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty;" also the statute expressly provides that the description of the claim may be made "by reference to some natural object or permanent monument, as will identify the claim located," and that "in no case shall the claim extend more than 1,500 feet along the course of the vein or lode, nor more than 300 feet on either side thereof, measured from the center line of the vein at the surface," and that the notice must contain "the number of linear feet claimed in length along the course of the vein, each

way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be." Civ. Code, 1426, 1426a.

Now, as regards the natural objects and monuments on the land which were attempted to be used by the defendant to "identify the claim located," the following appears from the testimony: The land in dispute is old mining ground and had been mined years before by the Guggenheims. In 1912, and prior thereto, and at the time of the location, there was on the claim a 115-foot tunnel; also the ground was all clear, and with but a single tree on it; also plaintiff's husband testified that he had known the land for years, that "discovery of copper-bearing ore had been made on the claim; there is a well-defined ledge on the claim, and the apex of the vein extends the whole length of the claim"; and respondent testified:

> "On March 11, 1914, I discovered rock in place on the claim bearing valuable copper ore. I built my discovery monument on the vein at this point. It was made of rocks, and was 2 feet wide and 3 feet high; and on that day I placed and posted [the above notice of location] on this discovery monument."

From the foregoing it will appear that there were upon the ground three objects, each of which objects were referred to by the locator in his notice, to wit, the well-defined ledge on the claim, the apex of which "extends the whole length of the claim," the shaft, or tunnel, and the monument. The description in the first place makes the well-defined ledge "the center of the claim," and, second, makes the stone monument referred to as the point of discovery the starting point for the measurement northerly 600 feet and southerly 900 feet of an aggregate distance of "1,500 linear feet along the course of this lead, lode, or vein of mineral-bearing quartz"; and the notice also defines the other dimension of the claim by like reference to this well-defined ledge on the claim as being "300 feet in width on each side of the middle of said lead, lode, or vein."

And, furthermore, by his own conduct, the husband of plaintiff, while acting for her, indicates that the monument referred to in defendant's location notice was a sufficient location of the point of discovery when he testifies:

> "I posted the Lone Tree mine location notice in the same monument of rocks where I found the Sunnyside mine notice of location."

Furthermore, he gives no testimony from which it can be inferred that the notice of location posted by the defendant was insufficient to give him or any other person notice or information of the boundaries of defendant's location; his testimony in this action being as follows:

> "A few days after March 11, 1914, I was on the ground and found the notice of location of the Sunnyside mine by defendant John Richards in a monument of rocks on the vein. I read this Sunnyside mine notice of location at this time, and then put it back in the monument of rocks where I found it. I did not make any effort to follow the directions contained in the Sunnyside mine location notice to find if any monuments had been placed to mark the claim. I have never made any such effort. The ground is all clear, some grass grows each year, and there is but one single tree on the ground. By little effort I could have readily found and seen any monuments of rocks or any other monuments on the ground. I was advised that the Sunnyside mine location was defective, for the reason that the notice of location did not contain enough writing; that it did not comply with the requirements of the statutes of the state of California, and that was my sole and only reason for making the Lone Tree location on the same ground as claimed by the Sunnyside mine notice of location. I posted the Lone Tree mine location notice in the same monument of rocks wherein I found the Sunnyside mine notice of location."

[3] As stated by this court in the case of Green v. Gavin, 10 Cal. App. 330, at page 337, 101 Pac. 931, at page 933:

> "We think the court below was justified in concluding that there was an honest attempt by defendants to locate said land; that there was a sufficient compliance with the requirements of the law; * * * that plaintiff had full knowledge of the extent of defendants' claim."

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

40 Cal. App. 633

DURAN v. YELLOW ASTER MIN. & MILL. CO. (Civ. 2615.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1919. Rehearing Denied by Supreme Court June 9, 1919.)

1. Master and Servant 🔑285(5)—Injury to Servant—Evidence—Defective Rope.

In a servant's action for injuries by the breaking of a rope, evidence *held* to justify a finding that the rope which yielded was the part run over by an engine before the accident.

2. Negligence 🔑121(2)—Presumptions.

When a thing causing injury is shown to be under defendant's management, and the accident is such as in the ordinary course of things does not happen if those in charge use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from a want of care.

3. Master and Servant 🔑265(5)—Injury to Servant—Unsafe Tools—Rope—Evidence—Sufficiency.

In a servant's action for injuries by the breaking of a rope after it had been run over by an engine, plaintiff, to make a sufficient case for the jury, was not required to do more than show the defect was actually known to defendant or would have been discovered by a reasonable inspection.

4. Trial 🔑103—Reception of Evidence—Purpose—Exception.

In a servant's action for injuries, the master's exception to the introduction of evidence to show that defendant was a rich corporation cannot avail, where there was another and unquestionably legitimate purpose for its introduction, to which such evidence was pertinent.

5. Evidence 🔑127(4)—Res Gestæ—Declarations of Injured Servant—Pain.

In a servant's personal injury action against a master, testimony of a witness that after the accident, when plaintiff was seeking to use a rake, he heard plaintiff exclaim, "My God! it hurts!" was admissible upon the question of the seriousness of the injury, and there was no error in overruling the objection that it was a self-serving, hearsay declaration and incompetent.

6. Damages 🔑132(8)—Excessive Damages—Permanent Disability of Two Fingers—Other Continuing Disabilities.

Where the injured servant was compelled to undergo much suffering, and there was evidence tending to show permanent disability affecting two fingers of his right hand and other disabilities continuing at the time of trial, nearly two years after the accident, *held*, award of $4,000 did not raise an inference that the verdict was influenced by passion or prejudice.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Vinton E. Duran against the Yellow Aster Mining & Milling Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Ward Chapman, of San Francisco, for appellant.

Frank P. Doherty and B. Rey Schauer, both of San Francisco, for respondent.

CONREY, P. J. The defendant appeals from a judgment in the sum of $4,000 and from an order denying its motion for a new trial. The case was tried by jury. The action was brought to recover damages for personal injuries suffered by the plaintiff while in the employ of the defendant. It was alleged that the accident and injury were caused by negligence of the defendant, which negligence consisted in the selection and use of a rope which was insufficient in size, weight, and strength to sustain and hold the weight of a dump car which had rolled off the track and down the side of the dump, and the accident occurred while defendant's employés, including the plaintiff, were engaged in putting back and placing the car upon the track.

[1] Appellant's principal contention is that the evidence is not sufficient to justify the implied finding of negligence. Counsel for appellant claims that, aside from the fact that the rope broke, the plaintiff offered no evidence whatever of any lack of care on defendant's part in the selection of the rope or in the manner of fastening it, or in any act committed or omitted, unless possibly certain testimony that an engine was permitted to run over the rope where it was tied on the track before the accident was intended to give rise to an inference of negligence.

The evidence is undisputed that a new rope of the size and quality used is good for 4,000 pounds dead weight on a vertical lift, and, if it is a slightly used rope, one-third should be deducted. The rope in question had been used. There is no evidence referring to the tensile strength of such a rope when resisting a sudden jerk or shock; so far as the evidence shows, it may be that such a rope would have broken under a sudden strain produced by an object weighing much less than two-thirds of 4,000 pounds. It was stipulated that the weight of the truck and running gear of the car was 1,600 pounds; that the weight of the bed independent of the running gear and truck was about 1,200 pounds, making a total weight of 2,800 pounds; and appellant claims that the rope was attached to the truck and running gear at the time of the accident, and that the bed of the car was lying apart from the truck and running gear. If the evidence produced by the plaintiff showing his injury by reason of the breaking of the rope was such as to raise an inference of negligence, then, in the absence of a satisfactory explanation of the circumstances on the part of the defendant, it cannot reasonably complain against the finding of such negligence. There being no evidence necessarily proving that the rope was reasonably sufficient to resist a sudden strain caused by an object weighing 1,600 pounds, we cannot say that the jury's conclusion upon the matter of insufficiency of the rope was not sustained by the evidence. Defendant's superintendent, C. H. Frye, was present at the time and place of the accident. He testified as a witness on behalf of the defendant. According to his testimony, there was nobody pulling on the rope; it was simply there as a guide to hold the car while the men were working, and when they lifted the lower side up the car came down a little bit and snapped the rope. "As soon as the car was lifted out of the muck on the side that Mr. Duran was working on, you see it pulled the rope taut and it snapped."

There does not appear to have been any close inspection of the rope before it was used. Mr. Frye says: "I did not examine the rope myself to see if it was in good condition; if the rope looks all right nobody pays any attention to it." At the commencement of the work one end of the rope was tied to the car and the other end was tied around the two tracks on the grade above. Afterwards and before the moment of the accident an engine had run over the rope and cut it in one place. Where the rope ran over the other rail of the track, the rope was not cut, and there is no evidence showing the extent to which the rope may have been mashed and weakened in any part except where it was cut. It does not appear that any inspection was made by the defendant for the purpose of determining that fact. That part of the rope which had been cut was taken out, and was not in use at the moment of the accident. So far as the evidence shows, that part of the rope which was not cut, but which had been run over by the engine, may have been in use at the moment of the accident, and may have been the part of the rope which yielded under the strain and caused the accident. Under the evidence the jury would have been justified in determining that this was the fact.

[2, 3] In connection with his claim that the evidence does not show any fact or circumstance from which negligence on defendant's part can be deduced, counsel for appellant endeavors to apply the rule that no inference of negligence can be implied from the mere fact that the injury occurs. Such cases as Madden v. Occidental Steamship Co., 86 Cal. 445, 25 Pac. 5, and Sappenfield v. Main Street R. R. Co., 91 Cal. 48, 27 Pac. 590, are cited as sustaining this rule. Those decisions and others are cited and discussed in O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674. The rule is affirmed that, when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. It is proper to say here, as was said in that case, that in order to make a sufficient case for the jury it was not incumbent on the plaintiff, under the circumstances appearing, to do anything further than he did do in the way of showing that the defect in the appliance was actually known to the defendant, or would have been discovered upon the exercise of reasonable care to ascertain its condition. We think that the evidence is sufficient to sustain the finding of negligence.

[4, 5] There are two exceptions to rulings of the court on the admission of testimony. The first exception is based upon the claim that certain redirect examination of the plaintiff which was allowed by the court was indulged for the purpose of conveying to the jury the information that the defendant was a rich corporation. Without setting forth this evidence, it is enough to say that it had another and unquestionably legitimate purpose, to which such evidence was pertinent. The exception is not sustained. The second exception relates to a question asked of plaintiff's witness Kelly as to whether or not he, at a time after the accident when plaintiff was seeking to use a rake, heard plaintiff utter any exclamation. Defendant objected to this upon the ground that it called for a self-serving, hearsay declaration, and was incompetent, but the court overruled the objection on the theory that the plaintiff was calling for a spontaneous exclamation, and the witness answered that the exclamation was, "My God! it hurts!" There was no error in overruling this objection. Dow v. City of Oroville, 22 Cal. App. 215, 226, 134 Pac. 197.

It is claimed that the court erred in its instructions on the measure of damages. The particular instruction selected by appellant for criticism is the following:

> "If from the evidence in this case the jury should find that the plaintiff has sustained damages as alleged in his complaint, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have testified or expressed an opinion as to the amount of such damages, but the jury may make such estimate from the evidence in the case and by considering them in connection with their own knowledge and experience in the affairs of life."

Counsel say that this is a true rule in so far as the award had reference to the element of suffering or impairment of health, but is wholly incorrect in so far as loss of earnings or medical expense is concerned. The decision in Rouse v. Pacific Electric Ry. Co., 27 Cal. App. 772, 151 Pac. 164, relied upon by appellant here, is not in point. The instruction discussed in that case referred particularly to the plaintiff's loss of earning power, and told the jury that "it is not necessary that evidence should be presented in this matter." It was held that in giving such instruction the court erred; but no corresponding statement or inference is contained in the instruction presented for consideration here. Moreover, in other instructions given the jury were plainly told that, if they found for the plaintiffs, they should award to him only such actual damages as the evidence showed that he had sustained, etc., "taking into consideration his loss of earnings (if any), necessary expenses in medical and surgical aid, so far as the same appear in evidence in this case (if any)."

[6] Finally, appellant claims that the amount awarded as damages was grossly excessive. The plaintiff was compelled to undergo much suffering, and there is evidence

tending to show permanent disability affecting two fingers of his right hand, and other disabilities still continuing at the time of the trial, which was nearly two years after the date of the accident. There is no such discrepancy between the evidence and the amount of damages awarded as to raise an inference that the verdict must have been influenced by passion or prejudice on the part of the jury. Perry v. Angelus Hospital Association, 172 Cal. 311, 156 Pac. 449.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

40 Cal. App. 617

PERAZZI et al. v. DOE ESTATES CO. et al. (Civ. 2700.)

(District Court of Appeal, First District, Division 2, California. April 11, 1919. On Petition for Rehearing, May 9, 1919; Denied by Supreme Court June 9, 1919.)

1. Mechanics' Liens 🔑281(2) — Foreclosure—Evidence—Sufficiency.

Evidence in suit to foreclose contractors' liens against lessors of a building, upon which improvements were made at the request of a sublessee, *held* sufficient to sustain finding that the contracts had been completed on the date of the sublessee's death; the fact that some of the changes contemplated were not made until a later date not being necessarily inconsistent with full performance of whatever contracts were made.

2. Mechanics' Liens 🔑281(2) — Foreclosure — Evidence — Sufficiency — Time of Completion.

In suit to foreclose three contractors' liens against the lessors, upon whose building improvements had been made at the request of a sublessee, finding that the contract upon which one of the liens was based was fully performed on March 31st *held* not supported by the evidence; there being testimony by one of the claimants that the work was finished on March 6th, or more than 60 days before filing the lien required by Code Civ. Proc. § 1187, on May 11th.

3. Mechanics' Liens 🔑132(4) — Time for Filing Lien—Notice of Completion.

A contractor's lien, filed more than 60 days after completion of the work, but before 90 days have expired, is too late, and cannot be allowed, under Code Civ. Proc. § 1187, where such contractor has failed to allege and prove the failure of the owner to file his notice of completion.

4. Mechanics' Liens 🔑78—Knowledge of Owner — Notice by Owner to Prevent Lien.

Knowledge shown by allegations in the answer of defendant lessors, in suit by contractors to foreclose lien for work performed at request of a sublessee, that they knew that repairs were being made by such sublessee but were ignorant of the scope of such work, was sufficient to require the filing of the notice required by Code Civ. Proc. § 1192, as a condition of relieving their property from liability for work performed at the request of the sublessee; only such knowledge as would put a prudent man on inquiry being necessary.

5. Mechanics' Liens 🔑272, 279—Enforcement — Defense—Notice of Nonliability by Owner.

Where the owners, at the time of their sublessee's death, had knowledge of the improvements made by contractors on the building at the request of such sublessee, the giving of notice of nonliability under Code Civ. Proc. § 1192, is a matter of defense to be pleaded and proved by such owner, on suit by the contractors to foreclose their lien.

On Petition for Rehearing.

6. Costs 🔑241 — Appeal — Apportionment of Costs on Appeal.

Where, on appeal in suit by contractors to foreclose three liens for improvements made upon a building, two of the liens were held valid and one invalid, the costs of appeal will be prorated among them.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by H. J. Perazzi against the Doe Estates Company and others. From a decree for plaintiffs, defendants appeal. Decree reversed, in so far as it decrees a lien in favor of Henry F. Castagnino and Emanuel Castagnino, plaintiffs, and in other respects affirmed.

Pringle & Robbins, Milo R. Robbins, and Arthur H. Redington, all of San Francisco, for appellants.

H. K. Eells and Maxwell McNutt, both of San Francisco, for respondents.

HAVEN, J. The appeal is from a decree of foreclosure of three contractors' liens against the leasehold interest of appellants in certain premises in San Francisco. The claims of lien sued upon are based upon work performed in the making of alterations and repairs to a portion of the building on said premises, occupied by one J. O. Long as a sublessee of appellants. Mr. Long died on March 31, 1914, while said alterations and repairs were in progress. Upon his death the workmen were withdrawn and all work stopped. The lien claims here involved cover work which was all performed prior to the death of Mr. Long, at his instance and request. Appellants claim that two of these liens were filed prematurely, because the contracts upon which they are based had not been completed prior to such filing. The court found that each of the said contracts was completed on March 31, 1914. It is asserted that this finding is unsupported by the evidence, for the reason that the entire alterations and repairs contemplated in the arrangement between Mr. Long and said two respective claimants were not finished at that time. It appears from the evidence that Mr. Long purposed somewhat extensive alterations in the interior arrangements of a market, oyster stand, and barber shop which occupied the portion of the building of which he was the lessee; that preparatory to these general alterations he desired to change the location of the barber shop and oyster stand, and employed the plaintiffs to perform the plumbing, electrical wiring, and painting necessary for that purpose; that there was no definite price agreed upon nor plan adopted for all these preliminary changes, but that the work was laid out from day to day as it progressed, and plaintiffs followed the instructions given to them from time to time by Mr. Long, or his superintending contractor, as to the manner of its performance.

[1] Both of the plaintiffs, to whose claims the objection now under consideration is made, testified that all the work which Mr. Long had requested had been performed prior to his death. This evidence is sufficient to sustain the findings of the trial court that the contracts of these plaintiffs had been completed on March 31, 1914. It further appears that the employés of both plaintiffs were working on the premises at the time of the death, and that all the changes contemplated in the preliminary work had not then been made, but were completed at a later date. In view of the nature of the arrangement between Mr. Long and plaintiffs, it cannot be said that there remained any uncompleted contract between them at the date of the former's death. The evidence last referred to is not necessarily inconsistent with full performance of whatever contracts of the character above indicated were made.

[2] The lien of Castagnino Bros. was upon a claim under a contract for painting, which the court found was fully performed on March 31, 1914. The only evidence in the record as to the time of completion of this contract is the testimony of one of the claimants that the work was finished on March 6, 1914. This finding is therefore not supported by the evidence.

[3] The notice of lien by these claimants was filed for record on May 11, 1914, more than 60 days after the completion of their contract, as fixed by their own testimony. Respondent seeks to sustain this lien on the ground that the owners filed no notice of completion under the provisions of section 1187, Code of Civil Procedure, and that, therefore, the claimants had 90 days within which to file their lien. The record is entirely silent as to the filing, or want of filing, of this notice. We have held in the case of Greely v. Noble (No. 2769, this day filed) 181 Pac. 666, that the burden of alleging and proving the failure of the owner to file this notice is upon the plaintiffs. Having failed to so allege and prove, their lien was too late, and should not have been allowed.

[4] It is further claimed that the record does not disclose when the appellants acquired knowledge of the making of the improvements from which the lien claims arose, and that they never obtained any knowledge of the scope and extent of such improvements. No evidence was introduced upon this matter. Its determination rests, therefore, upon the pleadings. The answer of appellants contains the following allegations:

> "Answering paragraph 11 of said first cause of action, these defendants admit that the defendants S. J. Pringle and E. C. Pringle had knowledge that certain alterations and repairs were to be made in said building, but deny that said S. J. Pringle and E. C. Pringle had full knowledge of the alterations and repairs in said complaint set forth, and in this particular said defendants S. J. Pringle and E. C. Pringle allege that said J. O. Long informed them that he desired to make certain alterations and repairs, and that these defendants then requested that a full plan of the repairs be submitted to them for their approval, and that said J. O. Long failed to submit said plan showing said alterations and repairs, and these defendants allege that while they knew that said J. O. Long had commenced work in said building that they did not know just what the scope of the said work was."

The knowledge admitted by the foregoing allegations was sufficient, in our opinion, to require the filing of the notice prescribed by section 1192 of the Code of Civil Procedure as a condition of relieving appellants' property from liability for the cost of the work performed at the request of Mr. Long. Such knowledge need be only sufficient to put a prudent man on inquiry. Gentle v. Britton, 158 Cal. 328, 332, 111 Pac. 9.

[5] Where it is shown that the owners had knowledge of the improvements, the giving of the notice of nonliability under the above section becomes a matter of defense, to be pleaded and proved by defendants. West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 277, 22 Pac. 231; Boscus v. Bohlig, 173 Cal. 687, 691, 162 Pac. 100. The appellants did not meet this burden.

The judgment is reversed, in so far as it decrees a lien in favor of the plaintiffs Henry F. Castagnino and Emanuel Castagnino, as copartners doing business under the firm name and style of Castagnino Bros. In all other respects the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

On Petition for Rehearing.

HAVEN, J. The appellants in this action have filed a petition for rehearing, claiming that the court has misinterpreted the contracts of the lien claimants Perazzi and Decker Electrical Construction Company, as set forth in their respective claims of lien; and, further, that, under the interpretation of the contracts adopted by the court, the lien claimants were not original contractors and, therefore, their liens, not having been filed within thirty days, were invalid. Appellants also request a modification of the former opinion as to the prorating of the costs on appeal. In this latter request the respondents have joined in a separate petition, urging, however, a different basis of division of costs.

It appears from the notices of lien filed by said Perazzi and Decker Electrical Construction Company that each of said claimants alleged a contract consisting of two items; first the performance of certain work in changing the location of the barber shop, for which in each case a definite contract price was agreed upon; and, secondly, for the performance of certain other work, with regard to which no definite price was agreed upon, but each of the claimants was to be paid the reasonable value thereof. The evidence disclosed that all of the work upon the barber shop had been performed prior to the death of Mr. Long. The remaining work under each contract was in the process of performance at the time of Mr. Long's death. It is with reference to that work that the construction of the contracts set forth in the former opinion is applicable. There was a definite contract between each of the lien claimants and Mr. Long, as alleged in their respective claims of lien and as established by their testimony. A part of each contract was for the performance of certain work at a definite price, all of which had been performed before Mr. Long's death. The extent and nature of the balance of the work under the contracts was dependent upon instructions to be given from day to day by Mr. Long or his agent. The possibility of the continuance of such instructions from that source was terminated by the death of Mr. Long. While, therefore, the lien claimants were original contractors, we are satisfied that there were no uncompleted contracts at the time of the death of Mr. Long, in the sense that the finding of the trial court of completion on March 31, 1914, was not supported by the evidence. Being original contractors, the liens which were filed fifty-five days after the date of completion were in time.

[6] In the former opinion it is held that two of the liens involved in these consolidated cases were valid and one was invalid. It is urged by both parties to the appeal that under such circumstances the costs of the appeal should be prorated between them. This contention is well founded and is supported by precedent in similar cases.

It is, therefore, ordered that appellants' petition for a rehearing be, and the same is hereby, denied; that the opinion heretofore filed herein be, and the same is hereby, modified by adding at the close thereof the following: "And it is further ordered that appellants recover such proportion of their costs on appeal as the amount of the lien of Henry F. Castagnino and Emanuel Castagnino, as copartners doing business under the name of Castagnino Bros., bears to the total amount of the three liens involved in the appeal; and that the respondents recover such proportion of their costs on appeal as the total amount of the two liens of H. J. Perazzi and Decker Electrical Construction Company bears to the total amount of the three liens involved in the appeal."

We concur: LANGDON, P. J.; BRITTAIN, J.

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40 Cal. App. 570

McADOO, Director General of Railroads, v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2753.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1919.)

MASTER AND SERVANT 🔑380—WORKMEN'S COMPENSATION—"SERIOUS AND WILLFUL MISCONDUCT."

Machinist helper's omission to use goggles while clipping off burrs formed in the reaming of saddle-bolt holes contrary to rules and specific instructions, merely because he disliked the goggles, was "serious and willful misconduct" within Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831) § 6, subd. 4, reducing compensation to one-half where injury was caused by "serious and willful misconduct" of injured employé, except where injury resulted in death or permanent partial disability equaling 70% of total, or where employer violated law or safety order of commission.

Petition for certiorari by William G. McAdoo, Director-General of Railroads against Industrial Accident Commission and Robert H. Hogan, to review an order of Industrial Accident Commission awarding to Robert H. Hogan compensation for injuries. Award annulled and case remanded to Industrial Accident Commission for further proceedings with instructions.

Dana T. Smith and E. E. Bennett, both of Los Angeles, for petitioner.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

CONREY, P. J. Certiorari. Pursuant to stipulation, the above-named petitioner has been substituted in place of the original petitioner, Los Angeles & Salt Lake Railroad Company. The writ was issued to review an order of the Industrial Accident Commission, awarding to Robert H. Hogan compensation for injuries received by him while working as an employé of said railroad company. It is conceded that if the injury received by Hogan was caused by his serious and willful misconduct, this court may set aside the award and remand the case to the commission for the reduction of the award to one-half of the amount allowed by the commission.

Section 6 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831), in subdivision 4 thereof, reads as follows:

> "Where the injury is caused by the serious and willful misconduct of the injured employé, the compensation otherwise recoverable by him shall be reduced one-half: Provided, however, that such misconduct of the employé shall not be a defense to the claim of the dependents of said employé, if the injury results in death, or to the claim of the employé, if the injury results in a permanent partial disability equaling or in excess of seventy per cent. of total: And provided, further, that such misconduct of said employé shall not be a defense where his injury is caused by the failure of the employer to comply with any provision of law, or any safety order of the commission, with reference to the safety of places of employment."

The award in this case is made upon a permanent partial disability equaling 30¼ per cent. of total disability of the right eye. The accident by which the applicant, R. H. Hogan, was injured, occurred on February 12, 1918, while he was employed as a machinist's helper. He was reaming saddle-bolt holes in a locomotive with an air motor and reamer. The reamer became stuck, and caused a burr to form in the top of the hole. He removed the reamer and chipped the burr off, and a piece of steel glanced off and struck him in the eye. He was not at that time wearing any goggles or other protection to the eyes. He had been employed as a machinist's helper at that place for about four months, and had several years' experience as a workman in other machine shops. At several places in the shop was posted a circular headed "Safety Rules for Shopmen." One of these was:

> "Do not do any chipping or grinding without wearing safety goggles. If you are not provided with goggles, go to foreman."

The applicant admitted that he had seen the notices posted, but that he never read them. Nevertheless, it is conceded that he was "familiar with the purport" of this rule. He knew that the company provided goggles and that they were to be found in the tool room. The following questions and answers are part of the testimony of the applicant before the commission:

> "Q. Have you ever used any glasses at all? A. I used goggles when I was doing a regular job of chipping. Q. You were doing a job of chipping at that time? A. Regular chipping job. This is just an incident of where you pick up a hammer and chisel and knock off a chip, and go right ahead with your regular line of work. Q. You were using a reamer driven by air under pressure? A. Yes. Q. And the reamer stuck in the hole? A. Yes. Q. That raised around the edge of the hole some chips of steel? A. Rough place. Just caused a rough place at the top of the hole. That prevented the reamer from running smoothly. In order to get a smooth surface to start from, I knocked those chips off and for that purpose I picked up a hammer and chisel. It was while using a hammer and chisel that the piece of steel flew into my eye. * * * Q. Had you been given any orders at all as to wearing the glasses when you were engaged in such work as that? A. No, sir."

On cross-examination the applicant admitted that he had on another occasion some cast iron burrs in his eyes and had the clerk of the general foreman remove them. He said that he did not remember that, about an hour before the time when he received his injury for which he seeks to obtain compensation, he got another piece of metal in his eye, and also had it removed by the clerk; also he did not remember that the first of these two incidents occurred on the day preceding the accident in question here, and that the clerk and the general foreman both told him to get goggles and wear them when he was doing work where particles of metal were liable to fly. He testified that he knew that goggles were kept in the tool room to be used by workmen, "if they thought they needed them." After the foreman, Keith, and his clerk, Pauff, had testified fully to both of the incidents referred to in the above-mentioned cross-examination, Hogan gave further testimony. In this later testimony the following occurs:

> "Q. You have heard the testimony of Mr. Keith and Mr. Pauff as to your having been in the office the day previous with some foreign body in your eye, have you? A. Yes. Q. Is that testimony correct or incorrect? A. I went in there before this, I don't remember whether that was the exact date or not. Q. Do you know how you got the foreign body in your eyes that was in there at that time? A. Drilling holes in cast iron, and the dust in the air from the exhaust of the motor. Q. You told them that was the way you got it in, did you? A. Yes. Q. And you supposed that was the way? A. I told them I was drilling holes in the saddle — Q. The morning you received the injury that caused the loss of your eye had you made a previous visit to Mr. Pauff? A. I had been there before with this dust in my eyes, but I don't remember whether that was the morning before or not. Q. How many times were you there? A. There just on this occasion with this cast

iron, I remember twice, and he gave me some water, some eye wash to wash it out. Q. Do you recall whether you were there that morning or not? A. I don't remember whether that was the time that I was or not."

It thus appears that there is no definite contradiction of the testimony given by the foreman and clerk on this matter, but rather that silence which gives consent. The job on which Hogan was employed involved the reaming of about 50 of those saddle bolt holes, and included more than one day's work. That the forming of burrs was a common incident of that work is not denied. It was so much expected that Hogan kept by him a hammer and chisel with which to remove the burrs. He voluntarily and intentionally omitted to obtain and use goggles, contrary to rules of which he had knowledge, and contrary to specific instructions, all of which were laid down for his protection. The only reasonable explanation is that he disliked the goggles because they were, as he said, "in his way," and so he preferred to take the chance of personal injury. This was willful misconduct and it was serious. The case was in essential elements very similar to that disclosed in Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, where an electric lineman disobeyed a known rule and positive instructions requiring him to wear rubber gloves while handling high-power wires, and in consequence was killed while doing that kind of work without gloves. As the court there said:

> "It cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct."

The case at bar sharply distinguishes itself from that of Diestelhorst v. Ind. Acc. Com'n, 32 Cal. App. 771, 164 Pac. 44, where the misconduct of the applicant occurred in a moment of thoughtlessness and not with deliberate intention. The commission's finding, that the applicant's injury was not proximately caused by his serious and willful misconduct, is not sustained by the evidence.

Our conclusion is that upon the record produced herein the award to the applicant should have been for only one-half of the amount allowed by the commission, and as to the excess above that amount the commission acted in excess of its powers. The award is annulled, and the case is remanded to the Industrial Accident Commission for further proceedings in accordance with this decision.

We concur: SHAW, J.; JAMES, J.

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40 Cal. App. 550

BRODERICK v. BRODERICK.
(Civ. 1929, Sac. 2750.)

(District Court of Appeal, Third District, California. April 3, 1919. On Rehearing in Supreme Court in Bank, June 2, 1919.)

1. DIVORCE 🔑184(10)—APPEAL—REVIEW OF FINDINGS.

Even though it be conceded that the trial court should not find that a wife was guilty of adultery except upon evidence convincing to a moral certainty and beyond a reasonable doubt, it is the duty of the appellate court to give the findings the same weight as it would to the verdict of a jury in a criminal case.

2. DIVORCE 🔑127(4)—CORROBORATION.

Civ. Code, § 130, requiring corroboration of the testimony of the parties to a divorce suit, calls for a lesser degree and quantity of corroboration where there is an entire absence of evidence as to collusion.

3. DIVORCE 🔑51—CRUELTY—REVIVAL OF OFFENSE CONDONED.

In view of Civ. Code, §§ 117, 121, extreme cruelty of a wife towards the husband consisting of the filing of a petition for divorce containing a false charge of adultery cannot be regarded as condoned by the husband by his act in thereafter living with the wife, where such act was induced by a promise of the wife to conduct herself properly, which promise she broke by committing fresh acts of misconduct.

4. DIVORCE 🔑116—EXTREME CRUELTY—EVIDENCE.

Where the wife, in her petition for divorce, alleged that defendant, her husband, was guilty of extreme cruelty in falsely charging her with infidelity and immorality, testimony offered by defendant tending to show specific acts of intimacy between plaintiff and men other than her husband was admissible.

5. WITNESSES 🔑275(3)—CROSS-EXAMINATION OF PLAINTIFF—PROPERTY.

Where in an action for divorce plaintiff testified on direct examination that defendant, her husband, had not furnished her with the necessities of life, and had for a long course of years ignored her repeated requests for money, it was proper on her cross-examination to submit to her a letter written by herself to defendant requesting money to pay the expense of an abortion on herself, in which letter she spoke as one who was accustomed to receive what money she asked for.

6. DIVORCE 🔑115—GENERAL REPUTATION—PLACE OF RESIDENCE.

In divorce suit in which defendant's cross-complaint alleged plaintiff's adultery, though plaintiff had not resided in K. county for more than three months prior to the commencement of her action for divorce, evidence as to her general reputation in that county, in which she had lived during most of her life, was admissible; the question of remoteness being for the determination of the trial court.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Actions by Blanche Barton Broderick against L. A. Broderick. Judgment for defendant, and plaintiff appeals. Affirmed.

H. A. Blanchard, of San Jose, and H. Scott Jacobs, of Hanford, for appellant.

John G. Covert and John F. Pryor, both of Hanford, for respondent.

BUCK, Presiding Judge pro tem. In September, 1915, appellant brought suit for separate maintenance of herself and minor daughter, alleging as the grounds of action failure to provide and extreme cruelty. In November of the same year she brought suit for divorce and custody of the minor children and all the community property upon the same ground. On motion of respondent these two causes of action were transferred from the county of Santa Clara to the county of Kings; and he answered in each action denying the allegations of cruelty and failure to provide. He also filed cross-complaints in each action, alleging extreme cruelty and adultery and praying for a judgment of divorce. These actions were by stipulation tried together on March 14, 1916. Findings were made that it was not true that respondent was guilty of extreme cruelty or failure to provide; but the court did find that appellant was guilty of extreme cruelty and of adultery. Pursuant to these findings, respondent was granted an interlocutory decree of divorce awarding him the custody of the minor son Lloyd and all of the community property except $2,000. Appellant was awarded the custody of the minor daughter and the sum of $2,000, to be paid in monthly sums of $50 after entry of judgment until the entire award was paid. In the maintenance action the court denied appellant any relief. A motion for a new trial was made by appellant, which was denied, and appellant appealed from the order denying her motion for a new trial, and also from the judgment and order entered in each of the actions. By stipulation the appeals in said actions will be heard and determined together upon the same transcript and briefs.

[1] It is stated in appellant's brief that "the paramount issue on appeal is as to the sufficiency of the evidence to support the findings as to adultery." The evidence is fully set forth in the bill of exceptions, and has been carefully read and considered by the court in the light of counsel's able and earnest brief. No useful or proper purpose can be served by reproducing this evidence in this record. If the trial court believed, as it had a right to, the testimony of the witnesses Meyers, Mr. and Mrs. Martin, Mrs. Davis, Hiram Barton, and the respondent, and distrusted, as it had a right to do, the testimony of the appellant and her co-respondent, Gatlin, there was an ample basis of sufficient proof to establish the court's findings, not only of adultery, but also of extreme cruelty. While learned counsel vigorously attacks the veracity and the character of some of respondent's witnesses, even to the extent of going outside of the record, he does not gainsay the potency of the damaging facts to which they testify. And even though it be conceded that the trial court in an action charging adultery should base its findings of guilt only upon evidence convincing to a moral certainty and beyond a reasonable doubt, it would still be the duty of this court to give at least the same weight to the findings of the trial court as it does to the verdict of a jury in a criminal case. As stated by Justice Henshaw in the case of People v. Durrant, 116 Cal. 200, 48 Pac. 79:

> "Upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited or that their testimony is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence."

Also our Supreme Court, in the case of Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155, which like the case at bar, was a suit for divorce:

> "We are bound by the well-established rule that the decision of the trial court upon issues of fact is conclusive upon us in so far as there is any substantial evidence tending fairly to support such decision, even though we may think that a different conclusion should have been arrived at. * * * The trial court was the exclusive judge of all questions of credibility of witnesses and weight of evidence, and must be assumed to have considered all the evidence given in the light of such rules as are laid down by the law for the guidance of the court and jury in the determination of questions of fact. It should further be borne in mind that the question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal."

And to a much greater extent is it true that "the acts and conduct" constituting adultery are "of such a nature" that an intelligent, observing, and experienced trial judge making full use of his opportunities to observe the conduct, temperament, manner, and appearance of the witnesses before him is in the nature of things more capable of reaching a just conclusion from the evidence than a court of review even with the assistance of able and zealous counsel. 9 R. C. L. § 106; Ellett v. Ellett [157 N. C. 161, 72 S. E. 861], 39 L. R. A. (N. S.) 1135 [Ann. Cas. 1913B, 1215]; Thayer v. Thayer, 101 Mass. 111 [100 Am. Dec. 110]; Cooke v. Cooke, 152

Ill. 286 [38 N. E. 1027]. And therefore, as stated by Presiding Justice Angellotti in the Robinson Case, above cited:

> "We feel that no useful purpose would be subserved by discussion of the evidence given upon matters embraced in the findings that are attacked by learned counsel in his brief as being without support."

[2] The only contention counsel in his brief makes in regard to the finding of cruelty is that—

> "The charges of cruelty are not supported by any testimony whatever other than that of the husband and wife, which is insufficient. Civ. Code, § 130. Appellant makes proper explanations as to every charge of cruelty."

The acts constituting cruelty as charged in respondent's cross-complaint and found by the court are that on or about July 2, 1913, the appellant filed her complaint in the county of Glenn, falsely charging that respondent committed adultery with a woman in Los Angeles on April 23, 1913, and praying for a divorce and a division of the property; that she reiterated these false charges in letters to members of her family which were communicated to respondent; that in the spring of 1913 she permitted another man, over the objection of her husband, to occupy one of her rooms as a night lodger; that in July, 1914, she forbade respondent to call her "wife." And as additional acts of cruelty, causing him great mental anguish, respondent charges appellant with some of the same improper conduct with co-respondent, Gatlin, that he had alleged in his cause of action charging adultery.

As regards the suit commenced by appellant in Glenn county falsely charging respondent with adultery, respondent's testimony to the commencement and dismissal of this action and the charges therein is corroborated by the records of the county of Glenn showing the complaint with signature of respondent's attorney with the seal and jurat of the notary public to appellant's verification of the complaint; also a telegram of appellant's attorney authorizing the dismissal of her action. No objection to this evidence was offered except that it "was barred by sections 124, 125, 126 of the Civil Code." There is also corroborating evidence that at the time of this action respondent was a resident of Kings county and went to Los Angeles, not of his own motion or purpose, but at the solicitation of his wife to come in pursuance of a telegram received by him from a stranger in Los Angeles by the name of Davis. This telegram was received in evidence without objection and corroborates the purpose and good faith of respondent's visit to Los Angeles. In the case at bar the record conclusively absolves the parties of any desire or purpose to obtain a divorce by collusion. The record conclusively shows that each party is attempting to obtain for himself or herself and prevent the other from obtaining a decree upon the grounds of cruelty or adultery. A bitter conflict as to property interests and the custody of the children, as well as the evident feelings of the parties leaves the case absolutely devoid of any suspicion of collusion. Consequently, in this case at least, the reason of the rule requiring corroboration is much modified, and a lesser degree and quantity of corroboration will be exacted. Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536; MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45.

[3] Counsel contends that the complaint is stale as regards the alleged false charges of adultery in the Glenn county suit. A similar contention was made in the recent case of Neeley v. Neeley (Sup.) 176 Pac. 163, but in that case our Supreme Court held as follows, in language which is quite applicable to the case at bar:

> "We should hesitate to say that an unexplained delay of 3½ years must, as a matter of law, be deemed unreasonable. But that is not the question here. The plaintiff's failure to proceed earlier is fully accounted for by the dismissal of the prior action, and the conduct of the parties thereafter. Civ. Code, § 125. The plaintiff condoned the offenses of 1911, but under the agreement, as well as by the terms of the law itself (Civ. Code, § 117), the condonation carried with it the condition subsequent that the plaintiff should be treated with conjugal kindness. This condition was broken by the defendant in 1915, and the original cause of action thereby revived. Civ. Code, § 121."

In the case at bar it is true that respondent lived with appellant as his wife up to August 5, 1915. But under the law this conditional condonation was revoked by the subsequent misconduct of the appellant with Gatlin, which caused, and was calculated to cause, respondent great mental suffering and of which he did not have knowledge until September 21, 1915.

[4] The appellant assigns as prejudicial error the overruling of her objection to the testimony pertaining to her relations with one John Hanford. This testimony was properly admitted because it was in direct response to and explanatory of issues raised by appellant herself in her complaint and in her own testimony. In her complaint filed in this action plaintiff charges that defendant "willfully inflicted upon her great and grievous mental suffering and anguish, * * *" and that some of said acts of cruelty are "* * * that on numerous occasions within the past ten years, the exact dates of which plaintiff is now unable to specify, the said defendant, without any cause or reason or provocation and wrongfully and falsely accused the plaintiff of infidelity and immorality." Presumably to substantiate this charge in her direct testimony she states that

"about the 27th of May, about ten years ago, he [respondent] accused me of adultery with John Hanford. * * * All of these charges that my husband made against me were not true. On June 20, 1915, at our home my husband admitted to me that they were not true. He said to me, 'I know you to be the purest woman that ever lived.'" In view of the foregoing it is evident that it was not error for the court to admit in evidence appellant's letter of August 31, 1904, to John Hanford, which contained language that indicated that her relations with Hanford were of such a character as to leave her no cause for rightful complaint as to respondent's charges against her of infidelity. Likewise the testimony of her uncle, Hiram Barton, and J. E. Gruwell that on different occasions in 1904 they had seen her lying on the same bed with John Hanford was relevant and pertinent testimony tending to contradict the allegations of her complaint and the prima facie inferences to be drawn from her testimony that she had rightly suffered great mental and grievous anguish when respondent charged her, as she claims he did charge her, with adultery with John Hanford.

[5] Learned counsel for appellant vigorously contends that the trial court erred in overruling appellant's objection to the introduction in evidence as a part of appellant's cross-examination of a letter written by her to the respondent in March, 1915, which contained, among other things, a request from appellant that he send her some money for hospital treatment in connection with a proposed abortion as well as money for other purposes.

The trial court evidently allowed this letter in evidence on cross-examination just as it allowed the above matters in regard to John Hanford, not for the purpose solely of proving respondent's case, but as evidence tending to explain and qualify general testimony given by appellant herself in direct examination in support of charges made by her in her own complaint against respondent. And in doing this we do not believe that the trial court erred or in any way abused the broad discretion with which the trial court is intrusted upon the cross-examination of a witness who is a party to the action. In her complaint, in narrating one of the particulars in which defendant "had wrongfully and willfully inflicted upon her great and grievous mental suffering and anguish," she charges:

> "Defendant has willfully failed, neglected, and refused to provide plaintiff with sufficient food, shelter, or medical attention or sufficient means with which to furnish the same, though able so to do, and had during the greater portion of said time compelled the plaintiff to live upon the charity of her friends and relatives, and thereby causing, and still causes, plaintiff grievous humility and grievous mental suffering."

For the purpose of substantiating these material charges appellant in her direct testimony testified as follows:

> "Since 1912 the defendant had not furnished anything for the children and I to live on. I have during that time supported myself and the children by my profession as an osteopathic physician. I have been practicing that since August 1912. He has not paid our grocery bills, rent bills, and has not hardly paid any of the bills in general. I asked him repeatedly for money, and he has refused it. * * * These acts of my husband which I have spoken of have humiliated me."

Upon cross-examination she testified as follows:

> "In 1915, while in Los Angeles, I wrote home several times and asked for money. Q. Now you say that you wrote to your husband and requested that he send you money when you were in Los Angeles in 1915; is that a fact? A. Yes, sir; I wrote him several times and asked for money. Q. In one of these letters didn't you write to him for money for the specific purpose of procuring an abortion? Mr. Biaggi: I object to that as not proper cross-examination. A. No, sir; I did not. * * * I wrote the letter which you are showing me, inclosed it in an envelope, placed a postage stamp thereon, addressed it to my husband, and deposited it in a mail box in the city of Los Angeles."

The letter was then received in evidence, subject to the same objection, ruling, and exception, and, among other matters, stated:

> "Dear Ardy: Well, I am getting over the effects of my fall, but I can never get over the effects of my visit to the ranch. I am surely pregnant, * * * so I am going to be operated on next week, and you will have to send me some money. * * * I am expecting a check from you to-morrow for those things at Bakersfield. * * * Now you must send me the money at once; I am sick about it. * * * I will have to have money enough to buy some gowns. I only have two and they are both rags, and to pay for operation and hospital fees. * * *"

Whatever else may have been the effect of this letter, in substance and tenor it surely tended to show the actual relations between the parties as regards money matters in 1915. It tended to show that at that time, at least, appellant was asking for money, not as one who was not accustomed to receive it, but was asking for it with the calm and firm assurance of the ordinary housewife, and to that extent the letter serves to explain, modify, and qualify the damaging and general testimony in direct examination that—

> "Since 1912 the defendant has not furnished anything for the children and I to live on. He has not hardly paid any of the bills in general. I asked him repeatedly for money, and he has refused."

Also, in connection with this letter, respondent introduced in evidence a large number of checks which he had sent to appellant in 1915 and at other times.

Learned counsel for appellant have cited and quoted liberally from numerous well-established authorities. But the strongest of these go only to the extent of holding that testimony on cross-examination, however discrediting, is inadmissible only when it is entirely foreign to the case and in no way germane to the matters brought out on direct examination and is offered for the sole purpose and with the sole effect of discrediting the witness or the party to the action. See Sharon v. Sharon, 79 Cal. 633, at page 674, 22 Pac. 26, 131; Estate of James, 124 Cal. 653, 57 Pac. 578, 1008, and cases cited; Short v. Frink, 151 Cal. 83, 90 Pac. 200; People v. Schmitz, 7 Cal. App. 330, 357, 360, 364, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717. But rules of evidence are primarily rules of exclusion. And in this state from the beginning (Jackson v. Feather River Water Co., 14 Cal. 19) the rule has never been so applied even in criminal cases as to relieve a party when under cross-examination from his sworn obligation to tell the whole truth when it might in any degree tend to explain, qualify, or shed light on any relevant testimony given by him on his own direct examination. As stated by our Supreme Court in the case of People v. Gallagher, 100 Cal. 466, at page 475, 35 Pac. 80, 83:

> "Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain, or qualify, or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, or to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination."

The rule applied in the case at bar is illustrated in the case of Davis v. Coblens, 174 U. S. 719, at page 726 (19 Sup. Ct. 832, 43 L. Ed. 1147):

> "Walter was called as a witness by plaintiffs; testified that such reconveyance was the only one he had made of lot 10—the lot in controversy. Thereupon defendant's counsel cross-examined him at great length against the objection of plaintiffs regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one, and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination in chief. In Rea v. Missouri, 17 Wall. 532 [21 L. Ed. 707], it was said: 'Where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error.' "

And the following cases from the federal jurisdiction further illustrate the extent to which the federal courts, in response to the demands of a progressive jurisprudence, are applying a rule conducive to the practical and effective administration of justice: Commercial State Bank v. Moore, 227 Fed. 19, 141 C. C. A. 573; Le More v. United States, 253 Fed. 887, at page 896; Diggs v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502. See, also, State v. Carter, 21 N. M. 166, 153 Pac. 271, at page 272; People v. Soeder, 150 Cal. 12, 87 Pac. 1016; Graham v. Larimer, 83 Cal. 173, at page 180, 23 Pac. 286; People v. Burke, 18 Cal. App. 72, at page 78, 122 Pac. 435; People v. Davenport, 13 Cal. App. 632, 110 Pac. 318; People v. Rozelle, 78 Cal. 84, at page 91, 20 Pac. 36.

[6] Counsel also contends:

> "That the court erred in permitting Mrs. Gruwell and Mrs. Rice to testify as to the general reputation of appellant in Kings county."

It is true, as stated by counsel, that appellant "at the time of the trial and for more than three months prior to the commencement of the divorce action had been a resident of Santa Clara county." But the evidence also shows that prior to that and for many years she and her family had, for the greater part of her life, lived in the county of Kings. And, as stated in People v. Cord, 157 Cal. 562, 108 Pac. 511:

> "It is a question for the court to determine whether or not general reputation in a place of former residence is too remote in point of time to be allowed in evidence."

However, when it seemed to appear upon cross-examination that the witnesses had never discussed her reputation "except in the family," it might have been proper for the court, upon motion being made, to have stricken out the testimony of the witness. But no such motion was made.

The order denying the motion for a new trial and the judgments in each action are affirmed.

We concur: BURNETT, J.; HART, J.

On Rehearing in Supreme Court.

PER CURIAM. We do not regard as material to the decision the portion of the opinion reading as follows:

> "Consequently, in this case at least, the reason of the rule requiring corroboration is much modified and a lesser degree and quantity of corroboration will be exacted. Blanchard v. Blanchard, 10 Cal. App. 203; McDonald v. McDonald, 155 Cal. 665."

And we express no opinion thereon.

The application for a hearing in this court after decision in the District Court of Appeal of the Third Appellate District is denied.

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40 Cal. App. 653

DUERR v. SLOAN et al. (Civ. 2743.)

(District Court of Appeal, First District, Division 2, California. April 15, 1919.)

1. Account Stated 🔑3, 7—Essentials.

An account stated must be based on prior dealings and a pre-existing indebtedness, and it constitutes a new contract, either express or implied, into which all prior negotiations merge.

2. Account Stated 🔑5 — Assent of Parties.

The only difference between an account stated which is expressly created by approval of the debtor indorsed on the bill and one where the contract is implied by reason of the silence of the party receiving the account is that in one case the person charged says the account is correct, and in the other fails to say that it is incorrect.

3. Account Stated 🔑6(2)—Implied Assent —Failure to Object.

Where there had been prior dealings between certain architects and the owner through her agents, resulting in the completion and acceptance of the building, when a bill was sent by the architects to such owner in care of S., her agent, an account stated was impliedly created in law by the failure of such owner or her agent to object.

4. Appeal and Error 🔑1011(1)—Findings —Conclusiveness.

Finding of the lower court upon conflicting evidence is conclusive on appeal.

5. Account Stated 🔑6(1)—Implied Assent.

The account must have been brought home to the party to be charged in order for such party to be bound by silence.

6. Principal and Agent 🔑171(8)—Ratification—Acceptance of Benefits.

Where the owner of a lot accepted the fruits of the dealings between certain architects and her brother and sons which resulted in the completion of a building thereon, she could be held liable to the architects, upon the principle of ratification.

7. Principal and Agent 🔑145(4)—Undisclosed Principal.

Where one deals with another believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal.

8. Principal and Agent 🔑177(3)—Rendition of Account—Notice to Agent.

The fact that the agent testified he never communicated with his principal regarding architects' bill rendered to him addressed to the owner cannot change the rule of law imputing his knowledge to the principal nor the rule that an account stated is implied from failure to make timely objection to an account based on antecedent dealings.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. C. Duerr against William R. Sloan and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Sterling Carr, of San Francisco, for appellants.

Keogh & Olds, of San Francisco, for respondent.

BRITTAIN, J. The defendants substituted as executors of her will on the death of Sarah A. Bryan, appeal from a judgment on an account stated, for architects' services, assigned by O'Brien & Werner to the plaintiff.

In 1911 Mrs. Bryan owned an unimproved lot in San Francisco upon which was erected an apartment house of six stories, known as St. Anthony Building. It cost $90,000 and was accepted September 23, 1913. On September 29, 1913, a statement was sent to the office of W. A. Sloan reading as follows:

September 29, 1913.

Mrs. Sarah A. Bryan, C/O W. A. Sloan, Mills Building, City.

First set of plans and specifications for seven-story steel frame fireproof building to be erected on Geary and Hyde streets..	$2,500 00
Architectural services rendered for second set of plans including details, specifications, and superintending based on cost of $90,000.00 @ 5%............................	4,500 00
	$7,000 00
By cash..	3,000 00
Balance due....................................	$4,000 00

The first set of plans, for which, on the statement, there was a charge of $2,500, was prepared by the architects, together with specifications for a class A building upon the order of Jesse Bryan and Sloan. Bids for the construction of the building were being received when Jesse Bryan died. J. S. Bryan, a brother of Jesse Bryan, then instructed the architects to call the matter off and that they would take it up later on. Subsequently Sloan and J. S. Bryan did take the matter up with the architects and ordered the preparation of plans for the cheaper class C building which was erected. The first set of plans was used as a basis of the second set, at least as to the floor plans. The two Bryans were the sons of the owner, and Sloan was her brother.

Before the contract for the building was executed Sloan took to Mrs. Bryan a note and mortgage, which she executed without reading, upon which Sloan advanced the money for the payment of the building bills. Mrs. Bryan left everything about the building to Sloan. John Bryan mentioned the matter of the mortgage to her, and she told him to go ahead and do everything that was necessary. After the mortgage was signed, Sloan took to Mrs. Bryan the building contract, which she also signed without reading. Sloan watched the progress of the building and paid all the bills. Neither O'Brien nor Werner ever met Mrs. Bryan, but on one occasion she telephoned to one of them, stating that she learned the name "St. Anthony" was on a foot mat at the door, and, as Jesse and she had a sentiment about this, she wanted the name taken up from there and put over the door. Later Mr. O'Brien telephoned to Mrs. Bryan with reference to something about the building, and she told him she knew nothing about it and had nothing to do with it. She testified she left the matter to Mr. Sloan.

[1-5] On behalf of the appellant many cases are cited to the proposition that in a suit upon an account stated the plaintiff must recover upon the account stated or not at all, and that in this suit recovery cannot be had upon the original items of account. There can be no question of this rule. If an account was stated it constituted a new contract, either express or implied, into which all prior negotiations merged. Gardner v. Watson, 170 Cal. 570, 150 Pac. 994. Numerous citations are made to support other equally well-established rules. An account stated must be based on prior dealings. In this case, when the account was sent to Mrs. Bryan in care of Sloan, the prior dealings between the parties had resulted in the completion and acceptance of the building. There must have been a pre-existing indebtedness. Upon this proposition counsel for the appellants quotes from 1 Corpus Juris, 681. Neither the text nor the cases cited would support a contention that, where a bill for services is rendered and the benefit of the services has been received, the party charged may not expressly agree to the value of the services and create an account stated by an approval indorsed on the bill. The only difference between an account stated thus expressly created and one where the contract is implied by reason of the silence of the party receiving the account is that in one case the person charged says the account is correct, and in the other fails to say it is incorrect. In this case the work was done, and the bill was rendered to Mrs. Bryan in the care of Mr. Sloan as her agent. If neither Mrs. Bryan nor Mr. Sloan, as her agent, objected to the account, the implication of an account stated thereupon arose as a matter of law. Upon the question of whether there was an objection or not, the evidence was conflicting. The lower court determined this question in favor of the respondent. This court is bound by that determination. The account must have been brought home to the party to be charged in order to bind her by her silence. At the time the account was rendered and during the construction of the building Mr. Sloan was in charge of the entire matter, with the consent of Mrs. Bryan. It is contended that his agency was not shown. This matter was also determined by the lower court adversely to the appellant. If there were conflict of evidence on the subject, the finding of the court would be conclusive here, but in view of the statements of Mrs. Bryan on her deposition, statements made by Mr. Sloan and John S. Bryan to the effect that she had never conferred authority upon them amounted merely to their conclusions, and there was no real conflict of evidence. The finding is conclusive.

[6, 7] Apart from the determination of agency existent at the time the account was rendered, it is contended that at the time of the employment of the architects by Jesse Bryan and Sloan to prepare the first set of plans the plaintiff failed to show either an actual agency or an omission or action on the part of Mrs. Bryan which could have generated a belief in the minds of the architects at that time on the subject of agency; hence that no ostensible agency was shown. Many cases are cited upon these elementary principles of agency. In regard to these authorities, as in fact all other authorities and statements of law made on behalf of the appellant, on the oral argument the attorneys for the respondent conceded that the law was as stated and the authorities supported the statements of law. The learned counsel for the appellants has overlooked the rules of law under which a principal may be bound, even though at the time a third party deals with another there was no agency. The person sought to be charged by accepting the fruits of the dealings may be held as principal upon the theory of ratification. Further, the rule is too well established to require citation of authority that, where one deals with another believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal. In this case Jesse Bryan discussed the matter of the building project with his mother. He attended to her affairs. He and Sloan ordered the first set of plans, which was used as the basis of the second set of plans ordered by Sloan and John S. Bryan, on which the building was erected. Sloan had entire charge of it. Mrs. Bryan had the benefit of the work. As is so strongly urged on behalf of the appellant, the suit here is upon the implied contract of the account stated. The sole question was

whether, in view of the dealings prior to sending the account, Mrs. Bryan should be held by the implied contract of the account stated. There was evidence to support the finding of the lower court upon which the question was resolved against the appellants.

[8] On behalf of the appellants it is argued that reliance upon the account stated amounts to a fraud upon Mrs. Bryan. This claim of fraud is not pleaded. It is based upon the definition of actual fraud as a suggestion of a fact which is not true by one who does not believe it to be true. It is argued that, since the architects rendered a bill, which counsel for the appellants says was not warranted, it was a suggestion of an untrue fact. To follow the further argument of counsel for the appellants upon this proposition, it would be necessary to assume that, when the architects rendered their bill addressed to Mrs. Bryan in the care of Mr. Sloan, who had paid all other bills, they anticipated that he would fail to inform his principal of the receipt of the bill. The knowledge of the agent is imputed to the principal. The fact that Mr. Sloan testified he had never communicated with Mrs. Bryan in regard to the account cannot change the rule of law imputing his knowledge to Mrs. Bryan. Neither can it affect the rule that an account stated is implied from failure to make timely objection to an account based upon antecedent dealings.

It is claimed the legal principle of ratification cannot be invoked in aid of the respondent, and appellants rely upon section 2334 of the Civil Code, to the effect that the principal is bound by the acts of his agent under a merely ostensible authority to those persons only who have in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof. In this suit the plaintiff sought to recover only by reason of the rendition of the account and its retention without objections. At the time of the rendition of the account there was no question of ostensible agency. Sloan was the agent of Mrs. Bryan. There were antecedent dealings of which she accepted the benefits. Sloan, her agent, knew all about them. The evidence fully sustains the findings. It is contended that the motion for nonsuit should have been granted. The grounds of the motion were substantially those which have already been discussed on which the appellants rely to show the evidence did not sustain the findings. The lower court held there was sufficient evidence at the time of the motion to require the defendants to proceed. The motion for nonsuit was properly denied. It was coupled with an order denying motion to strike out substantiallly all the evidence introduced on behalf of the plaintiff. The contentions in regard to striking out the evidence and on objections to its admission were the same grounds as those in support of the argument that the findings were not sustained. The motion was general in terms, as were the objections to the evidence. There was no error in denying the motion to strike out and none in the admission of evidence.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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40 Cal. App. 661

SHERMASTER v. CALIFORNIA HOME BLDG. LOAN CO. (Civ. 2671.)

(District Court of Appeal, First District, Division 1, California. April 15, 1919. On Rehearing, May 15, 1919; Rehearing Denied by Supreme Court June 12, 1919.)

1. Dedication ⚷31—Filing of Private Maps—Acceptance by City.

The filing of private maps, showing existence of street, in office of recorder did not constitute dedication of the land shown as street, in absence of acceptance thereof by city, or acts by any one amounting to dedication or user.

2. Vendor and Purchaser ⚷34—Representations—Construction.

Vendor's representation that land "fronted on a public street" had reference to means of physical access to the property, and not merely to an intangible quality in roadway, giving it the status of a public street.

3. Vendor and Purchaser ⚷34—False Representations—Frontage of Property.

Vendor's false statement that the property was bounded by a public street on the front was a most material representation.

4. Vendor and Purchaser ⚷37(1)—Misrepresentations—Investigation by Purchaser—Ascertainment of Falsity of Representations.

Generally, where purchaser avails himself of an opportunity to test the truth of vendor's representations, and discovers, prior to the consummation of the contract, that such representations were false, or by the exercise of reasonable diligence could have so ascertained, he cannot complain that he was deceived by the representations.

5. Vendor and Purchaser ⚷37(2)—Misrepresentations—Inspection of Property—Estoppel.

Where vendor knowingly misrepresented to purchaser, who was a laborer, without experience in the purchase of property, that the property fronted upon public street, purchaser by visiting property, and finding streets obliterated by use of the land for vegetable gardens, and by living on the land for several months before purchasing another piece thereof, was not estopped from asserting that he had been deceived by vendor's misrepresentations, as to property abutting upon street.

6. Contracts 🔑94(5) — Representations — Investigations of Truth of Statements.

One party to a contract is under no obligation to investigate and verify the statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.

7. Vendor and Purchaser 🔑127—Rescission—Amount of Purchaser's Recovery.

Purchaser, upon rescission of contract, is entitled to return of the purchase price paid, with interest, and value of improvements placed upon land by purchaser, less any sum due vendor for use and occupation of land by purchaser.

8. Evidence 🔑113(10)—Value of Improvements.

Testimony, as to cost of improvements placed upon land, is some evidence of their value.

9. Vendor and Purchaser 🔑121—Rescission—Sufficiency of Tender—Waiver.

Under Code Civ. Proc. § 2076, requiring objections to tender to be specified, and Civ. Code, § 1501, providing that objections to mode of offer of performance are waived, if not stated at time of offer, where purchaser's attorney wrote vendor offering to rescind contract and tendering quitclaim deed upon payment to purchaser of purchase price, with interest, cost of improvements, and damages, and vendor refused to accept offer to rescind and merely took exception to tender of quitclaim deed, without making specific objection, there was a sufficient offer and a direct refusal of rescission, though purchaser demanded more than he was entitled to recover.

10. Vendor and Purchaser 🔑114—Rescission—Waiver—Possession.

Purchaser's remaining in possession of premises after offer to rescind was not a waiver of his right to rescind, where such possession was necessary to protect the improvements upon property from being carried away by vandals.

On Rehearing.

11. Appeal and Error 🔑1011(1)—Review—Findings.

A finding on an issue presented by a conflict of evidence is conclusive on appeal.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by C. Shermaster against the California Home Building Loan Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. S. Hutchinson and Walter Slack, both of San Francisco, for appellant.

Henry L. Corson, of San Francisco, for respondent.

WASTE, P. J. Plaintiff had judgment rescinding and canceling two contracts of sale and purchase of real property, and defendant appeals.

From the findings of fact, which are amply supported by the evidence, it appears that the parties entered into two contracts in writing, whereby they mutually agreed that defendant should sell, and plaintiff should buy from defendant, two lots of land situate in the city and county of San Francisco. The particular description of the lot of land, in each contract, began as follows:

"Commencing at a point on the westerly line of Wieland street, distant thereon, etc., from the southerly line of Sunnydale avenue; running thence southerly along said westerly line of Wieland street," etc.

[1] Wieland street was not, at the time of making of the contracts, and never had been, a public street south of Sunnydale avenue. Some years previously the then owners of the property filed in the office of the county recorder of the city and county of San Francisco private maps showing the existence of such street, and indicating thereby a probable intention to dedicate the land to street purposes. No evidence was offered to show acceptance by the city of this land, so indicated on the maps, or acts by any one amounting to such dedication or user. An unexecuted intention of this character would not be sufficient to constitute dedication. Shultz v. Redondo Improvement Co., 156 Cal. 442, 105 Pac. 118; People v. Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22.

Some reliance is placed by appellant upon a deed between private parties conveying from one to the other a strip of land, which appears to be coincident with the parcel, which the appellant claims is Wieland street south of Sunnydale avenue, but we see nothing in this private document creating a public easement for street purposes. There was testimony that negotiations appeared to have been commenced between the present owner of the property and the city and county looking to a possible dedication and opening of Wieland street past plaintiff's land, deeds having been tendered for that purpose. But there was no showing that such result was presently probable, and no evidence which would in any way indicate that plaintiff, or any one, had the right to use the strip of land represented by defendant to be Wieland street, adjacent to the property in question, for street purposes.

Plaintiff believed, and relied on, the representations of defendant, concerning the existence of an open, public street, and would not have bought the lots, supposed to front thereon, had he known there was no way of reaching his property, other than over privately owned lands. He began living on the first lot purchased in April, 1914, and in June of the same year he executed the contract for the purchase of the second parcel. He first became aware of the true state of affairs when, in December, 1914, he found his property entirely cut off from any ingress or egress, by fences erected all around his property by the owner of the surrounding land. He demanded of defendant a rescission of the contracts, which, being refused, he executed and tendered quitclaim deeds of the property and brought this action.

It appeared from the testimony that during the preliminary negotiations leading to the signing of the first contract, defendants represented to plaintiff that the lot he was purchasing was bounded on the front by Wieland street, that Wieland street was an open street, south of Sunnydale avenue, and that the property could be driven to in wagons from any direction. Plaintiff was shown a map or plat of the property on which Wieland street was designated as fully laid out. Plaintiff visited the property before signing the contract, approaching it from Walbridge street, which was on the south of the tract of land, going over the adjacent lots to reach it. He located the exact property by "stepping it off from Sunnydale avenue." He saw a fence to the north, and between the land he was intending to buy and Sunnydale avenue. On this fence was a sign bearing the name "Wieland Street" in large letters. There were no indications on the ground of a street leading to or adjacent to the property. Plaintiff communicated the fact of his discovery of the fence to the defendant's agent, who assured him that it was not rightfully there and he "would go out with an automobile and tear the fence down."

[2] We cannot adopt the suggestion of appellant on this appeal that the representation of defendant, alleged and found to the effect that the lands and premises described in the contracts "fronted on a public street, to wit, Wieland street," had no relation to the means of physical access to the property, "but refers to an intangible quality in the roadway, giving it the status of a public street."

[3] The false statement, made by the defendant, that the real property, agreed to be sold to plaintiff was bounded by a public street, on the front, was a most material representation. Upon discovering that the representation was false, plaintiff was entitled to demand and recover, the consideration paid by him. Shultz et al. v. Redondo Improvement Co., supra. He was also entitled to recover the value of the improvements made on the premises, after deducting therefrom the fair rental value of the property. Garvey v. Lashells, 151 Cal. 526, 91 Pac. 498; Gates v. McLean, 70 Cal. 50, 11 Pac. 489.

[4, 5] The appellant contends that the plaintiff is estopped to claim a reliance on its representations, because he went on the land and examined it before signing the first contract, and lived on that portion several months before buying the second piece. Generally speaking, if one under such circumstances avails himself of an opportunity to test the truth of the representation made, and thereby discovers, prior to the consummation of the contract, that such representations were false, or by the exercise of reasonable diligence could have so ascertained, he will not be heard to say that he was deceived by them. Gratz v. Schuler, 25 Cal. App. 117, 142 Pac. 899. But we do not believe it requires citation of authority to establish that the situation of the parties, in the present case, gave plaintiff the right to believe and rely on the representations made by defendant. The trial court found that he was a laborer, and not accustomed to buying land. The evidence before us as to the lots, their location, condition of adjacent streets, fencing thereabouts, and ways of ingress and egress, warrants the conclusion that they formed part of a larger unimproved tract of land. All the streets in the vicinity appear to have been obliterated by the use of the tract as vegetable gardens. The result of the physical examination of the property made by plaintiff, before entering into the first contract, under these circumstances, was not such as to destroy his belief in, and reliance on, defendant's representations. He had been given a map showing the existence of the street. The assurance of defendant's agent concerning the fence would only serve to confirm his belief, and strengthen his reliance upon the truth of defendant's word.

The lots had been owned by the defendant for many years before the making of the contracts with plaintiff. The defendant knew that Wieland street, adjacent to the property, was not a public street, and that there was trouble in relation thereto. The president of the defendant company testified that he informed plaintiff of these facts before the contracts were made, but the trial court found otherwise. Defendant should not now be allowed to shift the burden of its misrepresentations onto plaintiff.

> "One who makes statements false in fact, and induces another to buy property, cannot defeat liability for the false statements by showing that if the other party had suspected him of falsehood or doubted the accuracy of the statements, such party, by ordinary diligence and by inquiry of persons whom he knew to be cognizant with the truth, could have learned of the accuracy or falsity of the statements." Spreckels v. Gorrill, 152 Cal. at 395, 92 Pac. 1017.

[6] One party to a contract "is under no obligation to investigate and verify the statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." Dow v. Swain, 125 Cal. 674, 58 Pac. 271.

[7] Plaintiff fenced a portion of his land, dug a well, put in a pump, and built a small

house, all at a "cost" of more than $500. The evidence relating to the value of the improvements placed on the property by the plaintiff seems to have been largely confined to the question of the cost. Only one witness (for defendant) fixed the value of the house at $150. The court in its findings arrived at the amount of the judgment for the plaintiff by adding the amount paid by plaintiff on account of the purchase of the lots, plus interest, with $250 added for "value of improvements placed on the land and premises, exclusive of any sum due defendant from plaintiff for use and occupation of said land and premises since said contract of sale was entered into." Provided there was evidence to support the finding in this regard, the method of determining the amount of the judgment was correct. Garvey v. Lashells, supra; Gates v. McLean, supra.

[8] The testimony as to cost of the improvements was some evidence of value.

Furthermore, no objection was made at the trial as to this method of fixing the value, which seems to have been acquiesced in by all parties and by the court.

The rental value of the property was established by a witness for defendant. While the court's finding is not as full and explicit as it might be, we are of the view that it was justified by the evidence, and is sufficiently clear to support the verdict.

Appellant contends that the plaintiff did not give proper notice of rescission prior to the commencement of the action. When plaintiff found there was trouble about the street, he moved very promptly. He notified defendant, and was told by its officers: "The best thing to do is to see your lawyer, and we will see our attorney. We sold the property as we bought it." He did see his lawyer, who wrote to defendant, on behalf of plaintiff, "I am now making you an offer to rescind his contracts," describing them, "and Mr. Shermaster herewith makes you a tender of a quitclaim deed to all his interest in and to said land upon the payment to him of the sum already paid," etc., specifying the amounts of purchase price (with interest), the cost of improvements and damages. Plaintiff had previously executed such a quitclaim deed, and it was in the hands of his attorney for delivery.

Defendant, by its attorney, in reply to the notification by plaintiff, just referred to, wrote that it expected "to carry out to the fullest extent all their agreements with Mr. Shermaster (plaintiff). They, however, do not accept any offer made by you to rescind his contracts. They also take exception to any alleged tender which you suggest in regard to a quitclaim deed." The communication further stated that when all payments had been made by plaintiff, defendant would "give him deeds in accordance with the terms of his respective agreements."

[9] Here was a sufficient offer, and a direct refusal of rescission. Plaintiff demanded more from defendant than he was entitled to recover, but, in the absence of any specific objection made to the tender, the exception thereto noted availed defendant nothing, and must be now disregarded. Civ. Code, § 1501; Code Civ. Proc. § 2076; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

The contracts of sale were executory, and the acceptance of the quitclaim deed by defendant would have restored everything of value which plaintiff had received from it.

[10] It developed during the trial that after the offer of rescission, plaintiff remained, and was still living, on the premises. He testified that unless he did so the house would be carried away, owing, no doubt, to its location in a sparsely inhabited neighborhood. Appellant contends that plaintiff, having remained in possession, cannot maintain this equitable action in rescission, but must be relegated to a legal action for damages for breach of contract. In our view, under the evidence, plaintiff's so-called possession was only an effort made in good faith to protect the property for all parties to the litigation. He had made a good tender or restoration of the premises, which was refused. If he abandoned the premises the improvements would be carried away by vandals. He came into court and offered to do equity, when in his complaint he offered to make a quitclaim deed to the land to defendant upon cancellation of the contracts being adjudged. The court, in its decree, directed that such quitclaim be executed.

We do not believe that plaintiff's remaining on the premises under the circumstances amounted to a waiver of his right to rescind.

Defendant has not suffered any injury by reason of plaintiff's act in remaining in such tentative possession, for the court found that the value of the improvements placed on the land, exclusive of any rental that might be due defendant for the use and occupation of the land, was the sum of $250. We may assume that the court allowed defendant the sum of $8 per month for the use of the land, that being the sum fixed by its own witnesses, for the full period of the 24 months from the date of occupation by plaintiff to the trial. We may further assume that the court fixed in its own mind the value of the improvements at somewhere near the amount they cost, that being the course pursued in the examination of the witnesses by the court. The judgment as rendered appears to give defendant full credit for the reasonable use and occupation during the term specified, and under the circumstances it should not be heard to complain.

What we have last said also disposes of

defendant's contention that the judgment was excessive.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

On Rehearing.

PER CURIAM. The petition for a rehearing is denied, but the opinion in this case, heretofore filed, is modified in the following particular:

[11] The ninth paragraph of said opinion should read as follows: The lots had been owned by the defendant for many years before the making of the contracts with plaintiff. The defendant knew that Wieland street, adjacent to the property, was not a public street, and that there was trouble in relation thereto. The president of the defendant company testified that he was familiar with the condition of the streets and roadways in the tract, "having been out there probably two or three or more times a year since 1906." He further testified that "at none of the times he had been on the property was the portion of Wieland street as shown on the map, south of Sunnydale avenue extending through the property of Crim, open." The agent, Webb, to whom defendant intrusted the sale of the lots in the tract, testified that at the time of the sale he told plaintiff the condition of Wieland street, and the fact that it was not a public street at that time, but that he thought it could be opened. On the issue presented by the conflict of evidence, arising from all the testimony bearing on this subject, the trial court found in support of plaintiff, and we are bound by the finding in that regard.

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40 Cal. App. 592

AUDITORIUM CO. v. BARSOTTI et al.

(Civ. 2658.)

(District Court of Appeal, First District, Division 1, California. April 7, 1919.)

1. EVIDENCE 🔑424—WRITTEN AGREEMENTS—CONTRADICTION—PAROL EVIDENCE.

While as between the parties to it, or as between them and other persons extending credit upon its face as forming a partnership relation, the parties to a written agreement would not be permitted to contradict its terms by parol evidence, such principle does not apply to cases where the question as to the real understanding between the parties signing the agreement arises between them, or any of them, and outside parties who have in their dealings not known of or depended upon the existence of a partnership relation.

2. PARTNERSHIP 🔑5—NATURE OF RELATION—INTEREST IN PROFITS.

The mere agreement between two or more persons to divide the profits of an undertaking is not sufficient to constitute them partners, but it is the association of two or more persons for the purpose of carrying on business together which is the distinguishing feature of a partnership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

3. PARTNERSHIP 🔑6—SHARING PROFITS.

Where one person advanced money to another on condition that he share in the profits, the money advanced to be repaid, whether the enterprise was successful or not, the transaction did not create a partnership relation, but rather that of debtor and creditor.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Auditorium Company against C. Barsotti and others, as partners. From a judgment in favor of the named defendant, plaintiff appeals. Affirmed.

Olin Wellborn, Jr., A. I. McCormick, and Stephen Monteleone, all of Los Angeles, for appellant.

Charles Baer, of San Francisco, for respondent.

RICHARDS, J. This action was commenced by the plaintiff against the defendants, who were alleged to be partners doing business under the firm name and style of the "Western Metropolitan Grand Opera Company," to recover the aggregate sum of $9,739.86 upon three separate counts; the first and second being upon accounts stated, for the sums of $2,490.34 and $4,949.52, respectively, and the third count being for money had and received, in the sum of $2,300. The defendant D'Avigneau defaulted, and the action as to him was later dismissed. The defendants Barsotti and Patrizi answered separately, each denying that Barsotti was at any time a member of the alleged copartnership, but each alleging that the defendants Patrizi and D'Avigneau constituted its only members. The only issue presented upon this appeal is as to whether the defendant Barsotti was in fact a partner of his codefendants. The trial court found that he was not and rendered judgment accordingly in his favor. The plaintiff and appellant herein urges that the evidence is insufficient to support the findings and judgment of the court in this regard.

A review of the record in the case convinces us that the evidence is sufficient to fairly establish the following facts:

During the year 1913 the defendants Patrizi and D'Avigneau were interested in the production of grand opera. In the spring of that year the former of these discussed with the officers of the plaintiff the matter of the organization of a company for the purpose of playing grand opera engagements in San Francisco and Los Angeles during that year. To that end Patrizi became associated with D'Avigneau, and on August 13, 1913, an agreement in writing was entered into between the officers of the plaintiff and Patrizi and D'Avigneau as parties of the second part by which the former were to advance to the latter the sum of $7,500 on or before August 31, 1913, upon the express condition that the latter should secure on or before said date the additional sum of $12,000, which combined sums were to be used for the purpose of organizing and operating an opera company to fill said engagements. Patrizi and D'Avigneau endeavored to raise this sum, said sum to be supplied by them by subscription, but failed in this endeavor, whereupon D'Avigneau suggested to Patrizi that he attempt to obtain the money from his friend Barsotti. They discussed between themselves the inducement apparently in the way of a bonus which should be offered to Barsotti to furnish this money, and agreed to offer him one-third of the profits of the San Francisco and Los Angeles engagements. Patrizi went to Barsotti with the proposition and induced him to advance the sum of $10,000. Barsotti and Patrizi both testify that this was to be an advance to be repaid out of the first profits earned in these engagements. Thereupon Patrizi drew up the document which is mainly relied upon by the appellant herein as being the articles of the alleged partnership, which document was signed by Patrizi, D'Avigneau, and Barsotti. It recited that it was the intention of the parties to it to establish an operatic organization, to be known as the "Western Metropolitan Opera Company," to give an opera season in San Francisco and in Los Angeles, and that it was agreed by them that "each will hold one-third interest in said enterprise, and that, if any profits will be derived from same at the end of the contemplated season, said profits are to be divided equally among said three parties." As to the part which Barsotti was to perform in this undertaking it was agreed:

> "Dr. C. Barsotti will help Messrs. Patrizi and D'Avigneau in securing a certain sum of money of about $10,000 by a note to be signed also by E. Patrizi and E. D'Avigneau, and to furnish certain bonds and guaranties which may be needed to help the work and development of the enterprise."

The evidence further shows that, after the execution of this agreement, Barsotti did pledge his credit at a certain San Francisco bank, by which the sum of $10,000 was realized, and that thereafter the two defendants Patrizi and D'Avigneau went ahead with the execution of the contract which they had entered into with the plaintiff's officers. The evidence sufficiently shows that as to the transactions between these two defendants and the plaintiff, through its officers, Barsotti was never consulted, nor his consent or signature asked or given, in the making or signing of agreements, or in any of the negotiations between these parties, and we think the evidence also sufficiently shows that neither the plaintiff nor any of its officers were aware of any such relation as that of partnership between Barsotti and his two codefendants until after the liabilities upon which this action is predicated had arisen, and that at no time did the plaintiff deal with, or extend credit to, his said codefendants upon the belief that Barsotti was their copartner. While upon the witness stand, both Barsotti and Patrizi denied the existence of such copartnership, and both testified that the understanding and agreement was that the money secured through Barsotti's credit and accommodation was to be repaid to him, whether the opera enterprise was successful or not.

[1-3] Upon the face of the foregoing state of facts we think there was sufficient evidence to support the finding of the trial court that a copartnership was not shown to have existed between Patrizi, D'Avigneau, and Barsotti so as to render the latter liable upon the obligations created as between the former two persons and the plaintiff herein. It is true that the written agreement upon which the plaintiff relies as conclusively establishing such relation, standing alone, would strongly support such a conclusion; and while, as between the parties to it, or as between them and third persons extending credit upon its face as forming such partnership relation, the parties to it would not be permitted to contradict its terms, this principle does not apply to cases where the question as to what the real understanding between the parties signing the agreement was, arises as between them or any of them and outside parties who have in their dealings not known of or depended upon the existence of a partnership relation. Under such conditions the parties may be permitted orally or by circumstances to show that no partnership in fact was contemplated between them, notwithstanding the terms of their written agreement. It is to be noted in this connection that the words "partners" or "partnership" are nowhere to be found in the writing upon which the plaintiff mainly relies, but that the partnership, if any, is to be inferred from the fact that the parties to it were to share equally in the profits, if any, of the enterprise which the two parties other than Barsotti were to actively engage in. It has been quite uniformly held that the mere agreement between two or more persons to divide the profits of an undertaking is not sufficient to constitute them partners, but that it is "the association of two or more persons for the purpose of carrying on business together," which is the distinguishing feature of a partnership. Hammond v. Borgwardt, 126 Cal. 611, 59 Pac. 121; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147; Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. 765; Title, etc., Co. v. Grider, 152 Cal. 746, 94 Pac. 601. An instructive case, strongly resembling, in some of its aspects, the case at bar, is that of Gille H. & I. Co. v. McCleverty, 89 Mo. App. 158, in which the court says:

> "We think that the contract shows it to have been the intention that McCleverty should advance a certain amount of money which Harrison was to use in his mercantile business, and if successful he was to return it with one-third of the profits; and if unsuccessful, and the advancement was lost, then that was to be the end of the matter as far as the former was concerned. It is true that the contract does not expressly provide that Harrison was to return the advancement, but we think that fact may be fairly inferred from all the facts and circumstances disclosed by the evidence. Our conclusion is that the transaction between the defendants did not create the partnership relation, but rather that of debtor and creditor."

It will thus sufficiently appear that it is our conclusion that the findings and judgment of the trial court are amply supported by the evidence in the case.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

40 Cal. App. 515

JAMES EVA ESTATE v. MECCA CO.
(Civ. 2741.)

(District Court of Appeal. First District, Division 2, California. April 1, 1919. On Rehearing in Supreme Court May 29, 1919.)

1. Insurance 🔑2—Statutory Provisions—Contracts of Insurance.

Pol. Code, § 594, subd. 5, invalidating "all policies and other contracts of insurance" issued without compliance with sections 594 to 596, relating to office of insurance commissioners and transaction of insurance business, does not require brewing company to comply therewith by placing itself under jurisdiction of insurance commissioner before making contract guaranteeing performance of a lease by one of its customers; such statutes applying exclusively to the conduct of business of insurance.

2. Corporations 🔑370(1) — Powers—"Ultra Vires."

The term "ultra vires" may refer to an act entirely beyond the scope of the powers of the corporation to perform under any circumstances or for any purpose, or may be applied to an act within general powers of corporation for some purposes but beyond such powers for other purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ultra Vires.]

3. Corporations 🔑385—Ultra Vires Acts—Availability as a Defense.

When the act is within the corporate powers for some purpose or under some conditions, the defense of ultra vires is not available unless it be shown that the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance.

4. Corporations 🔑385—Ultra Vires Acts.

The attempt of a corporation to use the defense of ultra vires as a means of escaping its liability to a third party is regarded with much less favor than when a direct attack is made upon such corporate act by a stockholder or by the state.

5. Corporations 🔑389—Ultra Vires Acts—Burden of Proof.

Where corporate act is within the powers of the corporation for some purposes, and is claimed to be without its powers under given circumstances, the burden of proving latter state of affairs rests upon corporation denying its liability.

6. Corporations 🔑461—Powers—Brewing Company—Extending Aid to Customers.

Corporation whose purpose, as provided by its articles of incorporation, is to operate and maintain the general business of brewing and malting, may, in furtherance of its own interest, extend financial aid to its customers.

7. Corporations 🔑389—Ultra Vires Acts—Guaranty Contract—Burden of Proof.

Brewing corporation seeking to avoid liability on its contract guaranteeing performance of a lease by one of its customers on ground that contract was ultra vires has burden of proving that it received no benefit therefrom, since such guaranty might, under some circumstances, be within its corporate powers.

8. Guaranty 🔑87—Discharge of Guarantor—Pleading.

In lessor's action against guarantor of lessee's performance, defense that guarantor was discharged by alteration of lease is not available where not pleaded.

9. Landlord and Tenant 🔑200(2)—Rebate in Rent—Effect on Lease.

Rebates for certain months from amount of rent specified in lease are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent.

10. Guaranty 🔑53(3)—Discharge of Guarantor—Change in Contract.

Rebate granted by lessor in amount of rent from rate specified in lease did not discharge guarantor of lessee's performance of lease, where guarantor asked for and consented to such change.

On Rehearing in Supreme Court.

11. CORPORATIONS ⚷389—ULTRA VIRES CONTRACT — BENEFIT TO CORPORATION — SUFFICIENCY OF EVIDENCE.

In lessor's action against brewing company on its contract guaranteeing performance of a lease by one of its customers, where ultra vires defense was interposed, evidence *held* to show that the contract was of benefit to the brewing company.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by the James Eva Estate against the Mecca Company and the Oakland Brewing & Malting Company. Judgment for plaintiff, and the last-named defendant appeals. Affirmed. Rehearing denied in Supreme Court.

Snook & Church, of Oakland, for appellant.
W. B. Rinehart, of Oakland, for respondent.

HAVEN, J. Action by a lessor for the collection of delinquent rent, against its lessee and two sureties, upon a bond guaranteeing the faithful performance on the part of said lessee of the covenants of a written lease. The lessee suffered default and the action was tried as against the sureties alone. Judgment was rendered against both sureties, from which one of them appeals. The appellant urges three grounds for reversal, which will be considered in the order in which they are made.

[1] It is claimed that the bond executed by appellant is void because "it was entered into contrary to express statutory law, to wit, sections 594–596, inclusive, of the Political Code of the state of California." The sections referred to are found in article 16 of the Political Code, which article by its title and provisions refers to the office of insurance commissioner, the performance of his duties, and the transaction of the business of insurance under his supervision. The particular sections relied upon are section 594, subd. 5, which provides that fidelity and surety insurance includes "* * * guaranteeing and executing all bonds, undertakings, and contracts of suretyship, and guaranteeing the performance of contracts other than insurance policies," and the closing paragraph of subdivision 6 of section 596, which reads as follows: "All policies and other contracts of insurance, issued without full compliance by all parties concerned with the laws of this state, shall be null and void." Appellant urges that the bond here sued upon comes within the term "other contracts of insurance" found in section 596, as defined in section 594. If such contention is correct, it follows that it is illegal for any corporation to execute in this state any bond guaranteeing the performance of any contract, or even to guarantee the payment of a promissory note, without having first complied with the provisions of the Political Code above referred to, and placed itself under the jurisdiction of the insurance commissioner. In our opinion the Code sections relied upon are intended to apply exclusively to the conduct of the business of insurance as such, and their provisions cannot be stretched to cover the case of a single contract of guaranty such as the one involved in this action. We hold therefore, that said sections have no application to the facts of this case.

[2, 3] It is next contended that the contract sued upon is a mere naked guaranty, and is therefore ultra vires of the purposes and powers of the appellant corporation, and for that reason void. The term ultra vires, when applied to the act of a corporation, is used in different senses. It may indicate that the act referred to is entirely beyond the scope of the powers of the corporation to perform under any circumstances or for any purpose, or, again, the term may be applied to an act of a corporation which may be fully within the scope of the general powers of the corporation for some purposes, but beyond such powers for other purposes. The rights of persons dealing with the corporation vary according as the act is ultra vires in one or the other of these senses. When the act is within the corporate powers for some purposes or under some conditions, the rights of parties who have dealt with the corporation, under the express or implied representation that it is acting within such powers in the making of a particular contract, are entitled to favorable consideration. In such a case the defense of ultra vires is not available, unless it be shown that the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, at pages 578 to 588, 99 Am. Dec. 300; 10 Cyc. 1148–9.

[4] The attempt of a corporation to use the defense of ultra vires as a means of escaping its liability to third parties is regarded with much less favor than when a direct attack upon such corporate act is made by a stockholder or by the state. McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927.

[5] It is the further established rule in this state that, in cases where the corporate act is within the powers of the corporation for some purposes and is claimed to be without its powers under given circumstances, the burden of proving the latter state of affairs rests upon the corporation denying its lia-

bility. Miners' Ditch Co. v. Zellerbach, 37 Cal. at page 585, 99 Am. Dec. 300; Morgan v. Board of Education, 136 Cal. 245, 247, 68 Pac. 703; Brown v. Board of Education, 103 Cal. 531, 534, 37 Pac. 503.

[6] With the above principles in mind, we take up the record before us. The plaintiff introduced in evidence its lease, to which the bond sued upon is attached. Accompanying this bond is a certified copy of a resolution duly adopted by the directors of the appellant corporation, wherein it is recited that it is for the best interests of that corporation that the lessee "shall secure the rights and privileges of the said lease under the terms thereof." In its attempt to prove that the execution of this bond was beyond its corporate powers, appellant introduced in evidence its articles of incorporation. These provide that the purpose of the corporation is to operate and maintain the general business of brewing and malting. Under such general powers a corporation may, in furtherance of its own interests, extend financial aid to its customers. Armour & Co. v. Rosenberg & Sons Co., 173 Pac. 404.

[7] It is conceded by appellant that if a corporation derives a direct and substantial benefit from the making of a contract of the character of the one here involved, "then the contract will be considered to be intra vires, or possibly, if ultra vires, that the corporation will be estopped to set up that defense." In other words, it is admitted that the execution of a guaranty of this character might, under some circumstances, be within the corporate powers of appellant. The case falls, therefore, directly within the principles of law above referred to. The execution of the bond was not beyond the powers of the corporation under all circumstances or for all purposes. In order to sustain the defense that its execution under the circumstances of this case was beyond such powers, it was incumbent upon appellant to show that it received no direct benefit therefrom. An examination of the record discloses no evidence of that character. On the contrary, it appears that the appellant was a creditor of the lessee, at the time the delinquent rent sued for accrued, upon a merchandise and cash loan account. There is no direct evidence, however, that this relation existed at the time the bond was executed, nor that the purchase of merchandise from appellant was a condition for the execution of such bond. It is unnecessary to determine whether or not this is sufficient proof of the receipt of a direct benefit by the appellant corporation. The appellant did not prove that no such benefit was received by it. The burden of proof as to that matter being upon appellant, it cannot be held that the contract was ultra vires of the powers of the corporation.

[8-10] The final contention of appellant is that the guarantor was discharged from liability for the reason that the principal obligation of the lessee was changed and altered in a material respect without the consent of the guarantor. The change in the principal obligation relied upon is the fact that the lessor made a rebate, for certain months, from the amount of rent specified in the lease, to the lessee and to a committee of its creditors. To this contention there are three answers: (1) No such defense was pleaded by the defendant. (2) Concessions of this kind are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent. Sinnige v. Oswald, 170 Cal. 55, 57, 148 Pac. 203. (3) Part of these concessions of rent were made to the committee of creditors, of whom Mr. Wieking, the vice president of the appellant corporation, was one. He was called as a witness and asked by the court whether or not the arrangement of a rebate of $150 on the $450 monthly rent was satisfactory to him. He stated that it was, and the only objection he had to the rebate was that it was not as large as he had sought to obtain. The appellant corporation, through its vice president, having asked for and consented to this change in the amount of rent, cannot be heard to object thereto.

In our opinion none of the contentions of appellant is well founded. The judgment is therefore affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

On Rehearing in Supreme Court.

PER CURIAM. [11] In view of the circumstances disclosed by the evidence in this case, including the recital in the resolution adopted by the directors of the appellant corporation to the effect that it is for the best interests of the corporation that the lessee shall secure the rights and privileges of the lease, we are satisfied that there was a sufficient showing of benefit to appellant corporation to make its undertaking valid. We express no opinion on the question of burden of proof discussed in the opinion.

The application for a hearing in this matter after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied.

180 Cal. 413

In re McGUE'S ESTATE.

McGUE et al. v. McGUE.

(L. A. 5577.)

(Supreme Court of California. May 28, 1919.)

1. Insane Persons 🔑42(3) — Order Settling Accounts of Guardian—Conclusiveness.

Where wife, as guardian of her husband, charged herself with entire interest in a note in which she had a half interest, as property belonging to the husband, the order of the court settling her account as guardian, and directing her to turn over the balance of said estate to administratrix of estate of husband, now deceased, was an adjudication against her that estate of deceased was the owner of the note and the whole thereof, and, where not appealed from, revoked, or reopened, is conclusive against her, and cannot be collaterally attacked.

2. Insane Persons 🔑44—Guardian—Settlements of Account—Death of Ward—Jurisdiction.

In view of Code Civ. Proc. § 1774, the court has jurisdiction in guardianship proceeding to settle the account of the guardian of an insane person after the death of the ward.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of John P. McGue, deceased. From an order of the superior court settling an account rendered by Elizabeth E. McGue, as administratrix of the estate of said deceased, Abram L. McGue and another appeal. Reversed.

Stephens & Stephens, of Los Angeles, for appellants.

Bordwell & Mathews and D. C. Burrey, all of Los Angeles, for respondent.

SHAW, J. The appeal herein is taken from an order of the superior court settling an account current rendered by Elizabeth E. McGue as administratrix of the estate of John P. McCue, deceased.

In the account the administratrix charged against herself the sum of $138,068.41 as the amount of inventory and appraisement. This inventory and appraisement included a one-half interest in a certain note executed by one Boggs on December 16, 1913, payable to the decedent, John P. McGue, and the said Elizabeth E. McGue, who was then his wife, for the sum of $8,500. In the inventory the estate was given credit for only a one-half interest in this note, and it was appraised therein at $4,250. Consequently the account covered but a one-half interest in the note. Abram L. McGue, a brother of the decedent, and Delbert McGue, the son of a deceased brother, the appellants herein, filed exceptions to the account, alleging that the decedent at the time of his death owned the entire interest in the Boggs note, and that the account was incorrect and false in so far as it failed to charge against the administratrix and credit to the estate the whole amount of said note. The appellants are heirs of the decedent, but not the only heirs.

The respondent in answer to the exceptions alleged that at the time of the execution of the Boggs note in 1913 McGue made a gift to her of a one-half interest in the note and in the mortgage given to secure the same, and that she thereby became the owner of said one-half as her own property. She further alleged that thereafter, on September 22, 1915, some four months before McGue's death, he was duly adjudged to be an incompetent person and that she was appointed his guardian; that as such guardian she filed an inventory and appraisement of his estate, in which the entire interest in said note was by mistake listed as belonging to the ward and was valued at $8,500; that her said husband died on January 21, 1916; that thereafter, in preparing a final account as such guardian, she failed to observe said error in the inventory; and that by charging herself with the amount of said inventory she charged herself as guardian with the entire interest in said note as property belonging to her said husband. She also alleged that she did not discover said mistake and was not aware that this said account and inventory included the entire interest in said note as the property of the ward until shortly afterwards, when she came to make out her inventory as the administratrix of the estate of said decedent.

Upon the trial the court made findings to the effect that the administratrix was the owner of the one-half interest in said note at all times, and that the estate of McGue, deceased, owned the other one-half interest therein, and that she should be charged with only one-half thereof in her account current as administratrix, and settled the account accordingly. The appellants claim that the evidence does not support the finding that Mrs. McGue was at all times the owner of said one-half interest in said note.

We do not find it necessary to examine carefully the evidence in proof of the gift by John P. McGue to his wife, of a one-half interest in the Boggs note. Assuming it to have been sufficient to support the express finding that such gift was made, we are nevertheless of the opinion that such proof was unavailing to support the order, for reasons presently to be stated.

[1] On the trial there was introduced in evidence the inventory rendered by Mrs. McGue as guardian of her said husband, her final account as such guardian, and the order of the court settling said account and directing her as such guardian "to turn over the balance of said estate to the legally appointed administratrix of the estate of John P. McGue, deceased." This order was an adjudication against her of the fact that the estate of her deceased husband, and not herself, was the owner of said note and of the whole thereof, and, as it had become final, it was conclusive of that fact as against her. Brodrib v. Brodrib, 56 Cal. 563; Guardianship of Wells, 140 Cal. 353, 73 Pac. 1065. The law is thus stated by Mr. Woerner:

> "On the termination of the guardianship * * * the accounting between the guardian and ward, or between them and their respective representatives, is final, and the order, judgment, or decree thereon by the court having jurisdiction is necessarily conclusive against all the world, like any other judgment by the court having jurisdiction of the subject-matter and of the parties. * * * Unless appealed from, revoked, or reopened, such settlement cannot be collaterally attacked * * * in any collateral proceeding." Woerner on Guardianship, p. 327, § 98.

He states only this qualification of the doctrine:

> "As to all matters lawfully embraced therein, the final settlement is conclusive; but matters not embraced therein are not concluded, and the ward may recover of the guardian personally a fund which came to the guardian's hands before his appointment, and which was never accounted for in his settlements." (Id. p. 340.)

[2] The court has jurisdiction, in the guardianship proceeding, to settle the account of a guardian after the death of the ward. Code Civ. Proc. § 1774.

In view of these principles we are bound to conclude that the finding that the respondent is the owner in her own right of one-half interest in the Boggs note is contrary to the law and the evidence.

The order is reversed.

We concur: OLNEY, J.; LAWLOR, J.

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180 Cal. 386

In re ROUNDS' ESTATE. (L. A. 5945.)

(Supreme Court of California. May 20, 1919.)

1. WILLS ⚷489(1)—INTENT OF TESTATRIX—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to prove that a bequest to sisters and brothers "living" meant those living at time of execution of will.

2. WILLS ⚷440 — CONSTRUCTION — PHRASEOLOGY.

Court, in construing will, is bound by its phraseology as written.

3. WILLS ⚷524(2) — CONSTRUCTION — "LIVING."

Where bequest was to sisters and brothers "living," children of sister and brother living at time of execution of will, but who predeceased testatrix, were not entitled to share in bequest as descendants under Civ. Code, § 1310; the word "living," in view of section 1336, referring to time of testatrix's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Living.]

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Sarah C. Rounds, deceased. From an order refusing to make partial distribution of assets of estate to certain nieces and nephews of deceased, they appeal. Affirmed.

Hammack & Hammack and D. S. Hammack, all of Los Angeles, for appellants.

Charles Lantz, Howard F. Shepherd, Marc Ryan, L. V. Shafer, Mulford & Dryer, Porter & Sutton, and Slosson & Mitchell, all of Los Angeles, for respondents.

MELVIN, J. This is an appeal by certain nieces and nephews of Sarah C. Rounds from an order refusing to make a partial distribution to them of the assets of her estate by reason of the fact that they are heirs, respectively, of her sister, Mary E. Barbour, and her brother, Hiram Edwards.

Mrs. Rounds died testate. She left certain legacies to charity and to nephews and nieces, and her will contained the following provision: "To each of my sisters and brothers living five hundred ($500) dollars." At the time the will was executed she had two sisters and a brother living. Two of them Hiram A. Edwards and Mrs. Mary E. Barbour, predeceased the testatrix. Appellants here, who are the sons and daughters of the deceased sister and brother of Mrs. Rounds, are, under section 1310 of the Civil Code, as they assert, entitled to take, as descendants, their proportions of the legacies of these predeceased beneficiaries under the will of Mrs. Rounds.

[1] The whole question presented to this court turns upon the interpretation of the word "living" as used in the will. Appellants cheerfully concede that ordinarily a will speaks as of the time of the death of the testator or testatrix, but they insist that in the present case the evidence indicates, conceding its admissibility, that the testatrix intended to use the word as applying to the time of the execution of the testament. With this view we are unable to agree. The only witness whose testimony appears in the record is Mary C. Rodgers, a friend of Mrs Rounds, who advised and assisted her in her business matters and who drew her will. Mrs. Rodgers made several rough drafts of wills for her friend before the one now in course of probate was executed. One of these contained the following provision:

> "To each of my brothers and sisters living two hundred ($200.00) dollars. Their names Mrs. Mary M. Barber, Mrs. Helen Augusta McOmber, William J. Edwards and Hiram A. Edwards."

[2, 3] After the preparation of this rough draft William Edwards died, and his sister then drew a pencil line through his name. Mrs. Rounds then told Mrs. Rodgers that she had one brother and two sisters who were still alive, and that she wanted provision made for them to the extent of $500 each. Mrs. Rodgers then wrote the clause of the will which is here in dispute, and she testified: "I do not think that Mrs. Rounds suggested the use of the word 'living' in this connection." We do not see how this testimony indicates the intention of the testatrix to use the word "living" as of the date of the execution of the will. Surely the mere elimination of the name of her deceased brother, William, from the rough draft would indicate no such intention unless it were accompanied by some direction that his share should be apportioned according to the statute of descents or in some similar manner ratably. The fact that Mrs. Rodgers used her own phraseology rather than that of Mrs. Rounds is not at all significant, because by subscribing the instrument Mrs. Rounds adopted the language, and we are bound by the phraseology as written. Words in a will referring to survivorship simply relate to the time of the testator's death. Section 1336, Civ. Code; Estate of Alexander, 149 Cal. 146, 85 Pac. 308, 9 Ann. Cas. 1141; In re Winter, 114 Cal. 186, 45 Pac. 1063. In many other jurisdictions this, too, seems to be the general rule. 40 Cyc. p. 1424; McCoury's Executors v. Leek, 14 N. J. Eq. 70, 76.

The order from which this appeal is taken is affirmed.

We concur: LENNON, J.; WILBUR, J.

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180 Cal. 395

In re CLARK'S ESTATE.

Appeal of O'BARN.

(S. F. 8714.)

(Supreme Court of California. May 21, 1919.)

1. APPEAL AND ERROR 🔑930(2)—PRESUMPTION—CORRECT INSTRUCTION FOLLOWED.

It cannot be presumed that jury disobeyed instructions and decided case outside of issues.

2. APPEAL AND ERROR 🔑1066—REVIEW—HARMLESS ERROR.

An instruction, correct in law but on subjects outside the issues, is not cause for reversal, unless it tends to mislead the jury as to the question for decision.

3. WILLS 🔑323—PROBATE PROCEEDINGS—ARGUMENT OF COUNSEL.

That testatrix had previously executed similar wills and was then of sound mind is a legitimate subject for argument as to her sanity while executing the will in question.

4. TRIAL 🔑240—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

While the giving of an instruction argumentative in form may not always be cause for reversal, the court is not bound to give it, even if the argument therein be a legitimate one.

5. TRIAL 🔑244(3)—PROBATE PROCEEDINGS—INSTRUCTIONS EMPHASIZING FACTS.

A requested instruction that testatrix had previously executed similar wills and was then of sound mind, and that such fact did not necessarily establish her sanity when executing the will in question, was erroneous, as emphasizing facts tending to prove or disprove an ultimate fact in issue.

6. TRIAL ⚷253(8)—INSTRUCTIONS—IGNORING ADMITTED FACT—TESTAMENTARY CAPACITY.

Where execution of will was admitted, the phrase "at the time it is claimed the said will was made," in a requested instruction on testamentary capacity, improperly suggests that execution was still in issue, and was correctly modified by substituting the phrase, "at the time of the execution of the will."

7. WILLS ⚷330(1)—PROBATE PROCEEDINGS—INSTRUCTIONS—TESTAMENTARY CAPACITY.

A requested instruction on testamentary capacity, stating that the jury have "a right to consider" the terms of the will, is properly modified by substituting the statement that the jury "are to consider all the evidence."

8. WILLS ⚷330(1)—PROBATE PROCEEDINGS—INSTRUCTIONS—TESTAMENTARY CAPACITY.

A requested instruction that testatrix was of unsound mind if she did not understand while signing the will "each and all of its provisions" was not improperly modified by substituting the phrase "its provisions."

9. WILLS ⚷383—PROBATE PROCEEDINGS—INSTRUCTIONS—HARMLESS ERROR.

The elimination of the phrase, "I charge you her mind was unsound," in a requested instruction, was not harmful, where the succeeding phrase stated substantially the same thing.

10. APPEAL AND ERROR ⚷1170(9)—REVIEW—HARMLESS ERROR.

In a will contest on the ground of mental incapacity, rulings as to instructions, if technically erroneous, will not cause a reversal, where the case made by contestants that testatrix was of unsound mind was extremely weak, while the great preponderance of the evidence was in favor of proponents, in view of Const. art. 6, § 4½.

Department 1.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Proceedings to probate the will of Bridget Clark, deceased, in which James Egan and E. M. Leonard as executors were proponents and John J. O'Barn was contestant. Revocation of an order admitting the will to probate was refused, and John J. O'Barn appeals. Affirmed.

Walter H. Linforth and Samuel M. Samter, both of San Francisco, for appellant.

Edward I. Coffey, Jeremiah B. Coffey, Garret W. McEnerney, Andrew F. Burke, and Edward M. Leonard, all of San Francisco, for respondents.

SHAW, J. This is an appeal from an order refusing to revoke a previous order admitting to probate a certain document as the last will of Bridget Clark, deceased.

It was admitted that the will was duly executed. The only ground of contest presented at the trial was that at the time of its execution the decedent was not mentally competent to make a will. The verdict was against the contestants. The only points urged in support of the appeal are certain rulings in the giving and refusing of instructions.

One of the instructions given was to the effect that the will purported to give more than one-third of the estate to charitable purposes, and "that the amount by which the sums so bequeathed for charitable purposes exceed one-third of the estate of said decedent will go to the persons and in the proportions in which the estate of said decedent would have descended had she died intestate."

The appellant concedes that this is a correct statement of the law on the subject, but objects to it on the ground that it was directed to a point that was not in issue, that it was irrelevant, and that the jury may have been induced to give a decision against the contestant because of the fact that it informed them that he would receive a substantial part of the estate, even if the will, which gave him nothing, were allowed to stand unrevoked.

The closing instruction was as follows:

> "Gentlemen, the only issue for you to determine in this case is the question whether or not Bridget Clark was of sound and disposing mind at the date of the execution of the will in question, which was on the 21st of September, 1915, and to that you will answer yes, or no, according as nine of your number conclude."

The court then gave the jury a prepared form of verdict, which the jury answered and returned as follows:

> "We, the jury in the above-entitled cause find a special issue. Was the decedent, Bridget Clark of sound and disposing mind on the 21st of September, 1915, at the time of the execution of the will in question? Answer: Yes. Edward A. Dakin, Foreman."

[1, 2] Over and over again the instructions repeated the statement that this was the only thing the jury was to decide, and that it must be decided from the evidence in the case. The instructions on the subject were complete, elaborate, and clear. We cannot, on appeal, indulge in the surmise that the jury may have disobeyed these elaborate and express instructions of the court, disregarded their oaths to decide the cause from the evidence introduced and in accordance with the law as given them by the court, and may have gone afield upon an inquiry as to the extent of the estate and the amounts which the interested parties would ultimately receive. The instruction objected to did not

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

direct them to such inquiry. The giving of it may have been suggested by the closing argument of counsel for appellant to the jury, wherein he erroneously stated that under the provisions of the will, as made, $24,000 of the $39,000 estate would go to the church. But, however this may be, the instruction was correct in point of law, and, though it may have been irrelevant to the issue, there was nothing in it which could tend to mislead or confuse the jury with regard to a question so clearly and precisely submitted for its decision. An instruction correct in law, but upon a subject that is outside the issues, is not cause for a reversal, unless it tends to mislead the jury as to the question for decision. George v. Los Angeles Ry. Co., 126 Cal. 361, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184; 14 Ruling Case Law, 782; People v. Park, 62 Cal. 206.

Two previous wills of the testatrix, one dated July 12, 1910, the other November 14, 1912, each making dispositions of her estate similar to those made in the will in question, were admitted in evidence. The appellant asked the court to instruct the jury that these wills were to be considered as well as all the other evidence admitted, and that if they should find they were executed by her, and that she was then of sound mind, "it does not necessarily follow from these facts, and these facts alone, that at the time of the alleged execution of the will in question she was of sound mind," and that they "should give these facts only such consideration as in your judgment they may be entitled to."

[3-5] The statement included in the instruction that the fact that she had previously executed similar wills, and was then of sound mind, did not necessarily establish the fact that she was of sound mind when she executed the later will in controversy is in the nature of an argument to the jury. It was a legitimate argument for the appellant's attorney to advance in his address to the jury. Opposing counsel could with equal propriety argue that the fact of the execution of two similar wills when she was admittedly of sound mind was sufficient evidence to satisfy the jury of her sanity when she made the will in question. But it is not the province of the court to make an argument to the jury, and though the giving of an instruction argumentative in form may not always be cause for reversal, it is also true that the court is not bound to give such an instruction even if the argument be a legitimate one, and the refusal thereof is not error. People v. Stanton, 106 Cal. 139, 142, 39 Pac. 525; People v. Williams, 17 Cal. 147; People v. Hertz, 105 Cal. 665, 39 Pac. 32; Birmingham, etc., Co. v. Martin, 148 Ala. 8, 42 South. 618; 38 Cyc. 1600. Furthermore, it violated the rule that the court need not give an instruction which emphasizes one of the facts, among others, which tend to prove or disprove an ultimate fact in issue. The instructions given were to the effect that the jury should consider all the evidence introduced at the trial bearing on the condition of her mind prior to, at the time of, and subsequent to the date of the will in question, and that the jury should consider her state of mind on other occasions only in so far as the same sheds light upon her state of mind when the will in question was executed. The refusal of the instruction could not have been prejudicial.

The third ruling complained of was in modifying the following instruction asked by the appellant:

> "In determining the question of the soundness or unsoundness of mind of Bridget Clark, at the time it is claimed the said will was made, you have a right to consider the terms and provisions thereof, and if you believe from the evidence that, at the time of the signing of the said instrument, she did not have the mental capacity to understand each and all of its provisions, and in fact did not understand each and all of its provisions, then I charge you her mind was unsound, and your answer to the issue, Was she of sound mind at that time? will be No."

As modified by the court and given it was as follows:

> "In determining the question of the soundness or unsoundness of mind of Bridget Clark, at the time of the execution of the will in question, you are to consider all of the evidence herein, and if you believe from the evidence that, at the time of the signing of the said instrument, she did not have the mental capacity to understand its provisions, and in fact did not understand its provisions, then your answer to the issue, Was she of sound and disposing mind at that time? will be No."

[6-9] The court correctly struck out the phrase "at the time it is claimed the said will was made" and inserted in lieu thereof the phrase "at the time of the execution of the will." At the trial the execution of the will was admitted, and it was improper for the court to suggest, as the requested instruction did, that its execution was still under consideration. The substitution of the statement that the jury "are to consider" the evidence, for the statement requested that they have "a right to consider" it, was, of course, correct. Instead of limiting their attention, as the instruction requested provided, to "the terms and provisions" of the will in question, the instruction as given directed the jury to consider all of the evidence herein. This was a correct instruction, while that requested might have misled the jury to confine their consideration to the will alone. The substitution of the phrase "its provisions," referring to the will, for the phrase "each and all of its provisions," was not improper. The elimination of the phrase in the requested instruction, "I charge you her mind was unsound," was not harmful, inasmuch as the succeeding phrase stated substantially the same thing.

[10] Finally, it may be said that even if the rulings complained of had been technically erroneous, it cannot be said that they were prejudicial or that their effect was such as to cause a miscarriage of justice. The case made by the appellant regarding the mental condition of the testatrix at the time of the execution of the will was an extremely weak one. On the other hand, the proponents of the will introduced an abundance of evidence satisfactory in character, showing that the decedent was then of sound mind. The great preponderance of the evidence was in favor of the proponents. Under these circumstances, the judgment cannot be reversed. Constitution, art. 6, § 4½.

The order is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

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180 Cal. 437

PERKINS v. TRUEBLOOD. (L. A. 4951.)

(Supreme Court of California. May 29, 1919.)

1. Physicians and Surgeons ⚷18(7)—Malpractice—Evidence—Admissibility.

In a malpractice case, evidence regarding a fracture, and condition of plaintiff's leg previous to defendant's alleged negligent treatment thereof, *held* admissible.

2. Limitation of Actions ⚷55(3) — Malpractice Case.

A malpractice case, instituted within one year of defendant's alleged negligent treatment, but over a year after plaintiff's leg had been fractured and defendant's treatment had commenced, was not barred by Code Civ. Proc. § 340, subd. 3, prescribing a one-year limitation period in such cases.

3. Physicians and Surgeons ⚷18(8)—Malpractice—Sufficiency of Evidence.

Evidence *held* not to sustain finding that defendant physician was negligent in setting and treating plaintiff's fractured leg.

Department 2.

Appeal from the Superior Court of Kern County; Howard A. Peairs, Judge.

Action by C. W. Perkins against W. E. Trueblood. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Stratton & Kaufman and Wm. P. Hubbard, all of San Francisco, and Rowen Irwin, of Bakersfield, for appellant.

Emmons & Hudson, of Bakersfield, for respondent.

LENNON, J. This is an action for damages, wherein the plaintiff recovered judgment against the defendant, a physician and surgeon, for alleged negligence in the performance of a surgical operation upon the plaintiff in setting a broken leg. The negligence relied upon for a cause of action is charged in those allegations of the complaint which aver:

> "That the plaintiff herein by an accident broke his leg during the month of April, 1912. That thereafter the plaintiff employed the defendant, who is a surgeon, as such surgeon, for a reasonable reward to be paid therefor, to set and heal the same. That the defendant so negligently and unskillfully conducted himself, in attempting to set said leg of the said plaintiff, that the broken portions of the said leg were not joined, and that at both ends of the said fracture the parts overlapped, and the same did not heal or become strong, and that subsequently the same leg broke again at the same place without any fault of the said plaintiff."

The denial of these allegations, coupled with the defense of the statute of limitations, which was specially pleaded, presented the only issues in the case.

The complaint in the action was filed on April 9, 1913. The court below tried the case without a jury, and made its findings in favor of the plaintiff, which in substance were that the plaintiff broke his leg in March, 1912; that the defendant was employed to reduce the fracture; that, the fracture not satisfactorily healing, the defendant separated the surfaces of the bone during the month of April, 1912, and again set the plaintiff's leg; that the defendant performed the latter operation negligently; and that by reason thereof the plaintiff had suffered damage in the sum of $1,250.

[1, 2] The appeal is from the judgment, and presents the question of the sufficiency of the evidence to support the findings and also the question of the correctness of rulings admitting evidence concerning the plaintiff's condition and the defendant's surgical treatment of him prior to April 9, 1912. While the court's findings rested the plaintiff's cause of action upon the defendant's negligent resetting of the plaintiff's leg in April, 1912, nevertheless it would seem that the trial court proceeded upon the theory, and correctly so, we think, that the negligence ultimately found against the defendant was dependent in a measure upon the condition of the plaintiff's leg at the time of and subsequent to the setting of the original fracture which the trial court found, and the undisputed evidence shows, occurred in March, 1912. Upon this theory, evidence relative to the original fracture, its treatment and progress, and process of its healing, was admissible, to the end that it might be determined whether or not the

methods resorted to by the defendant in resetting the leg on or after April 9, 1912, were of a nature which an ordinarily skillful surgeon would have given to a leg in such a condition. This being the theory of the case and the judgment, it follows that there is no merit in the contention that the commencement of the action was barred by subdivision 3 of section 340 of the Code of Civil Procedure.

[3] The plaintiff's case, as revealed by the evidence, seems to rest upon the contention that as a result of the defendant's negligent treatment of the fractured leg on and after April 9, 1912, he was caused great physical pain and suffering, that he could not pursue his usual vocation by reason of the fact that he did not have the full use of the leg, and that some 10 months later the same leg was again broken in the same place in a fall which would not have fractured the leg, if it had been properly treated by the defendant upon the occasion of the second setting. In this connection, it will be noted that, in spite of the great suffering and financial loss claimed to have been endured by the plaintiff for a period of 10 months following the last treatment by the defendant, it affirmatively appears that the defendant was not requested to give any further treatment, and that the plaintiff failed to place himself under the care of any other surgeon. Moreover, apart from the testimony of Dr. Rogers that the plaintiff said that the second fracture was caused by a fall of 3 or 4 feet on an oil rig, and the testimony of the plaintiff that he did not fall over 12 inches, there is no evidence of any circumstance preceding or attending the fall. In view of the fact that a person may snap a perfectly sound leg in a fall of 12 inches or less, the claim that the defendant's negligence was the proximate cause of the second fracture finds, to say the least, very slight support from the facts revealed by the record. Upon this analysis of the case, we find it difficult to consider seriously the claims advanced by the plaintiff. Nevertheless the trial court has entered its findings in favor of those claims, and we shall review the evidence adduced upon the whole case, in order to determine whether it is sufficient to support the findings.

The only evidence which appears to support the finding that the surfaces of the bones were separated in April, 1912, is found in the testimony of Dr. C. A. Rogers. Upon being handed an X-ray photograph of the leg, taken on April 28 or April 29, 1912, Dr. Rogers remarked that, inasmuch as no sign of a callus appeared, he should judge that the leg had been set very recently—a few days prior to the date of the photograph. A callus is a formation of new bony tissue found between and around the fractured ends of a broken bone in the process of reuniting, and we must infer from Dr. Rogers' testimony that, if it forms at all, it begins to show in an X-ray photograph within a few days after the process of reuniting begins. Therefore the fact that Dr. Rogers saw no sign of a callus in the photograph taken on April 28 or April 29, 1912, merely tends to show that no callus was ever formed around the break in question prior to that date. But that fact, if true, cannot serve as the basis for the further inference that a setting of the leg took place a few days prior to the date of the photograph. That this must be so appears from the undisputed fact that the plaintiff originally broke his leg on March 6, 1912, and that it was set on the following day. Since it necessarily follows from Dr. Rogers' testimony that no callus formation appeared at all or at any time after that setting and prior to the date of the photograph, the absence of a callus cannot be taken to indicate a resetting a few days prior to April 28 or April 29, 1912.

But, even assuming that the evidence supports the findings that the defendant separated the surfaces of the fractured bone and reset the leg in April, 1912, still we are of the opinion that the evidence does not show that the defendant failed to use reasonable prudence and skill in performing that operation or in treating the leg thereafter. It is true that there is some evidence which tends to show that at the time of the fall and the second fracture the ends of the broken bone overlapped nearly one-half of an inch, and that there was no complete bony union prior to the treatment of another physician for the final fracture resulting from the fall. In the absence, however, of a showing that such a condition would have been at least improbable, had the leg received reasonably prudent and ordinarily skillful surgical treatment, it cannot be said that the mere pathological condition of the leg in and of itself sufficed to show negligence on the part of the defendant in resetting the leg.

> "The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances." Zoterell v. Repp, 187 Mich. 330, 153 N. W. 695.

With respect to the failure to attain a complete bony union, the plaintiff's experts themselves testified that there was no way for an average or even a skilled surgeon to tell whether ligamentous or bony tissue was being deposited between and around the fractured ends of a broken bone in the process of reuniting, without opening the wound. While Dr. C. A. Rogers testified that it was good surgery to open the wound and staple the bone, especially where, as here, there was an oblique fracture, none of the experts gave it as their opinion that it was not good practice to rely altogether upon casts and splints, as did the defendant in the instant case.

Concerning the overlapping, the plaintiff's expert, Dr. C. A. Rogers, said:

> "Sometimes you will have a bone slip with the best in putting on splints anyway."

Again, referring to the break treated by the defendant, he said:

> "The break runs obliquely, as distinguished from straight across. Where a bone is broken in that form, it is absolutely a general proposition in surgery more difficult to set that bone in place and hold it in place than where it is straight across. We do not expect to get a perfect alignment of the bone, where the character of the break is such as was this bone."

Dr. Homer Rogers added:

> "It is more difficult to reduce a fracture of that character than in reducing a transverse fracture. I would not insure that the reduction of a fracture of the character in question would be perfect."

None of the experts gave it as their opinion that the use of reasonable care and skill would have insured a more perfect reduction.

It follows, from the foregoing analysis of the evidence, that negligence on the part of the defendant must be predicated, if at all, upon some act or omission in the course of the treatment of the fracture by the defendant shown to have been imprudent or unskillful. There is no direct testimony to the effect that the surfaces of the bone were in fact separated during the month of April. There is therefore no direct testimony as to the method adopted by the defendant in aligning the bones and reducing the fracture at that time, even assuming that he did make an attempt to realign the bones and reduce the fracture anew. In the absence of evidence, it cannot be assumed that he proceeded, if he proceeded at all, without ordinary care or skill. It will be necessary, therefore, upon this view of the case, to confine our attention to a consideration of the acts of the defendant as to which there is evidence in the record. It appears that a plaster of paris cast was put on the leg on April 9, 1912; that another cast was put on on April 12, and possibly another on April 17; that the cast was removed on April 25; and that a yucca splint was then put on and held in place by a light bandage. The following testimony of the defendant concerning the circumstances attending and following the treatment of April 25, 1912, is uncontradicted:

> "I put on what is called a yucca splint—a splint made from material gotten from the yucca plant for that particular purpose. I put that on and bandaged, and the patient wanted to go to the ranch, I believe the Panama ranch, and I told him he could go by being careful and using his crutch all the time, keeping the splint on for about two weeks from the time that I put it on. * * * I did not see him any more for some time, as he went to the Panama ranch, or some place else, I don't know where. * * * I do not remember of having seen him between that and the time I saw him in April [July], as in the meantime I had gone South on a vacation, and he knew I was going. I told him, if this thing didn't go right, to go on to Dr. Kellogg, or some doctor, to see to it for him during my absence."

There is no evidence to show that he was thereafter called upon to give any further treatment, or to take any further responsibility in the case. There was no testimony of any expert witness who said that anything covered by this treatment was improper, or that there was anything lacking in the treatment which would have been included by a reasonably prudent and skillful surgeon.

In McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 873, it is said:

> "Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done."

Quoting further from the same case:

> "The authorities are practically uniform in holding * * * that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony."

See, also, Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128; Hesler v. California Hospital Co., 174 Pac. 654.

The evidence wholly fails to show any lack of care and skill on the part of defendant in setting and treating the fractured bone of plaintiff's leg.

The judgment appealed from is reversed, and the case remanded for a new trial.

We concur: WILBUR, J.; MELVIN, J.

180 Cal. 430

In re HOYTEMA'S ESTATE. (S. F. 8843.)

(Supreme Court of California. May 29, 1919. Rehearing Denied June 28, 1919.)

1. WILLS 🔑865(1)—CONSTRUCTION—PARTIAL INTESTACY.

A will directing that in case of testatrix's death it be sent to her brother, and that, should he be dead, named nieces were to sell testatrix's property and divide it between children of a named sister, with two specific bequests of $500 each, *held* to make division of the property among the children of the named sister contingent and conditional upon testatrix's brother's death, so that, he being alive, the two specific bequests constituted the only effective disposition made by the will, and as to the residuum testatrix died intestate.

2. WILLS 🔑448—CONSTRUCTION FAVORABLE TO TESTACY.

Constructions leading to intestacy, total or partial, are not favored, and will be rejected when the language used reasonably admits of a construction that renders the will effective as to all the property of the decedent.

3. WILLS 🔑440 — CONSTRUCTION — INTENT—LANGUAGE OF WILL.

Although the language used must be liberally construed with a view to carrying into effect what the will as a whole shows was testator's true intent, this intent must, according to Civ. Code, § 1318, be found in the language used in the will, taking into view, in cases of uncertainty arising upon its face, the circumstances under which it was made.

4. WILLS 🔑448 — CONSTRUCTION FAVORING TESTACY.

Courts are not permitted, in order to avoid a conclusion of intestacy, to adopt a construction based on conjecture as to what the testator may have intended, although not expressed.

Shaw, Lawlor, and Olney, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Jennie Hoytema. Appeal from decree of partial distribution. Affirmed.

Shelton & Levy, of San Francisco, for appellants.

Lloyd S. Ackerman, Joseph E. Reardon, Wm. M. Abbott, and Wm. M. Cannon, all of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for respondent.

ANGELLOTTI, C. J. This is an appeal from a decree of partial distribution. The only appellants are the four children of decedent's deceased sister, Anna Mathieson, residents of the kingdom of Denmark, who claim that under a writing admitted to probate as the last will of decedent they are entitled to all of the estate of deceased except two legacies of $500 each. The lower court concluded that such writing was insufficient as a will or otherwise to dispose of the estate of decedent except as to the said two legacies, and that as to all of the estate over $1,000 so disposed of the decedent must be held to have died intestate. The effect of the decision is that, except as to $1,000 to be paid on the two legacies, the estate of decedent will go, one-third to Hans Peter Nelson, surviving brother of decedent; one-third to the three surviving children of her deceased sister, Bena G. Edwardson, one of whom is named Agnes; and one-third to the appellants here, the surviving children of her deceased sister Anna Mathieson, these being all of her heirs at law.

The record is such that we are bound by the finding of the lower court as to the contents of the will, which, the bill of exceptions shows, was entirely written, dated, and signed by the hand of the decedent, and was almost entirely in the Danish language. The trial court by a finding unquestioned by any specification of insufficiency, declared the same to be in the words and figures following:

"San Francisco, October 5, 1915.

"I am writing these lines in case I should meet with an accident or in any other way die then it is my wish if my brother Hans Peter Nelson is alive send this letter to him. Should he be dead then it is my wish that by brother's daughter Emma and my dead sister Bena's daughter who lives in Chicago, her name is Agnes, shall together sell all my property and divide equally between my dead sister Anna's children by name Engeborg, Anna, Alfrida, and Otto, living in Copenhagen and Nakskov. It is my wish that my niece Emma Nelson receive $500 extra for her taking care of me. It is also my wish that my friend Mrs. Rosa Friis shall be given $500.

"Mrs. Jennie Hoytema,
"94 Sanchez Street."

"P. S. My safe deposit box is in the Humboldt Savings Bank No. 295."

The niece, Emma Nelson, referred to herein is the daughter of the brother, Hans Peter Nelson, who survived decedent.

[1-4] The lower court was of the opinion that the testamentary disposition so apparently made in favor of the children of the dead sister Anna was conditioned upon the death before her own death of her brother, Hans Peter Nelson. This view was upheld by the decision of Department 2 of this court, the opinion being written by Mr. Justice Lennon, and upon mature consideration we believe this to be the correct view. We recognize that this construction results in almost total intestacy, in view of the fact that her brother survived decedent, and also that constructions leading to intestacy, total or par-

tial, are not favored, and will be rejected when the language used reasonably admits of a construction that renders the will effective as to all the property of the decedent. It is also an elementary rule in the construction of wills that the language used must be liberally construed with a view to carrying into effect what the will as a whole shows was the real intent of the testator. This intent, however, must be found in the language used in the will, taking into view in cases of uncertainty arising upon its face the circumstances under which it was made. Civ. Code, § 1318. Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended, although not expressed. In the case at bar we have a testatrix whose next of kin were a brother and the children of two deceased sisters. Her brother was her nearest relative. No reason whatever appears why in disposing of her property she should discriminate against him in favor of children of one or both of her deceased sisters. Certainly in her very informal will she does not do so in plain and unambiguous terms. To the contrary, her first thought is of him, and her first expression of desire is, "It is my wish if my brother, Hans Peter Nelson is alive, send this letter to him." No expression direction or desire as to what is to become of her property in that contingency or what he is to do in the matter appears. It is as though in the mind of the testatrix this was to be the end of the whole matter. If we were at liberty to resort to conjecture as to the intent we might well conclude from the language that she thought she was giving the property to him in this contingency or that he would then take the property as her nearest relative. It is only "should he be dead" that she has any desire to express in regard to the disposition of her property, and her desire in that contingency is that her dead brother's daughter, Emma, and her dead sister Bena's daughter should sell the property and dispose of it in the way indicated. Appellants seek to make the primary object of the instrument the distribution of the property in any event in the manner specified in the portion commencing "should he be dead," and to do this find it necessary to construe the directions to Emma and Agnes as being intended as applicable to the brother in the event that he survived decedent, although no such idea is expressed. It is sufficient to say that no such intention is expressed with reasonable certainty, and that under the circumstances any such conclusion would be based solely on conjecture. As was said in the department opinion:

> "Only through speculation and conjecture may the construction contended for by appellants be confirmed. And this cannot be countenanced in view of the cardinal rule to the effect that in the interpretation of wills it is not the probable intent which may have existed in the mind of the testatrix which prevails, but only that which is expressed in the language of the will. Estate of Blake, 157 Cal. 448, 108 Pac. 287."

We are satisfied that the appellants cannot fairly be held to take anything under the will. By the decree they are adjudged their rightful share as heirs of deceased. No objection is made by them as to the allowance of the two legacies of $500 each, a matter apparently settled by the decree. All parties to the estate have acquiesced in their allowance.

It may be noted that appellants claim that the translation of the will embodied in the court's finding is not entirely correct, and append to their brief what they call a "literal translation." While we are bound by the translation found, we do not think that the so-called "literal translation" would materially help appellants. In the same connection respondents suggest that, properly translated, the provision as to the disposition of the property by Emma and Agnes is that they "shall together sell all my property and share with (instead of divide between) Anna's children; the Danish word "udele" used meaning "share" and not "divide." This would produce the very natural and reasonable conclusion that even had the brother predeceased the decedent, appellants under the will could take only one-third of the property, and would entirely explain the use of the word "extra" in the $500 bequest to Emma Nelson.

The decree is affirmed.

We concur: LENNON, J; WILBUR, J.; MELVIN, J.

SHAW, J. I dissent. In my opinion certain well-established rules of interpretation applying especially to wills, when considered in connection with this will, give it a meaning different from that given to it by the majoriy opinion.

The primary object of a court, when an ambiguous will is before it, must be to ascertain, as far as possible from its language, the intention of the testator. Civ. Code, § 1318. All its parts are to be construed in relation to each other, and so as, if possible, to form one consistent whole. "Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." Civ. Code, § 1326. Words which are irreconcilable with the general context may be rejected, whatever the local position which they happen to occupy. 1 Jarman, *445. Where it is clear on the face of a will that the testator's meaning is not completely expressed by the words used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context. 1 Jarman, *p. 451; 1 Redf. on Wills, 454. Many instances of this rule are given by Mr. Jarman at page *455. Where an expression, otherwise senseless or contradictory, can be rendered consistent with the context by being transposed, such transposition is warranted. Id. *466; 1 Redf. on Wills, 467. Punctuation may be disregarded if a change in that respect will render its meaning more obvious. 1 Redf. 434. In construing wills drawn by persons unskilled in the art "it is the duty of the courts to spell out the probable relative importance of the different provisions, and how far one was intended to yield to another, when it becomes impracticable to carry all into effect." 1 Redf. on Wills, 452.

A striking instance of the liberality indulged in these particulars in considering olographic wills drawn by illiterate persons is found in the decision of this court in Estate of Stratton, 112 Cal. 517, 44 Pac. 1028. The will in that case, after a number of specific gifts, concluded as follows:

> "Common Beadsteads with Feather Bead and all the rest of the Furniture and all Money in what Ever Shape he will have full controle after all Expenses is Paid of my sickness and death. Mrs. Georgiana Hanham Stratton.
> "my Husband
> "Thomas Stratton."

It was held that the will could be made clear by transposing the words "my Husband Thomas Stratton" from the place below the signature of the testatrix to a place immediately after the word "he"; and, this being done, it was construed to make a gift to the husband of the residue of the estate.

Coming now to the will here involved, we repeat it in full to facilitate the discussion:

> "San Francisco, October 5, 1915.
>
> "I am writing these lines in case I should meet with an accident or in any other way die then it is my wish if my brother Hans Peter Nelson is alive send this letter to him. Should he be dead then it is my wish that my brother's daughter Emma and my dead sister Bena's daughter who lives in Chicago, her name is Agnes, shall together sell all my property and divide equally between my dead sister Anna's children by name Engeborg, Anna, Alfrida, and Otto, living in Copenhagen and Nakskov. It is my wish that my niece Emma Nelson receive $500 extra for her taking care of me. It is also my wish that my friend Mrs. Rosa Friis shall be given $500.
>
> "Mrs. Jennie Hoytema,
> "94 Sanchez Street.
>
> "P. S. My safe deposit box is in the Humboldt Savings Bank No. 295."

The opening sentence disclosed the testamentary intent. The mind of the writer then turned to the selection of a person to carry out her intent, to act as executor. It may readily be supposed that her brother would be preferred for that office, and, accordingly she named him, saying, "Send this letter to him" if he is alive. In her ignorance, she evidently believed that if the letter were placed in his hands he would be thereby authorized to dispose of the property as the will directed. But it occurred to her that he might be dead, and in that event a substitute must be designated. For that purpose she chose two nieces, Emma, daughter of the brother, and Agnes Edwardson, daughter of her sister. She then came to the point of stating what was to be done with the property. The instructions to those to whom the office of executor should fall were "to sell all my property and divide equally between my dead sister Anna's children, by name Engeborg, Anna, Alfrida, and Otto, living in Copenhagen and Nakskov." These words are certain, and their effect is absolutely clear. They cannot be given any other meaning than that conveyed by the ordinary sense of the words, unless a clear intention to use them in some other sense can be collected from the context or from extrinsic facts. Civ. Code, § 1324. No extrinsic facts appear, and the context furnishes no cause for giving them other than their ordinary import. The use of the word "extra" in the gift of $500 to Emma is easily explained. The gift shows on its face that Emma had been taking care of the testatrix. Apparently Emma was the only relative she had in California. Her brother lived in Idaho, and the other heirs in Illinois and Denmark. It is to be supposed that Emma had already received something for this service, and the intent evidently was, as the words indicate, to give her an additional compensation therefor. To give it the effect of qualifying or explaining the meaning of the preceding disposition in any manner would violate the rule that "a clear and distinct devise or bequest cannot be affected" by any other words "not equally clear and distinct."

I think the will on its face clearly gives the residue of the estate to the children of Anna, the deceased sister of the testatrix, and that it left nothing undisposed of to go to the other heirs.

I concur: LAWLOR, J.

I concur with Justice SHAW: OLNEY, J.

180 Cal. 368

In re PUSEY'S ESTATE. (L. A. 5922.)

(Supreme Court of California. May 14, 1919.)

1. JUDGMENT 🔑818(6) — FOREIGN JUDGMENT—IMPEACHMENT—WANT OF JURISDICTION.

A recital in a foreign judgment of facts sufficient to give the court jurisdiction can be impeached by a bare preponderance of evidence inconsistent with the recital.

2. DIVORCE 🔑328—FOREIGN DECREE—IMPEACHMENT—EVIDENCE.

Evidence *held* sufficient to support finding that a second affidavit was not filed in a foreign divorce suit, notwithstanding a recital in the judgment record of the filing of such affidavit.

3. WITNESSES 🔑195—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE—EFFECT OF DIVORCE.

Where, after a divorce decree, the validity of which is attacked, both parties remarried, one of them seeking to establish the validity of the decree cannot object to the introduction of testimony by the former spouse as to matters occurring after the alleged divorce on the ground that it was a privileged communication between husband and wife within Code Civ. Proc. § 1881.

4. WITNESSES 🔑188(2) — PRIVILEGED COMMUNICATION—HUSBAND AND WIFE—EFFECT OF DIVORCE.

Code Civ. Proc. § 1881, providing that neither spouse can after termination of their marriage relation be examined without the consent of the other as to any communication between them during marriage, does not prevent the introduction of testimony, the purpose of which is to show the act of communicating, and not the character of communication.

5. JUDGMENT 🔑818(6)—FOREIGN JUDGMENT—COLLATERAL ATTACK—STATUTE OF LIMITATIONS—LACHES.

Laches and the bar of the statute of limitations have no application to a collateral attack upon a foreign judgment rendered without jurisdiction.

6. DIVORCE 🔑328—JUDGMENT—COLLATERAL ATTACK—RIGHT TO ATTACK IN PROBATE OF A WILL.

Where the probate of a will was contested because of revocation by marriage and sought to be upheld because testatrix's husband was never validly divorced from his first wife, proponents are entitled to attack the foreign judgment in the divorce action on the ground of being void for want of jurisdiction in that there was no sufficient affidavit for the publication of summons.

Department 2.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Probate of the will of Gertrude C. Pusey, also designated as Gertrude C. Finley Pusey, deceased, opposed by Henry F. Pusey and another. From an order admitting the will to probate, contestants appeal. Affirmed.

See, also, 173 Cal. 141, 159 Pac. 433; 170 Pac. 846.

C. D. Latourette, of Oregon City, Or., and R. Y. Williams and A. W. Rutan, both of Santa Ana, for appellants.

Steele Finley, of Santa Ana, and E. J. Fleming, B. F. Woodard, Michael F. Shannon, and E. L. Kolb, all of Los Angeles, for respondents.

LENNON, J. For the third time this case is here on appeal. The question heretofore presented and now again presented for review involves the correctness of an order of the lower court admitting the will of Gertrude C. Pusey to probate upon the petition of the respondent S. H. Finley. The appellants are Henry F. Pusey, who contested the probate of the will, and C. S. Crookshank, who, as nominee of the said Henry F. Pusey, petitioned for letters of administration upon the estate of the deceased. These appellants now, as heretofore, contend that the will in question was revoked by the marriage of the testatrix to Henry F. Pusey. The respondents, on the other hand, contend that the testatrix never in fact became the wife of Pusey, because he had never been validly divorced from his former wife. In 1893, a decree of divorce in favor of Henry F. Pusey was entered by an Oregon court of competent jurisdiction, which recited that jurisdiction of the defendant had been obtained by publication of summons. The respondents assert, however, that the decree of divorce was void for want of jurisdiction over the defendant, because there was no sufficient affidavit for the publication of summons. The said decree was admitted in evidence. It contains, among other things, a recital that service of summons by publication had been ordered "upon due and proper affidavits. * * *" However, only one affidavit to support the order for publication of summons appeared in the record of the divorce action. This affidavit was decreed by the trial court to be insufficient as a basis for the order of publication of summons, because it contained no averment or attempted averment that due diligence had been employed to ascertain the residence of the defendant in the divorce action or that such residence could not have been ascertained by the exercise of due diligence.

Upon the first trial in the probate proceeding, it was not affirmatively shown that the defendant in the divorce action was alive at the time of Pusey's marriage to the testatrix. Upon an appeal to this court, it was then held that a presumption should be raised in favor of the validity of the marriage, whereby it should be assumed that the defendant in the divorce action was dead at the time of the marriage. The order of the lower court admitting the will to probate was reversed for the error of the court in failing to consider this presumption. Estate of Pusey, 173 Cal. 141, 159 Pac. 433.

A second trial in the probate proceeding was thereupon had, wherein it was shown and found that the defendant in the divorce action was alive at the time of Pusey's marriage to the testatrix. Upon the appeal in that case, this court emphasized the fact that the decree of divorce recited that service of summons by publication had been ordered "upon due and proper affidavits. * * *" It was held that this recital imported that more than one affidavit was filed to obtain the order, wherefore, the attack on the judgment being collateral, it would be presumed in its favor that there was at least one other affidavit in addition to the defective affidavit appearing in the record, that such second affidavit was sufficient, and that it was lost after being duly filed. For the error of the lower court in failing to consider this presumption the order admitting the will to probate was again reversed. Estate of Pusey, 170 Pac. 846.

A third trial was had. Inasmuch as any possible objection to the allowance of such a new trial is fully and finally answered in the opinion rendered in the second appeal in this case (170 Pac. 846), we need not again consider the point here. Conflicting evidence was introduced bearing on the issue of the filing of a second affidavit to support the order for publication of summons. The court found that no such affidavit was in fact filed, and again made an order admitting the will to probate.

The appellants attack the order upon various grounds: (1) That the evidence is insufficient to support the finding; (2) that some of the evidence was improperly received; (3) that any attack on the judgment is barred by the statute of limitations or by the equitable doctrine of laches; and finally (4) that it is not competent for a stranger to the record, who had no interest in the outcome of a judgment at the time it was made, to attack it collaterally, even on the ground that it is void for want of jurisdiction.

[1] In support of the first contention, appellants lay great emphasis upon a statement in a former decision of this case that a recital in a foreign judgment of facts sufficient to give the court jurisdiction could be impeached only by proof of necessity inconsistent with the recital. But the words "of necessity" refer to the nature, and not to the weight, of such independent proof. If there was a bare preponderance of evidence of a nature of necessity inconsistent with the recital, that would be sufficient to impeach it.

[2] It was proved that the register of actions recorded the filing of but one affidavit in the divorce action in question. Of course, a second affidavit might have been filed and never recorded. But an examination of the files for a period of six months before and six months after the filing of the complaint in the divorce action was proved to have resulted in failure to discover a second affidavit. This evidence was of a nature necessarily inconsistent with the recital that proper affidavits were filed, but it might be urged that a second affidavit, though filed, might have been not only not recorded, but also lost. To prove that such was the case appellants placed Senator Brownell on the stand. He had been Pusey's attorney in the divorce action in question. The material portion of his testimony relied on by the appellants reads as follows:

> "My recollection is absolutely that my affidavit was defective on the ground that I did not show sufficient diligence. Now that is my idea. Now, although I don't say that positively, but it must have been that, because I can see right in that affidavit that I left it out. I can't remember the details, but I know the judge told me my affidavit was wrong, and I came back here and saw Pusey and made an additional affidavit, and I am satisfied it was to show that he exercised the proper diligence in trying to ascertain what her residence was. Now, that is my recollection. I cannot in all these years go into detail, because I don't know."

It is significant to observe that Brownell here expressed his idea of the preparation, and not of the filing, of the alleged second affidavit. Moreover, it was the province of the trial judge to pass upon the credibility of the witness. Numerous depositions were offered to the effect that the reputation of the witness for truth, honesty, and integrity was not good. While these were met by other depositions, the trial court might properly, we think, have wholly disbelieved the testimony quoted, and such a conclusion would be further supported by the consideration that the statement was quite possibly influenced by a desire to make it appear that there had been no negligence in handling the divorce action. In addition to these considerations, Brownell's testimony itself not only tends to impeach the statement quoted, but contains admissions which positively support the contention of the respondents. Being presented with an affidavit in another divorce action brought by him at about the same time as the one in question which was defective in the same particular as the affidavit filed in the Pusey Case, he stated:

> "Oh, I made a great many affidavits that way. I haven't any doubt but what I did. I was practicing politics in those days more than anything else and was very careless in my business."

This statement could have been properly considered by the court as evidence that a second affidavit was not prepared, or that, if it was prepared, it was not filed.

Finally, we have the testimony of the defendant in the divorce action which the appellants evidently regard as very damaging to their case. And so in fact it is. Describing an interview with Pusey subsequent to the divorce, she states:

> "He had very little to say. I was trying to tell him all the time that he did know where I was all the time. I couldn't hardly realize what this was all about. I remember so well I kept saying to Pusey, 'You did know I was there, Henry; you used to write to me all the time.' He didn't answer me for a while, and finally he said, 'Yes; I did know where you were.'"

If the court believed this testimony, as it might properly have done, it would follow that Pusey could only have executed a proper affidavit by committing perjury. We are not ready to hold that the court was bound to presume that he made a second affidavit if it had further to presume and say that in so doing he made a perjured affidavit.

We are satisfied that the evidence, considered as a whole, is sufficient to support the finding that no second affidavit was in fact filed.

[3] But it is contended on behalf of the appellants that the testimony of Julia Proctor, the defendant in the divorce action, was improperly received. The effect of the decision of the court was to hold that Julia Proctor was at all times the wife of the appellant Henry F. Pusey. The appellants, however, were contending throughout the case that the decree of divorce was valid, and that from and after that decree Julia Proctor ceased to be the wife of the appellant Pusey. Under these circumstances, the appellants offered the objection that her testimony was incompetent, irrelevant, and immaterial. Under some circumstances this general objection might be considered sufficient to raise the point that the testimony sought to be adduced was privileged under that portion of section 1881 of the Code of Civil Procedure which reads:

> "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent." Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223.

In this case, however, there had been a decree of divorce the validity of which was the matter in dispute. After that decree, both parties to the marriage had attempted to contract marriage and had entered into the marriage relation with other parties. The appellants, who were seeking to establish the validity of the decree of divorce, cannot, then, well be allowed to claim that by their general objection they were seeking the benefit of a relation which they claimed did not in fact exist. To properly apprise the court of its nature the objection should, to say the least, have been made in definite and unequivocal language.

[4] It is true that Julia Proctor testified to communications between herself and her husband before as well as after the decree of divorce, and that it is further provided in section 1881 of the Code of Civil Procedure that neither husband nor wife can, even after the termination of the marriage, be examined, without the consent of the other, as to any communication made by one to the other during the marriage. It is to be noted, however, that the point sought to be shown by the communications here in question was the act of communicating, and not the nature or character of the communications themselves; the purpose of the inquiry being to show that the appellant Pusey knew the whereabouts of his wife. These circumstances present a proper case for the application of the rule stated in 4 Wigmore on Evidence, § 2337:

> "The privilege has for its object the security from apprehension of disclosure, a security in consequence of which confidences will be freely given and not withheld. The protection therefore extends only to communications, i. e., utterances, not acts; the reasoning being analogous to that which establishes a similar limitation for communications between attorney and client. * * *"

We think, therefore, that the purpose of the inquiry being to show the act of communicating and not the disclosures involved in the communications, the testimony does not come within the inhibition of the statute.

[5] Considering the contention that the attack upon the judgment is barred by laches or by the statute of limitations, we find that the appellants have cited no statute the effect of which would be to bar the attack upon the judgment in question. They do indeed cite Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 Pac. 19, but the language in that case is applicable only to actions in equity for relief on the ground of fraud. Since the judgment here in question is attacked, not upon the ground that it is voidable for fraud, but upon the ground that it is void for lack of jurisdiction, that case has no bearing upon the issue. Appellants cite numerous cases bearing on the doctrine of laches, but they have failed to show how that doctrine can apply to this case. Nor can it, we think, be asserted that the respondents have in any way slept upon their rights.

[6] Were it not for the elaborate array of cases presented by the appellants, we should consider that any discussion of their fourth point was concluded by the statements in Forbes v. Hyde, 31 Cal. 342, 348:

> "A judgment absolutely void * * * may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties

or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever."

See, also, Pioneer Land Co. v. Maddux, 109 Cal. 638, 42 Pac. 295, 50 Am. St. Rep. 67, and Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275.

An examination of appellants' cases, however, reveals the fact that, practically without exception, it was assumed or clearly shown that the defendant in the action wherein the judgment which was being attacked had been rendered had been regularly brought within the jurisdiction of the court. It is indeed stated in 23 Cyc. 1068, that strangers to the record can attack a judgment only when rights accruing to them prior to its rendition are affected. We have examined all the cases cited to support this statement. In each case property rights had been the subject of adjudication, and the rights of the party attacking the judgment had arisen with respect to the property in question after the judgment had been rendered. The judgment was in no case alleged to be void. Obviously no rule based on these cases has any application to the case at bar. McLeod v. McLeod, 144 Ga. 359, 87 S. E. 286, appears at first glance to support the appellants, but we note that the court decided, not that a stranger could not attack a void judgment, but that the judgment in question was not void. It remains only to consider the case of Harpold v. Doyle, 16 Idaho, 671, 102 Pac. 159. We do find language in support of the appellants' contention in the opinion of Sullivan, J. It appears, however, to be dictum. It was dissented from by Stewart, J., and upon a rehearing of the case it was so qualified as to remove any support it may formerly have afforded to the argument of appellants. Under the circumstances of this case, the respondents are entitled to attack the judgment in the divorce action on the ground that it is void for lack of jurisdiction. They have, we think, been successful in this attack.

The order appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

(180 Cal. 356)

HUTCHINSON CO. v. GOULD et al.
(S. F. 8214.)

(Supreme Court of California. May 9, 1919.)

1. PRINCIPAL AND AGENT ⚿166(2)—RATIFICATION — KNOWLEDGE OF FACTS — CONFIDENCE IN AGENT.

An owner of city lots, who, upon being told that his agent had signed a contract for street improvements upon them, said that it was satisfactory to him, will be deemed to have ratified the contract, though he did not have full knowledge of the facts at the time; his confidence in his agent appearing such that he was willing to trust to his judgment and ratify his act without making further inquiry.

2. FRAUDS, STATUTE OF ⚿56(4)—INTEREST IN REAL ESTATE — CONTRACT FOR STREET IMPROVEMENTS—ORAL RATIFICATION.

A written contract for street improvements providing for a lien under Code Civ. Proc. § 1191, does not make it a contract providing for an interest in real estate, required by Code Civ. Proc. § 1971, to be in writing, as well as a ratification thereof, according to Civ. Code, §§ 2309, 2310, since the lien is created by statute.

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Hutchinson Company, a corporation, against Charles B. Gould and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Reed, Nusbaumer & Bingham, of Oakland, for appellants.

Robinson, Robinson & Price and R. W. Macdonald, all of Oakland, for respondent.

WILBUR, J. This is an action to foreclose a mechanics' lien upon certain lots owned by defendant Charles B. Gould for street work done under private contract by the plaintiff. Plaintiff had judgment and defendant Gould appealed.

[1] The street work was done under a written contract signed by S. S. Austin on behalf of Gould, the owner of the lots sought to be subjected to the lien. The only question in the case is whether or not the finding of the trial court that appellant is bound by the signature of Austin to the contracts for street work is sustained by sufficient evidence. A consideration of the evidence most favorable to the finding of the trial court leads us to the conclusion that there was sufficient evidence to justify the findings of the trial court. The vice president and general manager of respondent testified that after the signing of the contracts in question by Austin he told appellant that:

> "Mr. Austin has signed our contract for Gray street and Douglas street. * * * I told him that Mr. Austin had signed our contracts for the improvement of these two streets, Boulevard Park tract, and asked him if Mr. Austin was authorized to do it. He said, 'Did Mr. Austin sign it?' I said, 'Yes, he has signed our contract.' He said, 'That is satisfactory to me.'"

The appellant contends that this conversation did not amount to a ratification, and that, if it did, it was a ratification without a full knowledge of the facts, and therefore not binding on the appellant. In order to understand the situation of the parties and the significance of the conversation it will be necessary to state additional evidence. Appellant was the owner of unsold lots in the Boulevard Park tract. The Union Bank of Savings held a mortgage thereon and all sales of unsold lots were handled at the bank. Miss Baker, an employé in the bank, held appellant's general power of attorney. The appellant testified that he did not handle these properties at all. S. S. Austin was the sales agent of the tract. For six or seven years he had been daily upon the property, occupying a branch office thereon. He had sold most of the property and had handled the improving and selling of the tract. When anything was required to be done, the usual procedure was for Austin to notify the bank and for them to authorize him to proceed. Mr. Austin had signed a protest against the street improvement for appellant. He had caused a sidewalk to be laid in front of the lots in this litigation, which was paid for. At the request of the other property owners along Gray and Douglas streets, Mr. Austin signed a contract for the improvment of these streets on behalf of appellant and with all the other property holders fronting on these streets. It was under these circumstances that respondent's general manager told Mr. Gould that Mr. Austin had signed "our contracts for the improvements of these two streets, Boulevard Park tract, and asked him if Mr. Austin was authorized to do it" and received the reply "That is satisfactory to me."

Appellant contends this is not a sufficient ratification, for the reason that he had insufficient information at the time of the nature and character of the contract to ratify the same, and for the further reason that the ratification was not in writing. It is true that the nature and character of the proposed improvements and the price therefor and the extent thereof—essential features of the contract—were not disclosed by the statement and question of Mr. Hutchinson. On the other hand, Mr. Gould knew of his ownership of the lots fronting upon the streets in question, knew Mr. Austin and his familiarity with the contract and with the conditions necessary for successful sales, and his question concerning the contract, "Did Mr. Austin sign it?" showed that he was willing to trust to the judgment of Mr. Austin in regard to the matters not disclosed by Mr. Hutchinson's question. As is said in 2 Corpus Juris, 481:

> "The lack of full knowledge does not protect a principal who is willfully ignorant, and deliberately chooses to act without such knowledge, as where, knowing that he is ignorant of some of the facts, he has such confidence in his agent that he is willing to assume the risk and ratify the act without making inquiry for further information than he at the time possesses, or where he intentionally and deliberately ratifies without full knowledge, under circumstances which are sufficient to put a reasonable man upon inquiry."

See, also, to the same effect, Mechem on Agency (2d Ed.) § 404; Ballard v. Nye, 138 Cal. 588, 598, 72 Pac. 156; Pope v. Armsby, 111 Cal. 159, 43 Pac. 589; Phillips v. Phillips, 163 Cal. 530, 535, 127 Pac. 346.

[2] Appellant contends that as the contract in question provided for a lien, it is a contract providing for an interest in real estate required by the provisions of section 1971, Code of Civil Procedure, to be in writing and that, therefore, under the provisions of section 2310, Civil Code, the ratification in question must have been in writing. The lien for the contract price for work done upon a public street is created by law. Section 1191, Code Civ. Proc. The contract does no more than expressly recognize this fact. It therein provides for liens "as provided by section 1191 of the Code of Civil Procedure of the state of California," thus by reference making the law concerning liens for work done on public streets a part of the contract. It has been held by this court that contracts for the performance of work upon public streets by private contract need not be in writing. Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109. The effect of the contract would have been the same, with or without the stipulation concerning the liens for the value of the work done. Such stipulation is not a material part of the contract and may be disregarded. Authority to execute the contract might rest in parol and its ratification therefore can rest in parol. Civ. Code, § 2309.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

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180 Cal. 404

SELOWSKY v. SUPERIOR COURT OF NAPA COUNTY. (S. F. 8927.)

(Supreme Court of California. May 27, 1919.)

1. CONTEMPT ⚷20—DISOBEDIENCE OF DECREE.

Under Code Civ. Proc. § 1209, and Pen. Code, § 166, willful disobedience of a decree of a court having jurisdiction to make it ordinarily constitutes "contempt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

2. NUISANCE ⚷86—VIOLATION OF INJUNCTION—CONTEMPT.

Pursuant to Code Civ. Proc. § 1211, the superior court which had under St. 1913, p. 20, known as the Red Light Abatement Act, enjoined petitioner from using or permitting the use of premises for the purpose of lewdness, may, on presentation of an affidavit setting forth the facts, take cognizance of a contempt arising out of disobedience of the order.

3. CONTEMPT 🔑54(4) — AFFIDAVIT — SUFFICIENCY.

A proceeding to punish for contempt is criminal in character, and the affidavit which is made the basis of the proceeding is the counterpart of a complaint in a criminal action; so, while a sufficient affidavit is necessary, the affidavit charging a contempt need not be more specific in its averments than a complaint or information charging a crime.

4. DISORDERLY HOUSE 🔑12 — OFFENSES — COMPLAINT.

A general allegation that premises were used for the purposes of lewdness, assignation, and prostitution is sufficient to charge violation of Pen. Code, § 315, without alleging the names or characters of the frequenters of the premises.

5. NUISANCE 🔑86 — VIOLATION OF INJUNCTION — CONTEMPT — AFFIDAVIT — SUFFICIENCY.

In view of the fact that false allegations in an affidavit charging contempt in the violation of a decree made under St. 1913, p. 20, enjoining petitioner from using premises for prostitution, would be perjury under Pen. Code, §§ 118, 125, *held*, that an affidavit alleging that after the decree petitioner used the premises for purposes of lewdness, assignation, and prostitution was sufficient to support a judgment punishing petitioner for contempt.

6. NUISANCE 🔑86—VIOLATION OF INJUNCTION—FINDINGS—SUFFICIENCY.

Where petitioner was charged with contempt in using premises for purposes of lewdness, assignation, and prostitution after such use had been enjoined in a proceeding under St. 1913, p. 20, findings that petitioner, in violation of the decree, conducted the premises for that purpose, are sufficient, without findings of any particular acts of lewdness, etc., to support a judgment punishing her for contempt.

7. STATUTES 🔑71—UNIFORM OPERATION OF GENERAL LAWS.

The provision of Const. art. 1, § 11, that all laws of a general nature shall have a uniform operation merely requires a law to act uniformly upon all persons in the same category, and operation upon different classes is proper if there is a reasonable basis for the classification.

8. STATUTES 🔑74(1)—UNIFORM OPERATION—PUNISHMENT FOR CONTEMPT.

As the mere keeping of a house of prostitution is a crime denounced by Pen. Code, § 315, petitioner, who was found guilty of contempt in violating an order made under St. 1913, p. 20, enjoining her from using premises for immoral purposes, may be punished as provided in section 6 of that act, notwithstanding the punishment was more severe than the general punishment provided for contempts; for such a classification was reasonable and did not violate Const. art. 1, § 11, requiring general laws to have a uniform operation.

9. STATUTES 🔑110½(1) — VALIDITY — TITLE OF ACT—RED LIGHT ABATEMENT LAW.

The title of St. 1913, p. 20, known as the Red Light Abatement Act, entitled "An act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation or prostitution are held or occur, * * * and providing for the abatement and prevention of such nuisances by injunction," is sufficient to cover provisions fixing penalties for violations of the injunction.

10. NUISANCE 🔑77—INJUNCTION—REMEDY.

Though courts already had power under the general laws to enjoin the maintenance of bawdyhouses, the provisions for an injunction in St. 1913, p. 20, known as the Red Light Abatement Act, are not nugatory; for the Legislature may provide two or more concurrent modes for obtaining a given end.

11. NUISANCE 🔑77—INJUNCTION—RELIEF.

Under St. 1913, p. 20, known as the Red Light Abatement Act, the court may, pursuant to sections 3 and 6, enjoin the maintenance of premises as a bawdyhouse, without necessarily including the order of abatement contemplated by section 7.

In Bank.

Mary M. Selowsky was convicted of contempt of court, and she applies for writ of certiorari against the Superior Court of the County of Napa to review and annul the proceedings and judgment. Affirmed.

See, also, 177 Pac. 301.

Frank J. Murphy, of San Francisco, for petitioner.

Nathan F. Coombs and Frank L. Coombs, both of Napa, for respondent.

LENNON, J. Certiorari to review and annul certain proceedings culminating in a judgment entered by the superior court of Napa county convicting the petitioner of contempt of court and sentencing her to pay a fine of $1,000 and to serve a term of six months' imprisonment in the county jail.

On November 19, 1917, the superior court of Napa county found, in an action instituted under the provisions of a statute known as the "Red Light Abatement Act" (Stats. 1913, p. 20), that the "Stone Bridge Saloon," situated within the said county, was owned, in the possession of, and maintained and conducted by the petitioner herein as a place of lewdness, assignation, and prostitution. A decree was duly entered in that action adjudging and declaring the said premises to be a nuisance and perpetually enjoining the petitioner from directly or indirectly using or permitting the use of the said premises for the purpose of lewdness, assignation, or prostitution. On July 9, 1918, the said court, having found that the petitioner had used the said premises for the purpose of lewdness, assignation, and prostitution on or about May 18, 1918, entered the contempt judgment here complained of.

The petitioner attacks this judgment on four grounds: (1) That none of the affidavits upon which the contempt proceeding was instituted alleged facts with sufficient detail to give the court jurisdiction to proceed in the matter; (2) that the findings upon which the contempt judgment is based are fatally defective in that they fail to detail any particular and specific act of lewdness, assignation, or prostitution found to have been permitted by the petitioner upon the premises in question; (3) that, in so far as the contempt judgment purports to be entered pursuant to section 6 of the statute in question, it is void, in this, that the said section 6 is violative of section 11 of article 1 of the Constitution of the state of California; (4) that the judgment is not in fact authorized by section 6 of the statute in question, and was not in fact entered pursuant thereto, and that there is no other statutory provision providing for and permitting the particular penalty imposed.

[1-3] Prior to the institution of the contempt proceedings, the court had entered a valid decree prohibiting the use of the premises in question for the purpose of lewdness, assignation, or prostitution. The petitioner was duly served with a copy of the decree. Willful disobedience of the decree of a court having jurisdiction to make it ordinarily constitutes a contempt. Code Civ. Proc. § 1209; Pen. Code, § 166. Pursuant to section 1211 of the Code of Civil Procedure, the court was empowered to take cognizance of a contempt thus committed in a proceeding instituted by the presentation of an affidavit setting forth the fact or facts constituting the contempt. The contempt charged in the proceedings here in controversy consisted in the willful use of the premises in question by the petitioner in defiance of the court's decree for the purpose of lewdness, assignation, and prostitution. A sufficient allegation in the affidavit by which the contempt proceedings were instituted to the effect that the premises were so used was essential. But a proceeding to punish for contempt is criminal in character, and the affidavit which is made the basis of the proceeding is the counterpart of the complaint in a criminal action. Frowley v. Superior Court, 158 Cal. 222, 110 Pac. 817; Ex parte Gould, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57. Therefore an affidavit charging the commission of a contempt need not be more specific in its averments of the facts constituting the contempt than a complaint or an information charging a crime.

[4, 5] In support of the contempt proceedings and judgment, the record shows the affidavit of one Kelton, sheriff of Napa county, wherein it is alleged:

"That on the 18th day of May, 1918, he, in company with officers of the law, visited the premises belonging to Mrs. M. Salowsky, mentioned and set forth in the judgment in said cause made, signed, and filed herein on the 10th day of November, 1917, and that at said time said Mrs. M. Salowsky was still the owner and in charge of said premises, and was keeping and maintaining a house of lewdness, assignation, and prostitution, assisted by one Florence Ponta, as follows:

"That at said time said Florence Ponta occupied a room at said premises with a man, and, affiant verily believes, committed with him then and there the acts of illicit sexual intercourse.

"That thereafter, and on the same day, said Florence Ponta occupied a room at said premises with another man and, as affiant believes, committed such acts.

"That said premises set forth in said judgment hereinbefore referred to, and occupied by said Mrs. M. Salowsky, sometimes known as and called Mary M. Selowsky and Mrs. M. Krueger, on the 18th day of May, 1918, were in charge of said Mrs. M. Salowsky as the owner thereof, and was conducted as a house of lewdness, assignation, and prostitution.

"That Florence Ponta, one of the inmates thereof, is a prostitute, and was working in said house for said Mrs. M. Salowsky as a prostitute.

"That affiant, by reason of his long experience as a sheriff, is familiar with houses of prostitution and knows of his own knowledge that said premises, on said date, were being maintained, conducted, and operated by said Mrs. M. Salowsky as a house of lewdness, assignation, and prostitution, and that all of said acts of lewdness, assignation, and prostitution committed on said premises were committed with the knowledge and approval of said Mrs. M. Salowsky, and for her personal financial gain, and for the purpose of lewdness, assignation, and prostitution."

The petitioner contends that the affidavit was insufficient in that no specific act of lewdness, assignation, or prostitution was alleged except upon the belief of the affiant, and that the grounds upon which that belief was based were not set forth. Conceding that there may be no sufficient allegation of any specific act of lewdness, assignation, or prostitution, we are nevertheless of the opinion that the affidavit as a whole was sufficient to institute the contempt proceedings and to support the judgment. Ex parte Selowsky, 177 Pac. 301. The allegations of Kelton's affidavit that he knew of his own knowledge that the premises in question were in the possession of the petitioner and were being used and conducted by her as a place of lewdness, assignation, and prostitution stated an essential and ultimate fact. Clearly, if Kelton willfully and contrary to his oath averred that to be true which he knew to be false or which he did not know to be true, he was guilty of perjury. Pen. Code, §§ 118 and 125. Such a general allegation of the use of premises as a place of lewdness, assignation, and prostitution would be proof against demurrer in a complaint charging the violation of section 315 of the Penal Code, namely, the keeping of a house of ill fame. It is well settled that a general allegation of the use of premises for the purpose of lewdness, assignation, and prostitution is sufficient in a complaint, and that it is unnecessary to allege the name or character of the frequenters of the house, or to allege particular acts of lewdness, assignation, or prostitution. State v. Patterson, 29 N. C. 70, 45 Am. Dec. 506; State v. Dame, 60 N. H. 479, 49 Am. Rep. 331; State v. Brunell, 29 Wis. 435; Betts v. State, 93 Ind. 375; State v. Schaffer, 74 Iowa, 704, 39 N. W. 89; Drake v. State, 14 Neb. 535, 17 N. W. 117; State v. Mamie Jones, 53 W. Va. 613, 45 S. E. 916. By a parity of reasoning, we are constrained to hold that the affidavit of Kelton was sufficient to give the court jurisdiction to proceed and to pronounce judgment in the contempt proceedings.

[6] The foregoing discussion practically disposes of the contention that the findings of the court were insufficient in that they failed to detail any specific act of lewdness, assignation, or prostitution permitted on the premises in question by the petitioner. The court did find as a fact that on May 18, 1918, the petitioner did, in violation of the decree of the court, conduct the premises in question for the purpose of lewdness, assignation, and prostitution. This was an amply sufficient finding of the ultimate fact in issue. Any finding as to particular acts of lewdness, assignation, or prostitution would have been out of place as being a recitation of purely evidentiary matter.

[7, 8] Considering the constitutional question, it appears that the court in the judgment here in question imposed penalties authorized by section 6 of the abatement act which are in excess of the penalties prescribed in the general Code provisions relating to contempts. It is urged that by reason of the fact that said section 6 provides a different and more severe penalty for a certain class of contempts, it is violative of section 11 of article 1 of the Constitution, which provides that all laws of a general nature shall have a uniform operation. This provision only requires a law to operate uniformly upon all persons in the same category. Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600. It is satisfied if the statute applies alike to all persons or objects within a class founded upon some natural and intrinsic distinction. Vail v. San Diego County, 126 Cal. 35, 58 Pac. 392. Operation differently upon different classes is proper if there is a reasonable basis for the distinction. Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341. The application of these principles to the particular legislation here involved has been correctly stated by Mr. Justice Hart as follows:

> "We know of no constitutional limitation upon the right of the Legislature to fix reasonable penalties for contempts of the judgments, decrees, orders, or processes of courts of justice, and, in admeasuring such punishments, to assign, as it may do and has done in cases of public crime, to certain acts of contempt a greater or less penalty than is annexed to others, according to the nature of the contempt with respect to the subject-matter of the adjudication violated and the consequences of such violation to the public or to individual rights." People v. Barbieri, 33 Cal. App. 770, 780, 166 Pac. 812, 816.

See, also, People v. Casa, 35 Cal. App. 194, 169 Pac. 454.

It is objected that every contempt is against the majesty of the law and the dignity and authority of the court, and that therefore classification on the basis of other circumstances affecting the public welfare must be held improper. The answer to this is that there can be no doubt that the Legislature has power to classify with respect to the penalty to be imposed not only upon the basis of the inherent nature of the offense, but also upon the basis of the nature of the circumstances attending the commission of the offense considered in their relation to the public welfare. People v. Finley, 153 Cal. 59, 94 Pac. 248; People v. Carson, 155 Cal. 164, 99 Pac. 970.

The contempt contemplated and condemned by section 6 of the abatement act is the keeping of a house of lewdness, assignation, or prostitution. We think there is much in the nature of this contempt which differentiates it from other possible acts of contempt and justifies the imposition of a different and more severe penalty. The keeping of a house of prostitution is itself a crime. Pen. Code, § 315. It is a crime involving moral turpitude. It is subversive of the public morals and decency and affects injuriously the sexual life of the people in a manner and to an extent unparalleled by any other act. It is not to be forgotten that morals, decency, and sexual purity have been protected by elaborate penal legislation from the earliest times on the theory that the fate of a nation depends on the breed of men it produces. It follows that it was competent for the Legislature to provide for a distinctive and more severe penalty for the commission of those acts of contempt contemplated and controlled by the statute in question.

Ex parte Clancy, 90 Cal. 553, 27 Pac. 411, cannot be relied upon as an authority against the foregoing conclusion. While in that case the writer of the main opinion said that it was not competent for the Legislature to provide one mode of reviewing judgments in contempt proceedings in general and another mode of reviewing contempt proceedings arising in cases under the insolvent act, and while a majority of the court concurred in the result, still it will be noted that the conclusion reached by the writer of the main opinion concerning the constitutional question involved did not receive the concurrence of the majority of the court. But, aside from this, in that case no reasonable basis for any classification was suggested, and probably none could have been suggested. There is, therefore, nothing in that decision which conflicts with our holding here.

Nor can the statute be assailed on the theory that it conflicts with section 1218 of the Code of Civil Procedure. That section cannot be said to purport to fix the penalty for all contempts. Indeed, the next succeeding section provides a different punishment for certain classes of contempts, while a still different punishment is provided in the Penal Code for the contempts enumerated in section 166 thereof. People v. Barbieri, supra.

[9] There is no merit in the contention that the provisions of the statute in question fixing a penalty for the violation of the decrees provided for therein are not covered by the title of the act. The title reads:

> "An act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation or prostitution are held or occur or which are used for such purposes, and providing for the abatement and prevention of such nuisances by injunction and otherwise." Stats. 1913, p. 20.

This is sufficient to cover provisions for the punishment of the violation of injunctions provided for in the body of the statute.

> "A title fairly expressing the general subject covers all proper means and instrumentalities which will or may facilitate the accomplishment or enforcement of the purpose expressed, such, for instance, as a provision prohibiting violations of the act or prescribing a penalty or other punishment for such violations." 26 Am. & Eng. Ency. of Law, 588.

[10] There is no merit in the contention that injunctive relief is not "expressly provided for" in the act in question. This contention is apparently based upon the theory that, because the court had authority to grant injunctive relief pursuant to the provisions of an earlier statute, the abatement act, in so far as it purports to confer authority to grant injunctive relief, is nugatory, since it assumes to give what the court already has. It is undoubtedly competent for the Legislature to provide two or more concurrent modes of obtaining a given end, no matter how similar they may be. Granting that the court already had a general power to enjoin nuisances pursuant to the provisions of the Code of Civil Procedure, it nevertheless appears that the abatement act does in terms authorize the entering of a permanent injunction, such as that entered in the original proceeding in this case on November 19, 1917. Since, therefore, section 6 of the act authorizes the penalty here imposed in case of the violation of any decree "expressly provided for" in the act, it follows that the contempt judgment herein complained of was in fact authorized by the act.

[11] It is suggested by the petitioner that there was in fact no proper judgment pursuant to the terms of the abatement act, because the judgment did not contain the order contemplated by section 7 of the act. That section, in words that are apparently mandatory, directs the entry of an order requiring the removal and sale of "all fixtures, musical instruments and movable property used in conducting, * * * the nuisance" and requiring the "effectual closing of the building * * * against its use for any purpose" and so keeping it closed for a year. In all respects, save that noted, the proceedings and judgment in the original action closely followed the words and provisions of the abatement act. Unless, therefore, the order of abatement is so inseparably connected with the injunctive relief provided for in sections 3 and 6 of the act that the intent of the Legislature is manifest that no injunction shall stand unless the abatement order is made part of the judgment, the petitioner's suggestion is entitled to no consideration. The injunctive relief may be had against any one maintaining the nuisance, whether owner or tenant. The abatement order is a remedy only against the owner. If the owner has been guilty of no contempts, he may, by filing a bond, stay the abatement order, which apparently runs out of itself in a year. The injunctive relief, on the other hand, can be made permanent. There may be cases where the owner is completely innocent, ignorant of the use of the property, and opposed to any immoral use thereof. In such case, the entire purpose of the statute would be accomplished by the injunction and an abatement order would not only serve no useful purpose but would work a positive injustice. Upon this analysis of the act, there is no doubt but that the court may enter a perpetual injunction pursuant to the abatement act without necessarily including in the judgment the order of abatement contemplated in section 7 of the act. Such an injunction was duly entered by the superior court of Napa county in the original proceeding in this case on November 19, 1917.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

180 Cal. 384

Ex parte MORCK. (Cr. 2253.)

(Supreme Court of California. May 19, 1919.)

Habeas Corpus 🔑50 — Time of Application.

Any question of excess of sentence will not be considered until the expiration of the time for which the prisoner may be lawfully confined.

In Bank.

Application by Andrew Morck for writ of habeas corpus. Writ denied.

Geo. D. Collins, Jr., of San Francisco, for petitioner.

PER CURIAM. In view of the decisions of this court, we see no merit in any of the claims made in support of the petition for a writ of habeas corpus, with the possible exception of the claim that under the circumstances and in view of the provisions of section 220, Penal Code, the maximum penalty in petitioner's case was 14 years. As to this it is sufficient to say that, while the sentence imposed was one of 25 years, such judgment is not void in toto. It is a valid sentence for the term authorized by the law. The judgment was pronounced December 13, 1916. Obviously, therefore, the petitioner has not served the time for which he may be lawfully imprisoned. It is the established practice of this court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. It is clear, therefore, that a writ should not be granted at this time. In what we have said we are not to be understood as definitely determining that the judgment in this case was not one authorized by law.

The application for a writ of habeas corpus is denied.

All concur, except LAWLOR, J., absent.

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180 Cal. 467

HITCH v. SCHOLLE. (L. A. 4933.)

(Supreme Court of California. May 31, 1919.)

1. Highways 🔑159(2) — Obstructions — Public Nuisance — Action to Abate — Averment of Special Injury.

Action to adjudge the existence of a public highway over defendant's land, and to enjoin defendant from obstructing such highway, is an action by a private person, to abate a public nuisance, and the complaint must allege special injury in order to state a good cause of action.

2. Highways 🔑155 — Obstruction — Remedies of Private Persons—Abatement.

If an obstruction wrongfully maintained in a public highway constitutes a nuisance, which injures a private person in common with the public, such person cannot maintain a private action to abate such nuisance, unless the free use of his property is interfered with by such obstruction.

3. Highways 🔑159(2)—Obstruction—Action by Private Person—Sufficiency of Allegations.

Where a complaint by a private person to abate a public nuisance alleges obstruction of a public highway, and that plaintiff must have ingress and egress, but fails to allege that such highway is the only mode of ingress and egress, it does not state a cause of action.

4. Highways 🔑159(2)—Obstruction—Action by Private Person—Allegation of Irreparable Injury.

An allegation of irreparable injury in the complaint, in an action by a private person to abate a public nuisance resulting from obstruction of a public highway, unsupported by any allegation showing the injury would differ in kind from an injury suffered by the general public, is not sufficient to support a judgment for plaintiff.

5. Highways 🔑155—Obstruction—Action by Private Person.

A private person cannot maintain an action to abate a public nuisance resulting from an obstruction in a public highway merely on the ground that he is subjected to personal inconvenience by the obstruction and must use another more circuitous route as his means of ingress and egress.

Department 2.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by J. W. Hitch against Ignas Scholle. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. F. Blackstock, of Oxnard, for appellant.

Bowker & Sheridan and W. E. Shepherd, all of Ventura, for respondent.

LENNON, J. [1] In this action the plaintiff sought and secured a judgment decreeing the existence of a public highway over the lands of the defendant, and as an incident of the judgment the defendant was perpetually enjoined from obstructing said highway. The action is, as the defendant contends, one to abate a public nuisance by a private person not alleged to have been specially injured thereby. The complaint therefore does not state facts sufficient to constitute a cause of action, and the defendant's demurrer upon that ground should have been sustained.

[2] It is well settled, that, if an obstruction which is wrongfully erected and maintained in a public highway constitutes a nuisance which injuriously affects a private person equally in common with the public at large, a private action may not be maintained to abate the nuisance. Blanc v. Klumpke, 29

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Cal. 156. It is only where the free use of the property of a private person is interfered with by such an obstruction that he may have his private action to abate the nuisance resulting therefrom. Civ. Code, §§ 3479, 3493; Yolo County v. City of Sacramento, 36 Cal. 193, 195; Grigsby v. Clear Lake Water Co., 40 Cal. 396, 406; Shirley v. Bishop, 67 Cal. 543, 546, 8 Pac. 82; Gardner v. Stroever, 89 Cal. 26, 29, 26 Pac. 618.

[3, 4] The complaint herein alleged, in substance, that the plaintiff was the owner of certain farming land in the county of Ventura, upon which he raised lima beans, hay, and other crops commonly grown and harvested in that particular vicinity; that ingress and egress to and from this land was necessary in order to take his crops to market and for other purposes; that the defendant owned certain land in the vicinity subject to an easement of way in the public; that the defendant had obstructed this public highway by building and maintaining a fence across it, and was threatening to plow up the said highway; and that the plaintiff would suffer great and irreparable injury if these acts were not enjoined. The allegations of one of the paragraphs of the complaint were stricken out upon the motion of the defendant upon the ground that they were redundant, irrelevant, and immaterial. These particular allegations did no more than declare that the plaintiff's land was devoted to farming purposes, and that for these purposes ingress and egress to and from the land was necessary. Neither these allegations nor any other allegations in the complaint averred that the highway in question affords the only mode of ingress and egress to and from the plaintiff's land.

The complaint cannot be considered as attempting to state anything more or less than a cause of action to abate a public nuisance. The allegation that the way in question is a public highway is necessarily inconsistent with the existence of any private right therein in the plaintiff. So considered, the complaint is vitally defective for the reason that it fails to allege that the highway in question constitutes the only mode of ingress and egress to and from the lands of the plaintiff. Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Scrutchfield v. Choctaw, etc., R. R. Co., 18 Okl. 308, 88 Pac. 1048, 9 L. R. A. (N. S.) 496. There is indeed an allegation of irreparable injury, but it is unsupported by the allegation of any fact showing wherein that injury would differ in kind from the injury which would be suffered by the public in general.

The defendant did, in his answer, deny that the plaintiff would suffer special injury, but that portion of the answer was stricken out upon motion before the trial. Nor can it be said that the issue of special injury was raised at the trial itself. There was no finding on the question of special injury, although a finding that the plaintiff would suffer such injury by reason of an obstruction of the highway was essential to support the judgment, inasmuch as it was found that the said highway was in fact a public highway.

[5] The evidence adduced on behalf of the plaintiff was to the effect that the highway in question constituted his only convenient mode of ingress and egress, but that there was another route available over other public highways which he sometimes used. This evidence would not, we think, be sufficient to support a finding of special injury. The weight of authority is to the effect that in actions of this character it should clearly appear from the pleadings and by the proof that the way in question constitutes the only means of ingress and egress to and from the land of the plaintiff. In short, there is no ground for an action by a private person to abate a public nuisance resulting from the obstruction of a public highway where it merely appears that the person would be subjected to personal inconvenience by the obstruction or placed under the necessity of traveling by a much more circuitous route to reach his destination. Houck v. Wachter, supra.

This view of the case makes it unnecessary to decide whether the evidence supports the finding that the way in controversy was in fact a public highway.

The judgment appealed from is reversed.

We concur: MELVIN, J.; WILBUR, J.

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180 Cal. 447

CITY OF VENICE v. SHORT LINE BEACH LAND CO. (L. A. 4886.)

(Supreme Court of California. May 29, 1919.)

1. Dedication ⚷35(1, 3)—Public Highways—Adverse Possession — Statutes—Applicability.

Under Pol. Code, § 2618, relating to the dedication, abandonment, and acceptance of land for public highways, neither improvement of the way by public authority nor payment of taxes by the public is necessary, and Code Civ. Proc. § 325, prescribing the conditions necessary to an adverse possession of land, is not applicable in a suit to determine whether land has been dedicated as a public highway.

2. Dedication ⚷17—Public Highways—Intent—Express Declaration.

To constitute a dedication or abandonment by the owner of land for a public highway under Pol. Code, § 2618, the necessary intent need not be manifested by any contract or express declaration of the owner, but may be implied from his conduct.

3. DEDICATION 🔑37—ACCEPTANCE—USER.

Acceptance by the public of a dedication or abandonment of land for a public highway under Pol. Code, § 2618, need not be manifested by any direct action, ordinance, or declaration of the public authorities, but may be shown by mere user for a reasonable length of time, notwithstanding payment of taxes by the property owner.

4. DEDICATION 🔑44—HIGHWAYS—EVIDENCE—SUFFICIENCY.

In a suit to quiet title to land alleged to have been dedicated by the owner to the public as a highway, evidence *held* sufficient to show an intent that the land in question should be used as a public street.

5. CORPORATIONS 🔑425(4)—REPRESENTATION BY AGENT—ESTOPPEL TO DENY AUTHORITY.

Where a corporation having the exclusive sale of all the land within a subdivision gave its agents ostensible authority to make representations to purchasers that a certain strip of land was to be used as a public street, the corporation was estopped to deny the authority of its agents.

6. CORPORATIONS 🔑432(6) — EVIDENCE 🔑158(26)—AUTHORITY OF AGENT.

The authority of an agent to act for a corporation need not be proved by the minutes of its board of directors or by a contract in writing, but may be shown by evidence that the person did business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors or general manager or by their direction.

7. TRIAL 🔑90—RECEPTION OF EVIDENCE—FAILURE TO MOVE TO STRIKE—WAIVER.

Where evidence is apparently admissible and no motion is made to strike it out when the contrary is shown, the objection as to its admissibility is deemed to have been waived.

Department 1.

Appeal from Superior Court, Los Angeles County; H. T. Dewirst, Judge.

Action by the City of Venice against the Short Line Beach Land Company to condemn land for a public street, with cross-action to quiet title. From a judgment in favor of plaintiff on the cross-complaint, defendant appeals. Affirmed.

William H. Fuller, of Los Angeles, for appellant.

Rush M. Blodget, City Atty., of Venice, and Fredericks & Hanna, all of Los Angeles, for respondent.

SHAW, J. The Short Line Beach Land Company appeals from a judgment in favor of the city of Venice declaring that a certain strip of land claimed by said company is a public street or highway in the city of Venice.

The proceedings in the court below were initiated by a complaint filed by the city of Venice against said land company to condemn said land and other parcels for a public street. This complaint was filed on September 27, 1912. An answer was filed thereto, and the cause was continued from time to time until May, 1914, when the court, pursuant to a stipulation of the parties, made an order granting the land company leave to file a cross-complaint concerning the particular parcel now in question, on condition that the issues raised by the cross-complaint should be determined and disposed of before the issues raised upon the complaint in condemnation were determined. The cross-complaint was filed accordingly, and the city of Venice made answer thereto. The issues upon this cross-complaint came on for trial in 1915. In the meantime the city of Venice had dismissed its action for condemnation. The only questions for decision here are those arising upon the cross-complaint. The parcel of land is described as lot 38 of block 10 of the Short Line Beach subdivision No. 1, as recorded in Map Book 2, page 59, in the recorder's office of Los Angeles county.

The cross-complaint is in the form of an ordinary suit to quiet title. The answer thereto alleges that said parcel of land is a public street or alley in the city of Venice. The court found that it was such public street, and the only question presented for consideration is whether or not the evidence is sufficient to support this finding.

The contention of the respondent is that the owners of the tract in question dedicated it to public use as a street or alley, and that such dedication was accepted by the public. It is not claimed that there was any express dedication, or that the owners ever executed any contract, deed, or map showing their intention to make such dedication. In March, 1914, some two months before the filing of the cross-complaint, the city of Venice passed an ordinance reciting that said strip of land had been offered for use as a street, and formally accepting it as such street. The respondent does not rely wholly on this acceptance, but contends that there was also an acceptance by the common use of the land by the public as a street and by other acts showing acceptance of the property as a street.

[1] There is no merit in the appellant's contention that section 325 of the Code of Civil Procedure, prescribing the conditions necessary to an adverse possession of the land, is applicable to this question. Land used for a highway could not be inclosed or cultivated, and no improvement thereof by the public authorities is necessary to constitute it a highway. The law relating to highways is indicated by section 2618 of the Political Code, declaring that such highways are roads, streets, alleys, etc., "laid out or erected as such by the public, or if laid

out or erected by others, dedicated or abandoned to the public." To accomplish such dedication or abandonment and acceptance by the public, neither improvement of the way by public authority nor payment of taxes by the public is necessary. All that is required is a dedication or abandonment by the owner and an acceptance thereof by the public.

[2, 3] In order to constitute such dedication, or such abandonment, by the owner, his intention to that effect must appear. Such intent need not be manifested by any contract, writing, or express declaration of the owner. It may be implied from his conduct. "If the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete." People v. Marin County, 103 Cal. 228, 37 Pac. 203, 26 L. R. A. 659. In that case it is said that, in the case of an express dedication by words or acts, "the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose," but that an implied dedication may be proved "by acts or conduct not directly manifesting the intention, but from which the law will imply the intent." As stated in Helm v. McClure, 107 Cal. 204, 40 Pac. 437, the question "whether a dedication of land for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case; that such circumstances must clearly show an unequivocal intention, manifested by appropriate words or conduct, or both, on the part of the owner, to devote his land to the wayfaring uses of that somewhat vague entity called 'the public.'" Sussman v. San Luis Obispo County, 126 Cal. 539, 59 Pac. 24; Smith v. San Luis Obispo, 95 Cal. 466, 30 Pac. 591; Harding v. Jasper, 14 Cal. 647. It is not necessary that the acceptance by the public be manifested by any direct action, ordinance, or declaration of the public authorities. "Such acceptance may be shown by mere user without any formal action in relation thereto by the municipal authorities." Monterey v. Malarin, 99 Cal. 293, 33 Pac. 840. "The use of the street by the public for a reasonable length of time" is sufficient evidence of acceptance. Smith v. San Luis Obispo, supra, 95 Cal. 470, 30 Pac. 591. This case further holds that the payment of taxes on the property by the owner is not sufficient to rebut the proof of dedication, if such proof is otherwise sufficient. Upon applying these principles to the case, we find that there is sufficient evidence to sustain the findings of the court.

Block 10 is a parcel of land between Canal street, lying easterly, Pacific avenue, otherwise called Trolleyway, westerly, Center street, southerly, and Mildred avenue, northerly, in the subdivision mentioned in the description aforesaid. Its width from Pacific avenue to Canal street is 235 feet. The frontage on Canal street is about 500 feet; that on Pacific avenue about 644 feet. The difference between these sides is caused by the fact that Mildred avenue is not at right angles to the side lines of the block. It contains 38 lots. Seventeen of them are on the Canal street side. Twenty of them front on Pacific avenue. All of these are 100 feet in length, thus leaving a strip 35 feet wide in the center of the block, extending from Mildred avenue to Center street and lying between the respective tiers of lots. This strip is designated on the map as lot 38. The land was subdivided for sale by a syndicate composed of some six or more persons, and the subdivision and sale thereof was committed by the owners entirely to one member of the syndicate, a real estate firm known as Strong & Dickinson, and their subagents. Prior to the filing of the map, a tentative map had been made showing what is now called lot 38, not as a lot, but as an alley or street. At that time it was expected that a street car line would be built through the tract upon this strip of land, and it was intended to be used for that purpose. By some change of plan it was determined that the street car line would not be so located. Before it was filed, this strip was designated on the map as lot 38, and a similar strip through block 9, lying southerly of block 10, was designated as lot 42. The evidence showed that nearly all of the lots were thereafter sold by the owners through Strong & Dickinson and subagents authorized by them, and that in making sales of lots they stated, or authorized the statement, to several of the purchasers that this strip would be left open for a public street. The street car line which was built on Pacific avenue, or Trolleyway, was so constructed that there was no adequate room for the passage of teams along that street. Purchasers made objections to this frontage, and were told that they would have access to the lots over the strip of land in question. Houses were built upon the lots on each side of this strip; the lots fronting on Pacific avenue being almost entirely built upon. Several of the owners made sidewalks in front of their lots upon the alleyway, so called, designated on the plat as lot 38. Some of these sidewalks were made as early as the year 1906. From about the year 1905 until the time of the trial this strip was continuously used as a public way, and was commonly known as "Strong's Drive." It was the only means of access to the buildings situated on the westerly side of the strip that could be conveniently used by delivery wagons and other vehicles. There is evidence that the owners of the property, through their local agents in charge of the property, were fully aware of this use of the strip of land. The city of Venice improved Center street and Mildred avenue with sidewalks, and at the corners of this alley upon those streets insets in the sidewalk were made which plainly indicated that it was supposed to be a public way. At the time the map was filed the title to the property was held by the Union Trust & Realty Company in trust for the members of said syndicate. Shortly afterwards the members formed the appellant corporation, and the title was thereafter transferred to the corporation, but the agency for the making and control of the sales continued as before.

[4] This evidence sufficiently shows the intention of the owners that this strip of land should be used by the public as a public street or alley for the convenience and benefit of the public and of the owners of lots abutting thereon. The general use by the public was a manifestation of its acceptance thereof, and upon the rules laid down in the foregoing authorities the street was in this manner completely "dedicated and abandoned" to the public use.

It is true that the managers and agents of the syndicate above referred to, and some members of the syndicate, as well, testified that they made no such declarations concerning the use of the street, and that they never intended to dedicate the property for that purpose. But the testimony of other persons concerning declarations made by them was sufficient to create a conflict of the evidence, which was determined by the court below in favor of the respondent.

[5] It is also suggested by the appellant that there is evidence that the directors of the appellant corporation never in any manner authorized its agents to dedicate this land to the public use. It is apparent, however, that the corporation is estopped to deny the authority of its agents in the matter. The entire subject of making the sales was left to the control of its agents, and they had at least ostensible authority to make the declarations referred to. Southern Pacific Co. v. Pomona, 144 Cal. 347, 77 Pac. 929.

[6, 7] Appellant complains of the ruling of the court allowing testimony of the declarations made by Carroll Daly with regard to the use of this strip of land as a public street, claiming that he had no authority to make such statements. It appears that he was a member of the syndicate that subdivided the land, and that he has been a director of the appellant corporation ever since its organization; that he was also secretary and treasurer of the corporation; that he took an active part in its business and was a subagent under Strong & Dickinson for the sale of the lots; and that as such he negotiated several sales of the lots by the company. Having obtained the benefit of his solicitations and representations to induce purchases, the company denies his authority to make them. It is not the law that the authority of an agent to act for a corporation can only be proven by the minutes of its board of directors or by a contract in writing. It may be shown by evidence that the person does business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors or general manager, or by their direction. The company, in such a case, is bound by his acts and declarations within the scope of the business intrusted to him. Crowley v. Genesee M. Co., 55 Cal. 276. It may be that Daly's declarations to W. A. Rennie in negotiating a sale by Daly of his own lot to Rennie was not admissible against the company. But they were given before it was disclosed that the lot belonged to Daly at a time when it appeared that it was one of the lots of the company. It was then apparently admissible, and no motion was made to strike out the evidence when the contrary was shown. Hence the objection must be deemed to have been waived.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

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180 Cal. 419

In re NUTT'S ESTATE. (L. A. 6047.)

(Supreme Court of California. May 29, 1919.)

1. APPEAL AND ERROR ⚿345(1)—TIME FOR TAKING APPEAL—PENDENCY OF MOTION FOR NEW TRIAL—NOTICE OF INTENTION.

Provision of Code Civ. Proc. § 939, that if proceedings for new trial are pending, time for appeal shall not expire until 30 days after entry of order therein, is limited to cases where new trial proceeding is regularly initiated by the filing and service of notice of intention, as required by section 663.

2. APPEAL AND ERROR ⚿345(1)—TIME FOR TAKING APPEAL—MOTION FOR NEW TRIAL—FAILURE TO FILE NOTICE OF INTENTION—ADVERSE PARTIES.

Where one "B." contested for incompetency of testator, probate of two alleged wills and beneficiaries under earlier will contested second will for undue influence, and court tried contest of beneficiaries to first and postponed trial of other issue, an appeal from judgment for contestants is properly taken, under Code Civ. Proc. § 939 within 30 days after entry of order denying new trial, though "B." was not served with notice of intention; since, if "B." was an adverse party on whom notice must be served, failure of service did not deprive court of jurisdiction to hear the motion.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

In the matter of the estate of Carolynn E. Nutt, deceased. Proceedings to probate two alleged wills, in which W. Ray Simpson was proponent of later will and Martha Nutt and another were proponents of earlier will, and contestants were Ann Nutt Baker, contesting both wills, and proponents of first will, contesting later will. From a judgment for contestants of later will, proponent appeals. On motion to dismiss appeal. Motion denied.

Hahn & Hahn, of Los Angeles, and Stephen G. Long, of Long Beach, for appellant.

M. B. Butler, of Pasadena, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal taken by W. Ray Simpson, the proponent of an alleged will of deceased, from a judgment sustaining the opposition of two heirs of deceased to the probate thereof. One of the grounds of the motion is that the appeal was not taken within 60 days after the entry of judgment. But it was taken within 30 days after the entry of an order denying proponent's attempted motion for a new trial, which was in time if such a proceeding was duly initiated. Section 939, Code Civ. Proc.

[1] Under section 663a, Code of Civil Procedure, the party desiring to initiate such a proceeding must serve on the adverse party and file with the clerk of the court a notice of intention within a time specified. We have held that, unless the notice of intention be both served and filed within the specified time, there is no initiation of a proceeding on motion for new trial, and no such "proceedings * * * are pending" within the meaning of section 939, Code of Civil Procedure (Whiting-Mead, etc., Co. v. Bayside Land Co., 172 Pac. 598), with the result that in such a case the right of appeal expires 60 days after the entry of judgment. This ruling was made in a case where there was no filing of any notice of intention within the specified time, with the result that there was no initiation of a proceeding on motion for new trial as to any adverse party.

[2] The situation here is different. The point in the case at bar is that no such proceeding was initiated for the reason that the notice of intention was never served on one Ann Nutt Baker, claimed to be an adverse party. The facts in this connection are as follows: There were two alleged wills of deceased, one dated August 17, 1917, and the other dated September 24, 1917. Both have been filed for probate and opposition to probate presented as to each, Ann Nutt Baker contesting both wills, and Martha Nutt and David Nutt, beneficiaries under the earlier will, contesting the will of September 24th. As to the will of September 24th, offered for probate by one W. Ray Simpson, the sole beneficiary thereunder, the contest of Martha Nutt and David Nutt was on the ground of fraud and undue influence, while that of Ann Nutt Baker was on a ground of incompetency to make a will. The question of the admission to probate of the alleged will of September 24th being before the court, and the two oppositions to such admission pending, for some reason the court proceeded with a trial of the issues presented by the opposition of Martha and David Nutt only; the opposition of Ann Nutt Baker being postponed to await the determination of the other opposition. This trial resulted in a verdict for the contestants, with a consequent judgment declaring the will of September 24th to be "null and void." This is the judgment attempted to be appealed from.

The notice of intention to move for a new trial was addressed only to Martha and David Nutt, and was served on them alone and filed within the specified time. This was upon the theory, doubtless, that under the circumstances Ann Nutt Baker was not an adverse party, and need not be made a party to the new trial proceeding. We may assume that this view was erroneous, but we are of the opinion that it does not follow that no new trial proceeding was duly initiated. To the contrary it is clear that by the service and filing of the notice on Martha and David Nutt within the specified time such a proceeding was duly initiated as to them at least, and that the trial court had jurisdiction to determine the motion.

If it be true that Ann Nutt Baker was an adverse party in the sense that unless by service she was made a party to the proceeding on motion for a new trial the trial court could not properly grant the motion, that fact would be a reason requiring the denial of the motion, but it would not deprive the trial court of jurisdiction to hear and determine the motion. This, we think, is the effect of the authorities. See Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719, and cases there cited. So it may not be held that a new trial proceeding was not pending in this case. Its facts clearly distinguish it from Whiting-Mead, etc., Co. v. Bayside Land Co., supra, where there was no initiation of a new trial proceeding as to any adverse party. It follows from what we have said that the appeal taken within 30 days after the entry of the order denying a new trial was in time.

The other ground of the motion to dismiss was that no sufficient notice of appeal was ever filed. As to this ground we orally stated our views from the bench at the time of the hearing of the motion, to the effect that the notice should be held to be sufficient. No useful purpose would be subserved by further discussion of this point.

The motion to dismiss the appeal is denied.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

180 Cal. 385

PEOPLE v. RICO. (Cr. 2235.)

(Supreme Court of California. May 20, 1919.)

HOMICIDE ⚿230, 232—EVIDENCE—DELIBERATION AND PREMEDITATION—WEIGHT AND SUFFICIENCY.

In a murder trial, evidence that accused, who was boarding with deceased, upon being ordered to leave for failure to pay his board, left in the morning, but, returning in the evening, attacked deceased and killed her with a razor, was sufficient to warrant the jury's finding of a deliberate purpose and intent on his part to kill, although there was evidence that he had been drinking whisky that day.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Pedro Rico was convicted of murder in the first degree, and appeals. Affirmed.

Albert D. Trujillo, of San Bernardino, for appellant.

U. S. Webb, of San Francisco, and Joseph L. Lewinsohn, of Los Angeles, for respondent.

PER CURIAM. The defendant, Pedro Rico, charged by information with the crime of murder, was convicted of murder in the first degree, and appeals from the judgment pronounced on such conviction.

It is shown by the evidence that the defendant, who for some time immediately preceding the commission of the homicide was a boarder in the household of Mrs. Manuela P. de Ortiz and her husband, in the city of San Bernardino, was on the morning of October 29, 1918, ordered by both Mr. and Mrs. Ortiz to leave the premises, the reason apparently being that he had failed to pay for his board and lodging. He left, and shortly thereafter returned and obtained his clothes, which he took away. During the early evening of the same day, between 5 and 6 o'clock, he again returned to the house, and finding Mrs. Ortiz in the kitchen engaged in her work, he made an assault on her with a razor and cut her throat, inflicting a wound from which she instantly died. It appeared that he had been drinking whisky to some extent during the day, but the evidence in regard to this is such that it cannot be held that the jury was not warranted in concluding that he knew fully what he was doing, and was acting with a deliberate purpose and intent to kill the deceased. Upon the question of the effect of intoxicants the jury was correctly instructed. The principal point made in the appellant's brief is substantially that the evidence fails to show the premeditation which is an essential element of the first degree of the crime of murder. As said in People v. Machuca, 158 Cal. 62, 64, 109 Pac. 886, 887, "this court has repeatedly declared that the question of the degree of crime is exclusively for the jury, and that their determination will not be disturbed when there is any evidence to support it." In this case there was clearly sufficient evidence to sustain the conclusion of a deliberate purpose and intent on the part of the defendant to kill.

A few rulings of the trial court in the matter of admission of evidence are complained of. Counsel has not specified wherein the error as to any of these rulings exists, and, so far as we can see, each of the rulings was correct.

This being a capital case, we have carefully examined the whole record. To our minds it discloses no reason to doubt that the proceedings in the court below were entirely without error, and that the conclusion of the jury is fully sustained by the evidence.

The judgment is affirmed.

ANGELLOTTI, C. J., and SHAW, J.; WILBUR, J.; MELVIN, J.; LENNON, J.; OLNEY, J.; and LAWLOR, J.—concur.

180 Cal. 471

FOWLER GAS CO. v. WEBER et al.
(S. F. 8040.)

(Supreme Court of California. June 1, 1919.)

1. BANKS AND BANKING ⚿154(7)—EVIDENCE—ADMISSIBILITY.

In action to recover amount of draft drawn on a partnership, but paid by defendant bank from funds of plaintiff corporation, excluding evidence that plaintiff had authorized this transaction in order to pay partnership for material purchased from it, *held* error.

2. EVIDENCE ⚿158(26) — ADMISSIBILITY — CORPORATE MINUTES.

Authority of corporation's officers to pay for material from its bank fund need not be shown exclusively by minutes of directors, but may be established by apparent authority of officers, and if minutes are not kept, proceedings at directors' meeting may be otherwise shown.

In Bank.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Fowler Gas Company against A. A. Weber and the First National Bank of Fowler. Judgment for plaintiff, and the last-named defendant appeals. Reversed.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

L. L. Cory, of Fresno, for appellant.

Gallaher & Aten, of Fresno, for respondent.

SHAW, J. Judgment was rendered in the court below in favor of the plaintiff against the First National Bank of Fowler and A. A. Weber, for $3,897.84. The defendant First National Bank of Fowler alone appeals.

The complaint alleges that the plaintiff had money on deposit in its name in said bank, and that, without authority from the plaintiff and against its will, and with intent to defraud the plaintiff, said bank, on December 5, 1913, paid out of the said deposit a certain sum of $3,897.84, in satisfaction of a draft for that sum, which draft said bank had previously received and honored and then held; that plaintiff was not then or at any time, indebted to said bank, or to any or either of the defendants; and that Weber received said money from the bank with knowledge of said facts and of said fraudulent intent.

The answer of the bank alleges that said draft "was honored and paid with the full knowledge and consent of said plaintiff and with its authority," and that it was not paid to Weber, but was paid to Smith-Booth-Usher Company, the drawers thereof. It further avers that on December 5, 1913, there was deposited in said bank in the name of the plaintiff, the sum of $14,000; that on said day the plaintiff authorized and directed the bank to pay from said deposit all drafts, orders, and vouchers bearing the O. K. of the defendant Weber; that said Weber had attached his O. K. to said draft; and that thereupon with said authority defendant paid the draft from said deposit.

The court below made findings sustaining the allegations of the complaint, except as to the alleged fraudulent intent. It is contended by the appellant that the finding to the effect that the payment of $3,897.84 by the bank out of the deposit account of the plaintiff therein was unauthorized, is contrary to the evidence, and also that by reason of the adverse rulings of the court the appellant was prevented from fully proving the facts which constituted its defense, and was thereby deprived of its right to a fair trial. Upon a careful examination of the record we are of the opinion that these points are well taken.

The draft which it is claimed was satisfied by the alleged payment reads as follows:

> "Los Angeles, California, Nov. 25, 1913.
>
> "At sight pay to the order of the First National Bank of Fowler ($3,897.84) three thousand eight hundred ninety-seven and 84/100 dollars. Value received and charge to the account of
>
> To Mess. Weber & Wilson, Dinuba, Cal.
> "Smith-Booth-Usher Co.
> "E. H. Law."

The evidence shows that Weber & Wilson had purchased a lot of pipe suitable for gas mains from Smith-Booth-Usher Company for $4,097.84, of which $200 had been paid, that said pipe had been shipped to the town of Fowler, consigned to Weber & Wilson, and that this draft was drawn for the purpose of obtaining payment of the balance due therefor. It is to be noted that there is nothing on the face of the draft to indicate that the Fowler Gas Company was in any way concerned with its payment. The business of Weber & Wilson was done by Weber alone, and we will use his name in referring to it.

At the outset of the trial the court was of the opinion that the authority of the bank to pay the draft aforesaid out of said deposit could not be shown, except by proof of an acceptance thereof in writing by said company. Efforts of the appellant to show transactions between Weber and the gas company, tending to establish the liability of the gas company for the debt represented by the draft, were thwarted by rulings based on this ground. This, of course, was erroneous. The court was also of the opinion that no authority for the payment of the $3,897.84 out of the plaintiff's account could be shown except by orders to that effect entered on the minutes of its board of directors. Other evidence to prove the authority was excluded by rulings to that effect. Later, after the trial had been postponed for a period of six months, the appellant again endeavored to show the transaction which it contended warranted the charge of this sum against the account of the plaintiff, and offered evidence of the dealings between Weber and the gas company for that purpose. Weber testified, "I had a contract and erected the plant," but the court would not allow him to state what the contract was, nor with whom it was made. After much difficulty and over repeated interruptions and objections, some of the facts concerning the deal were elicited, the court stating in explanation that the evidence was admitted tentatively only, subject to a motion to strike out the same in case the matter was not connected by proper legal evidence of the authority from the gas company. In this way the appellant introduced such scraps of evidence as the record contains on the subject. From the remarks of the court in making its rulings it is reasonably certain that its final decision was made in entire disregard of this evidence. The plaintiff, however, was careful to make no motion to strike out any of it, and we have no express ruling of the court declaring it immaterial.

[1] From the uncontradicted evidence introduced, the following facts appear: About September 1, 1913, Weber began preparing for the construction of the gasworks and distributing system in Fowler, apparently with the expectation of interesting other persons

therein before its completion. On November 18, 1913, the plaintiff corporation was organized for the purpose, among other things, of acquiring and operating gasworks and conducting its principal business in Fowler. At that time Weber had the gas plant partially constructed. About that time he ordered the pipe aforesaid, from Smith-Booth-Usher Company to be used in the laying of mains for the said gas plant. Negotiations ensued between the organizers and directors of the company and Weber, the nature of which was not allowed to be shown, for the purchase by said company of the said plant from Weber. The court refused to allow the complete terms of the contract finally made to be given in evidence, but by persistent effort the appellant finally succeeded in eliciting from Weber testimony to the effect that he sold the plant to the plaintiff and agreed to complete the same, in consideration of 15,000 shares of the capital stock of the gas company of the par value of $1 each, and $14,000 in money; that the money was all paid, and that the $3,897.84 paid by the bank in satisfaction of the aforesaid draft was a part of the said cash payment of $14,000; that he agreed to complete the plant for said price and turn it over to the company; that he did complete it and turned it over to the company on February 25, 1914. It also appeared that on December 5, 1913, the gas company deposited in the bank said sum of $14,000; that on the same day the bank officials entered a charge against said account for $10,565.02; that this charge consisted of $5,594 on account of a check made by the gas company to pay a note of Weber to the bank for money borrowed by him in September, 1913, the item of $3,897.84 on account of the draft in controversy, another item of $457.93 for freight paid by the bank at Weber's request, on the pipe above mentioned, and 24 other small items which had been paid on Weber's account by the bank, either on that day or previously, making the total amount above stated. All of these charges, except the note, were approved by Weber. None of them was objected to at the time, though known to Patton, the secretary of the plaintiff. The terms of the contract of sale by Weber to the company, of the gas plant, so far as they may have related to the purpose of the $14,000 deposit, were not given in evidence other than as above stated; the defendants apparently were deterred by the adverse rulings from pursuing the inquiry. But the evidence as a whole raised a strong inference that the $14,000 deposited in the bank by the gas company on December 5, 1913, represented the purchase price to be paid in cash to Weber for the sale and final completion of the plant, and that it was deposited in that manner in order to make sure that it should be applied and used as far as it would go, or as far as necessary if it were more than enough, in the payment of bills then already incurred by Weber in the construction of the plant, including the $10,565.02 aforesaid, and the balance to the further expenses of Weber in completing the plant. There was no contradiction of the facts above stated, nor of the facts which, as we have said, raised the aforesaid inference.

It may be that from these facts alone the inferences just mentioned would not of necessity follow. But there was other evidence, also undisputed, which establishes them as facts proven. The pipe for which the $3,897.84 was due was at Fowler, ready for laying in the distributing system of the plant at the time the deal was closed. The officers of the company knew this, and the company agreed to pay the bills for freight thereon, and did pay them by directing a charge therefor against the $14,000 deposit. They knew that the pipe was intended for use in the plant, and also that it was so used. In February, 1914, a settlement for the construction work was made by Weber with Patton, secretary of plaintiff, and also assistant cashier of the bank, and Avenall, a director of the plaintiff, and also cashier of the bank. The plant was accepted, and Weber paid plaintiff $322.01, ascertained to be due from him on said settlement. At that time the charge of $10,565.02 against the $14,000 deposit, which charge included the sum of $3,897.84 paid for the pipe, was standing on the books of the bank, uncontested. If it had not been credited to the plaintiff in the settlement, Weber would not have owed the $322.01, but plaintiff would have owed him $3,575.83. Weber's testimony that the entire $14,000 had been paid to him stands uncontradicted, and it is clear that it was not paid in any other manner than by the charges to the gas company against its deposit. Furthermore, in May, 1914, in an application to the Railroad Commission for leave to issue bonds, the gas company declared that the cost of the pipe laid for its mains was $4,097.84, and that it had paid for the same. This could be none other than the pipe bought by Weber from Smith-Booth-Usher Company, and the payment was obviously made in the manner above stated and not otherwise. The charge made on December 5, 1913, by the bank of this item of $3,897.84 against plaintiff was not objected to at all until April, 1914, on the occasion of a change in the position of manager of plaintiff. J. R. Lovely testified that he then became manager, that as such he got a statement from the bank, and found the draft of Smith-Booth-Usher Company returned by the bank as a voucher for $3,897.84, charged against the company and that he then investigated the bank account, as he said, "for the simple reason that I knew there was never no such stuff bought by the Fowler Gas

Company." That the pipe was bought by the company when it bought the plant of Weber was a fact incontrovertibly established by the evidence. His reason merely showed his ignorance of previous transactions, and implies that, if he had known that the pipe had been bought of Smith-Booth-Usher Company by Weber, that the draft was for the price thereof, that the pipe had been used in the plant and had been paid for as a part of the price to Weber for the plant, he would not have made the objection.

From all this evidence there can be no other conclusion than that the cost of this pipe was included in the price paid to Weber by the deposit of the $14,000 in the bank, and its subsequent application to the bills due for construction and material, and that the charge and payment complained of was in that manner authorized by the plaintiff. The findings should have been against the plaintiff on this vital issue.

The rebuttal evidence of plaintiff was confined to an effort to show that at the meeting of December 5, 1913, the directors of plaintiff did not direct the bank to pay this draft out of plaintiff's account or to pay for any shipment of pipe out of said account. There was a sharp conflict of evidence on these points. But the pipe was then delivered at Fowler, the draft, so far as Smith-Booth-Usher Company was concerned, had been paid by the bank at Weber's request, and the matter was then in the shape of an item on the "Teller's Cash Ledger" of the bank. There was no occasion for any special discussion regarding that item. It was not denied by any one that Weber was to have the equivalent of $14,000 for the completed plant, including the pipe, nor that he got it only in the manner we have stated. It is suggested, rather than claimed, by the plaintiff that compensation to Weber for the pipe included in the transfer of the plant to the plaintiff was covered by the payment of the $5,500 note charged against the plaintiff's deposit. If there is evidence of this fact the plaintiff will be at liberty to produce it upon a new trial. There is none in the record before us.

It is unnecessary to consider in detail the many adverse rulings made by the court during the progress of the trial. The issues presented the question whether the charge of the amount of this draft against the account of the plaintiff was authorized. This opened a wide field of inquiry, and justified the introduction of evidence of any transactions between Weber and the gas company tending to show that the gas company assumed the payment of the debt and provided for its payment in the manner above stated. The action of the court in preventing the introduction of the evidence except in the limited manner above stated was erroneous.

[2] For the guidance of the court upon a new trial we will say further that it is not true that the minutes of the board of directors of the plaintiff constituted the only evidence admissible for the purpose of showing authority for the payment of this sum by the bank out of the plaintiff's funds. If a corporation allows its officers to conduct its business and third persons act upon the apparent authority thus shown, it cannot defeat the rights of such persons arising from transactions done and completed under such ostensible authority by failing to enter upon its minutes any order giving its officers authority to act. Fresno, etc., Co. v. S. P. Co., 135 Cal. 208, 67 Pac. 773; Blood v. La Serena L. Co., 134 Cal. 370, 66 Pac. 317; Crowley v. Genesee M. Co., 55 Cal. 276. If minutes are not kept, other parties have the right to prove what actually occurred at the meetings of the directors, if such proof tends to establish their rights. We are of the opinion that a new trial is necessary, at which the appellant may be allowed fully to present the evidence under the rules we have stated.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; MELVIN, J.

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40 Cal. App. 628

GREELY v. NOBLE. (Civ. 2769.)

(District Court of Appeal, First District, Division 2, California. April 11, 1919.)

MECHANICS' LIENS 🔑272, 279—FORECLOSING—PLEADING—NOTICE OF COMPLETION—BURDEN OF PROOF.

In view of Code Civ. Proc. § 1187, requiring contractor's liens to be filed within 60 days after completion of the work or within 90 days if the owner fails to file a notice of completion, a contractor bringing an action to foreclose an original lien under section 1191 for street improvements, who filed the lien 62 days after completion, must allege and prove the failure of the owner to file his notice of completion in order to estop such owner from pleading the 60-day limitation in defense.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by M. A. Greely against Gerard E. Noble. From a judgment for defendant, plaintiff appeals. Affirmed.

Samuel Knight and F. E. Boland, both of San Francisco, for appellant.

Frank W. Sawyer, of San Francisco, for respondent.

HAVEN, J. Plaintiff appeals upon the judgment roll alone in an action to foreclose

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

an original contractor's lien for street improvements, claimed by plaintiff under the provisions of section 1191 of the Code of Civil Procedure. The plaintiff alleged, and the court found, that the work upon which the lien was based was fully completed and performed on June 4, 1917, and that plaintiff's claim of lien was filed in the office of the county recorder on August 6, 1917, more than 60 days after the completion of the work. From these facts the court reached the conclusion of law that the claim of lien was not filed within the time required by section 1187 of the Code of Civil Procedure, and was therefore invalid. There is neither allegation in the complaint nor finding as to the filing, or want of filing, by the owner of the notice of completion provided for in said section.

The appeal presents the single question as to whether or not it is incumbent upon the plaintiff, in order to obtain the benefit of the 90-day period for filing liens specified in the closing sentence of section 1187, Code of Civil Procedure, to allege and prove that the owner did not file the notice of completion therein provided for. Counsel for appellant state that this question has never been considered by the appellate courts of this state, and we have found no case in which the exact question is involved. In Meyer v. City Street Improvement Co., 164 Cal. 645, 130 Pac. 215, it was held that a claim of lien for street work under section 1191, Code of Civil Procedure, was in time if filed within 90 days after the completion of the work. That decision is based upon an interpretation of the Mechanic's Lien Law as it existed prior to the amendments of 1911, and expressly states that it does not determine the effect of the revised act. The present provisions of section 1187 apply to liens claimed under any section of the chapter on mechanics' liens. Boscus v. Waldmann, 31 Cal. App. 245, 254, 160 Pac. 180.

In order to maintain an action for the foreclosure of a lien under section 1187, Code of Civil Procedure, it was necessary for plaintiff to allege that his claim of lien was filed within the time therein specified. That time is limited to a period of 60 days after the completion of the work, with the proviso that, if the owner fails to file the notice of completion therein provided for, he—

> "shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto."

This is a statutory declaration of an estoppel against the owner, based on his failure to file the notice referred to. It is settled law in this state that:

> "If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance." Goorberg v. Western Assurance Co., 150 Cal. 510, 519, 89 Pac. 130, 133 (10 L. R. A. [N. S.] 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801); Newhall v. Hatch, 134 Cal. 269, 273, 66 Pac. 266, 55 L. R. A. 673.

The complaint alleges facts which show that plaintiff has no cause of action under the 60-day limitation contained in the first part of section 1187, Code of Civil Procedure, and fails to plead any facts showing that the 90-day limitation is applicable to his case. In other words, plaintiff pleads himself without the terms of one portion of the section, and does not plead himself within the other portion thereof. The 60-day limitation is a defense which is available to the defendant, unless he is estopped from relying upon it by reason of his failure to file the notice of completion. In order to prove the filing of his lien within the statutory period, plaintiff must rely upon this estoppel. If he so relies, he must plead and prove the facts constituting such estoppel. Having failed to do so, the trial court was correct in holding that his lien was too late, and for that reason invalid.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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41 Cal. App. 19

GROTHEER v. PANAMA-PACIFIC LAND CO. (Civ. 2625.)

(District Court of Appeal, First District, Division 1, California. April 30, 1919.)

1. Vendor and Purchaser ⚷109—Rescission of Land Sale Contract—"Failure of Consideration."

Where a land sale contract bound defendant vendor to exercise diligence in carrying out its terms, which provided for certain street improvements which were not made within six years, during which time purchaser was paying purchase-price installments vendor's breach constituted a clear failure of consideration within the provisions of Civ. Code, § 1689, providing that a party may rescind a contract if the consideration "before it is rendered to him fails in a material respect from any cause."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Failure of Consideration.]

2. Vendor and Purchaser ⚷114—Rescission—Waiver.

Where a land sale contract provided that vendor should complete certain street improvements and because of vendor's delay purchaser objected to making further payments, and an agreement was made to delay payments until the work was performed, and plaintiff purchaser still urged that the neglected work be done, purchaser did not waive the right to rescind the contract.

3. VENDOR AND PURCHASER ⚿118—STREET IMPROVEMENTS — BREACH OF AGREEMENT—EXCUSE.

As regards vendee's right of rescission for vendor's failure to perform an agreement to improve streets, it is not a defense to vendor that he was unsuccessful in getting permission of city engineer and superintendent of streets to place culverts, where the conditions were known to vendor prior to contract, and particularly where much of the work left undone was of a character not requiring official permission.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by F. R. Grotheer against the Panama-Pacific Land Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

Jordan & Brann, of San Francisco, for appellant.

Myrick & Deering and James Walter Scott, all of San Francisco, for respondent.

RICHARDS, J. The plaintiff and defendant on October 10, 1910, entered into a contract by which the latter sold to the former and agreed to convey to her a lot of land situate within the municipality of Oakland, at the corner of Sunnyvale avenue and Stanley road. The price of the lot was $1,580, part of which was paid upon the execution of the agreement, and the balance thereof was payable in monthly installments. The agreement contained the following provisions:

"Time is hereby expressly made of the essence of this agreement.

"The seller agrees as follows, viz.:

"(a) To construct concrete curbing and cement sidewalks.

"(b) To grade and macadamize and concrete gutter all streets.

"(c) To lay sewers and water mains.

"Improvements will be carried on with due diligence until completed, all at the expense of the seller."

The plaintiff made her payments regularly until May, 1914, at which time she paid on account of principal the sum of $1,005, together with $172.85 for interest and $17.55 for taxes. At that time she called upon the secretary of the defendant, and stated to him that the company was not living up to its agreement with reference to the construction of street improvements; that she did not wish to find herself in the position of having completed her payments before all the street work was done, but at the same time she did not wish to stop them and have interest accrue against her. The secretary of the company replied that the position assumed by the plaintiff was a reasonable one, and promised to take up the matter with his board of directors; and some months thereafter, on December 11, 1914, the company communicated to the plaintiff a resolution adopted by it relieving her of further payments until the street work in front of her lot had been completed. No further work having been done by the defendant in connection with the plaintiff's lot she, on November 16, 1915, rescinded the contract and demanded the return of the money paid thereunder by her, the refusal of the defendant to comply with this request resulting in the bringing of the present action.

Defendant answered, admitting that it had failed to construct cement sidewalks, concrete curbing, and concrete gutters in Stanley road, but alleged in this behalf that said work was not done by it because of the impossibility of securing from the city of Oakland the necessary permission for such improvement. It also set up as a separate defense that the plaintiff for a valuable consideration had waived the making of the omitted improvements.

The court found against these contentions of defendant and rendered judgment in favor of the plaintiff for the amount demanded.

[1] The defendant appeals, and urges as its first point that the record shows no ground entitling the plaintiff to the equitable relief of rescission. It argues that at most there is merely a breach of a simple contract, for which the only remedy is in damages, and that there is no damage shown.

Undoubtedly the rule in most jurisdictions is as stated by the appellant. This rule, however, has been changed in several states, including our own (Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755). Section 1689 of the Civil Code provides under what conditions the remedy of rescission, formerly exclusively equitable, is available. The Legislature has there enacted that a party to a contract may rescind if the consideration, "before it is rendered to him, fails in a material respect, from any cause." We think the present case comes within this provision of the Code. The evidence disclosed that there existed throughout the length of Stanley road, including that part of said road in front of plaintiff's lot, a ditch several feet wide and deep, which served the purpose of carrying off storm waters from neighboring lands, and also, as we have seen, that certain street improvements agreed to had not been made, rendering the lot of little value for residence purposes, for which it had been sold. This situation still existed six years after the execution of the contract, which bound the defendant to the exercise of diligence in carrying out its terms, even to the making of time of the essence thereof. This long-continued failure to comply with essential provisions of its agreement constituted a clear failure of consideration (Conlin v. Osborn, supra; Sterling v. Gregory, 149 Cal. 117, 85

Pac. 305; Richter v. Union Land, etc., Co., 129 Cal. 372, 62 Pac. 39; Brown v. National Electric Works, 168 Cal. 336, 143 Pac. 606) and, under the terms of subdivision 4 of the section of the Civil Code above referred to, entitled the plaintiff to rescind the contract.

[2] It is further contended by the appellant that the plaintiff waived her right (if any) to rescind by agreeing with it as to what the consequence of the delay in making the improvements should be, referring to the fact that, upon the objection of plaintiff to continuing her payments while appellant was behind in the prosecution of the work of street improvement, appellant in writing notified her that further payments could be deferred until the work was completed. We do not give to this incident the scope thus claimed for it. The plaintiff was still urging that the neglected work be done, and, although for some time she took advantage of the appellant's permission to defer further payments, this did not prevent her after a reasonable time from insisting that the terms of appellant's contract be lived up to. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 Pac. 951. The plaintiff waited such reasonable time, for it was not until nearly a year after the extension of time impliedly given to the appellant for the completion of the work (during which time no further work was done) that the plaintiff formally rescinded the contract and commenced this action.

[3] It is also argued by the appellant, as negativing the court's finding that it did not diligently prosecute the work of street improvement, that the evidence shows that it was impossible for it to do so because it was unable to obtain the permission of the authorities of the city of Oakland for the doing of the work. The only support in the record for this contention is that the appellant on several occasions unsuccessfully sought the permission of the city engineer and of the superintendent of streets to place a culvert over the storm water ditch in Stanley road. As to this, it may be said that the ditch was in existence and known to the appellant at the time it entered into the contract; that if, in order to comply with its contract, it was necessary to provide for carrying off the storm waters by some other means and fill up the ditch, it had assumed the obligation to do so. Such an operation, of course, would entail considerable expense, but that consideration would not excuse performance of an obligation, and, so far as refusal of permission by the city engineer and the superintendent of streets is concerned, it was merely a refusal to allow the ditch to be covered by a culvert; nor does the record disclose any application to the proper municipal authorities for whatever permission was necessary. Finally, it may be said that much of the work that was left undone was of such a character as not to require any official permission. The record thus abundantly sustains the finding of the trial court as to the appellant's lack of diligence in carrying out its contract.

Judgment affirmed.

We concur: **WASTE, P. J.**; **NOURSE**, Judge pro tem.

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40 Cal. App. 689

BOURGUIGNON et al v. PENINSULAR RY. CO. (Civ. 2673.)

(District Court of Appeal, First District, Division 1, California. April 17, 1919. On Motion for Rehearing in Supreme Court in Bank, June 17, 1919.)

1. CARRIERS 🔑321(23) — PASSENGER'S PERSONAL INJURY ACTION—INSTRUCTIONS.

In a passenger's action against carrier for personal injuries sustained in a derailment, instruction as to the burden of proof under the doctrine res ipsa loquitur *held* not erroneous where the complaint contained averment of general negligence and specific acts of negligence; the case being tried on theory that both general and specific negligence were alleged.

2. NEW TRIAL 🔑26—GROUNDS—VARIANCE—FAILURE TO RAISE QUESTION.

In a passenger's action for injuries in derailment, where the parties proceeded on theory that general and specific negligence were alleged, defendant could not insist on motion for new trial that plaintiff, having alleged special negligence, must prove it; defendant having made no objection to the sufficiency of plaintiff's showing in first instance.

3. TRIAL 🔑296(3)—INSTRUCTIONS—CURE OF ERROR.

In a passenger's action for injuries in a derailment, an instruction that defendant must show that the overturning of car was result of inevitable casualty which human foresight could not prevent, held not erroneous, in view of the other instructions given.

On Motion for Rehearing in Supreme Court in Bank.

4. NEGLIGENCE 🔑134(1) — DEFENSES—PRESUMPTIONS.

In negligence cases, where the accident raises a presumption of negligence, defendant will not be held blameless, except upon a showing either of a satisfactory explanation of the accident or of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown.

5. CARRIERS 🔑318(6)—PASSENGER'S PERSONAL INJURY ACTION—EVIDENCE OF DUE CARE—SUFFICIENCY.

Where a passenger transported by a carrier is injured in a derailment, and the carrier attempts to give a satisfactory explanation of the accident, or to show such care in all respects as to exclude the conclusion of want of care, the explanation or care shown must be most satisfactory.

6. CARRIERS 🔑318(1) — PASSENGER'S PERSONAL INJURY ACTIONS—BURDEN OF PROOF.

Where the accident by which a passenger transported by a common carrier is injured raises the presumption of negligence, the carrier, to overcome such presumption, need not do so by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation of the accident, or of his contention that he exercised due care in all particulars, as to offset the presumption in the minds of the jury, and produce a balance in their minds on the question of its truth; the burden always being on plaintiff to prove his case by a preponderance of evidence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Naomi Bourguignon and another against the Peninsular Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Louis Oneal, Wm. F. James, and James P. Sex, all of San Jose, for appellant.

E. M. Rea, of San Jose, for respondents.

RICHARDS, J. The plaintiffs in this action recovered judgment against the defendant for the sum of $18,001.35 as damages for personal injuries suffered by the plaintiff Naomi Bourguignon while a passenger upon one of the defendant's cars, through the alleged negligence of the defendant by reason of which said car was derailed and overturned while rounding a curve in the defendant's railroad.

The first and main contention of the appellant herein is that the trial court committed error in the giving and refusing of certain instructions having reference to the burden of proof in the case and the application of the doctrine of res ipsa loquitur to it in the light of the averments of the plaintiff's complaint with respect to the defendant's alleged negligence.

The averments of the complaint with respect to the defendant's negligence read as follows:

> "That the said car left the said rails and track and turned over on its side, as herein alleged, through the negligence, carelessness, and wanton recklessness of the said defendant in the management and operation of its said car, and the maintenance of said roadbed or tracks, and without any fault or negligence on the part of the said Naomi Bourguignon, and that at the time of said derailing of said car the said plaintiff Naomi O. Bourguignon was occupying as a passenger a seat on the inside of said car, said seat being a seat provided for passengers by said defendant; that said car left said tracks on account of the sagging or giving way of one of the rails of said track, coupled with the negligent operation of said car, which consisted in going over said curve at a high rate of speed."

No demurrer was filed to the sufficiency of the complaint, but the defendant answered, denying this averment, and the cause proceeded to trial. Upon the trial the plaintiff proved the fact of derailment and overturning of the car while she was a passenger upon it and the consequent injuries, and rested her case. No motion for nonsuit nor other objection to the sufficiency of the plaintiff's showing was made by the defendant, but it proceeded to introduce evidence tending to show an entire absence of negligence on its part and to support its claim that the injuries to the said plaintiff were the result of an unavoidable accident. Upon producing such evidence the defendant rested its case. Whereupon the plaintiff offered proof to rebut the evidence which the defendant had presented; and, the cause having been submitted, the court proceeded to instruct the jury. In so doing it gave certain instructions, one of which was the following:

> "Plaintiff has established a prima facie case against defendant if she shows that she was injured by the overturning of the car while being carried as a passenger by defendant without fault on her part; in such case there is a presumption that the accident was caused by the negligence of defendant, and the duty is then upon the defendant to show that the accident happened from inevitable accident or from some cause beyond the power of human care or foresight to prevent."

The court also gave certain other instructions which substantially restated the rule expressed in the foregoing instruction. The appellant now urges that the giving of these instructions was error, basing its insistence in that regard upon the proposition that, the plaintiff having alleged specific negligence on the defendant's part, the rule of res ipsa loquitur as above stated does not apply, and hence that the plaintiffs were bound in the first instance to prove that the accident was caused by specific acts of negligence alleged in their complaint.

[1] There are several answers to this contention. In the first place, the averment of the plaintiffs' complaint above quoted is, we think, fairly open to the construction that both general negligence on the part of the defendant in the management and operation of its car, and also specific acts of negligence on its part in maintaining a defective track and in rounding the curve at a dangerous rate of speed, are mingled in the same averment. In this respect the case strongly resembles the case of Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 111 Pac. 519, 527, in which the precise question presented here arose, in dealing with which the court used the following words:

> "Plaintiff, however, not only alleged specific acts of negligence, but he also alleged general negligence. It is true that he did not set up his alleged specific and general negligence in separate counts, as was done in Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747, but there was no demurrer addressed to this feature of the complaint; the averments of the complaint were specifically denied, the evidence went in without objection touching the issues as thus presented, and defendant makes no pretense of being surprised. Inasmuch as there was an issue of general negligence presented, a presumption of negligence arose upon proof made of plaintiff's injury while a passenger on defendant's cars. And the case was tried upon the theory that both specific and general negligence were alleged."

[2] The closing passage of the above quotation furnishes an added reason why the point urged by the appellant cannot be held to be well taken. This case, like the Roberts Case, was tried apparently upon the theory that the allegations of the plaintiffs' complaint were such that upon proof of the accident and of the resulting injury a presumption of negligence upon the part of the defendant arose; for when upon proof of the occurrence of the accident and of the resultant injuries the plaintiffs rested their case no motion for nonsuit or other objection to the sufficiency of the plaintiffs' showing in the first instance was made, but the defendant at once assumed the burden of proving the absence of any negligence on its part, and, having tendered such

proofs as it possessed upon this subject proffered no objection to the plaintiffs' counter-showing upon the ground that it should have been made in the first instance. This court, in the case of Roberts v. Sierra Ry. Co., supra, dealing with that precise condition, and quoting from 6 Thompson on Negligence, § 7473, said:

> "Where parties, without adhering closely to the written pleadings, proceed without objection and make a particular case by the evidence, and the court allows that case without objection to go to the jury, it is a violation of all correct rules of law then to assail the case thus made for the first time by the motion for a new trial on the assignment of error in the appellate court on the ground of failure of proof."

[3] The appellant further contends that the trial court, in giving one of its instructions, wherein the foregoing rule with regard to the burden of proof is stated in a somewhat different form, erred in instructing the jury that the defendant must show:

> "That the overturning of the car was the result of inevitable casualty which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs."

The instruction from which the foregoing excerpt is taken was adopted by the trial court from the case of Bonneau v. North Shore R. R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68, in which the precise instruction was approved by the Supreme Court. Aside from these considerations, however, we find from an examination of the record that the trial court not only gave the foregoing instructions, but it then proceeded to give some 30 or more instructions covering every phase of this immediate subject, a large number of which instructions were prepared by the defendant and given at its request. In the light of these very full and very fair instructions, it is impossible to perceive how the jury could have been mislead to the defendant's injury in its deliberation upon the case. The appellant's objection that the trial court refused to give certain of its instructions is sufficiently answered by the liberality with which the court gave almost every one of the instructions requested and which fairly covered every phase of its defense.

We are further satisfied from a careful reading of the voluminous record herein that the evidence was amply sufficient to justify the verdict, not only as to the defendant's negligence, but as to the nature and extent of the injuries suffered by the said plaintiff.

Finding no error in the record, the judgment is affirmed.

We concur: **WASTE, P. J.; KERRIGAN, J.**

On Motion for Rehearing in Supreme Court in Bank. (S. F. 8499.)

PER CURIAM. The petition for rehearing is denied. Such denial, however, is not to be taken as a complete approval of the instruction that the defendant must show "that the overturning of the car was the result of inevitable casualty, which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless, except upon the most satisfactory proofs."

[4] The true rule is that, where the accident is of such a character that it speaks for itself, as it did in this case, and raises a presumption of negligence, the defendant will not be held blameless, except upon a showing either (1) of a satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown.

[5] In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, the explanation or care shown, as the case may be, must be most satisfactory, in the sense that the carrier is held to a very high degree of care.

[6] But the proof which is required of such explanation or care is a different matter from the explanation or care itself. The explanation or the care shown, if true, may be perfectly satisfactory. The proof of its truth may or may not be satisfactory. On this point the rule is the same as in the case of any other presumption which a defendant must meet; that is, he is not obliged to overcome the presumption by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation, or of his contention that he exercised due care in all particulars, as to offset the presumption in the minds of the jury, and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence. See Haun v. Tally, 181 Pac. 81.

The instruction in question was taken verbatim from Bonneau v. North Pacific R. R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68, where it was approved. An examination of that decision, however, shows that the criticism which the appellant there made of that particular instruction was not directed to the point that it required most satisfactory proof, as distinguished from a satisfactory explanation, or a showing of satisfactory care. The rule in regard to proof is discussed with reference to another instruction, and is stated to be as above.

In the present case the instruction, while open to criticism in the particular indicated, could not have misled the jury, when considered in connection with the other instructions given as to the effect of a presumption and the requirement that the plaintiff prove his case by a preponderance of evidence.

All concur, except LENNON, J., absent.

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40 Cal. App. 748

MARR v. CITY OF GLENDALE et al.
(Civ. 2560.)

(District Court of Appeal, Second District, Division 1, California. April 22, 1919. Rehearing Denied by Supreme Court June 19, 1919.)

Waters and Water Courses 🔑201—Public Water Supply—Duty of Municipality to Furnish Water.

A municipality, engaging in the business of supplying its inhabitants with water, cannot be compelled to extend its system to make available its supply of water to a remote and isolated inhabitant, where the cost of such extension would be great, particularly where such inhabitant already has available, from a private corporation, water in sufficient quantity and of reasonably good quality.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Winifred F. Marr against the City of Glendale and others. Judgment for defendants and plaintiff appeals. Affirmed.

Winifred F. Marr, in pro. per.

Evans, Abbott & Pearce and W. E. Evans, all of Los Angeles, for respondents.

JAMES, J. Appeal from a judgment denying to the plaintiff a writ of mandate. Plaintiff brought this action for the purpose of compelling the city of Glendale and its officers to furnish her water for domestic and other uses. Her complaint contained three causes of action, the first and third of which only were relied upon at the trial. Under the first alleged cause of action the right claimed was that of a property owner who, having been regularly served with water by the vendor thereof, is arbitrarily cut off from the supply. The right claimed under the third alleged cause of action was different, and depended mainly upon the question as to whether an inhabitant of a city, which city is engaged in furnishing water for the use of such inhabitants, can in every case compel the municipality to connect the property of such inhabitant with its supply pipes. In the first alleged cause of action plaintiff set forth that a number of years prior to the date of the commencement of the action her property had been connected to a 4-inch water main owned by the Glendale Consolidated Water Company, which main was in turn supplied from a certain stream flowing in Verdugo canyon; that this pipe was disconnected from the stream several years prior to the commencement of the action, and that subsequent to its being so disconnected the city of Glendale acquired all the water rights and the distributing system of said Consolidated Water Company; and that subsequent thereto plaintiff's property had been without water, except such as was brought upon it by use of a pail. In the third cause of action facts were set forth showing that the city of Glendale had engaged in the business of supplying water to its inhabitants and had acquired a water system for that purpose.

The answer denied that plaintiff's property was not provided with a water service, although it was admitted that this service was not being given by the city of Glendale. The preliminary facts, as stated by the complaint, were admitted, and an affirmative defense was made, which was available in answer to both the first and third causes of action. In this defense it was alleged as follows:

"The defendants allege that the property mentioned in plaintiff's petition is located in the Verdugo canyon more than one mile north and east of any of the distributing lines used in connection with the water system of the city of Glendale; that said property is located at an elevation of more than 200 feet above any reservoir owned by said city from which water could be furnished to her from its present distribution system; that in order to furnish the plaintiff with water for domestic use the city of Glendale would be compelled to construct a reservoir somewhere in the vicinity of plaintiff's property at such an elevation as is necessary to furnish proper pressure, and would then have to lay and conduct pipes from such reservoir to plaintiff's said property, all of which would amount to a large expenditure on the part of the defendant city of Glendale, such as would not be justified from any income that could be derived from such construction; that at this time and for many years prior thereto the Forest Grove Land & Water Company and its predecessors in interest, who are the original owners and subdividers of the tract of land on which plaintiff is located, owns, operates, and conducts a distributing system in said tract, and that plaintiff's said property is bounded on the east and south by the distributing line laid in the street abutting plaintiff's said property, from which line the plaintiff could receive adequate water service; that said Forest Grove Land & Water Company's system was constructed for the express purpose of furnishing this plaintiff and other residents of this vicinity with water for domestic uses; and defendants are informed, and upon said information and belief allege, that the reason why plaintiff is not now receiving water from said Forest Grove Land & Water Company is that she has been disconnected by said company by reason of nonpayment of her water bills. Defendants allege, furthermore, that they could not furnish the plaintiff water service on her said property without paralleling the lines of said private water company, and in event this defendant should be required to so parallel the lines of said water company, it would be necessary for this defendant city of Glendale to charge much more for such service than she would be required to pay to said private water company for similar service; that the defendant city of Glendale has never furnished any water to any residents of the city of Glendale located in said Verdugo canyon for the reasons hereinabove set forth."

The court found the facts in accordance with this special defense, which showed that appellant's property had available to it adequate water supply and service pipes, and showed, contrary to plaintiff's allegations, that when the 4-inch pipe had been disconnected from the stream, it was supplied with water from another source, and that that supply had subsequent thereto been continuous and adequate, and that the pipes carrying the same immediately abutted plaintiff's property. It showed that for the city to be compelled to extend its system to the property of appellant would cause the municipality great expense. It further showed that plaintiff could receive all the water she needed by merely complying with the rules and regulations of the company owning the supply pipe abutting her property, which rules and regulations we must assume were reasonable.

Plaintiff makes no contention that she had any right to the use of the waters of the particular stream from which the 4-inch pipe passing her property originally received its supply; in other words, she had no right in any part of the water at any time. With that admission, and with the facts as pleaded in the answer and found by the court before us, we can see little reason to give any extended consideration to the claim made under the first alleged cause of action. Appellant, having no interest in the water, would have no right at all to complain because the company furnishing her might have sold all or any part of the water from which it supplied her at any particular time, so long as it kept in its pipes other water of fair quality and reasonable in quantity and pressure; and this is exactly what the company did, under the facts as they were alleged and determined to be. Without any right of use in the water itself, even though the company had abandoned its business of supplying property owners with water and thus left its supply pipes empty, plaintiff could not have complained.

> "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted, or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person, it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty." Fellows v. City of Los Angeles, 151 Cal. 52, 90 Pac. 137.

This case does not reach that far in its facts; plaintiff has never been deprived of the right to take water from the pipes abutting her property, and her supply from that source would be adequate and sufficient.

Under the third alleged cause of action, we think, also, the facts as found by the court are such as to conclusively bar the plaintiff from any right to the relief herein sought. From the fact that the municipality may engage in the business of supplying its inhabitants with water, it does not follow that every property owner or taxpayer, however remote his land may be situated from the distributing system, can by mandate compel such extension of the system as will make available to him that supply. It would be most unreasonable to hold that a municipality must establish an expensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well-settled districts; and more particularly is this true where the person asking for such service already has at his door water in sufficient quantity and of reasonably good quality. In our opinion, the appellant failed to show facts which would justify the court in extending to her the relief demanded in her complaint.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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40 Cal. App. 676

PEOPLE v. MEDAINI. (Cr. 467.)

(District Court of Appeal, Third District, California. April 16, 1919.)

CRIMINAL LAW ⟹1130(4) — APPEAL — ABSENCE OF BRIEF FOR ACCUSED.

Where on appeal no appearance by brief or otherwise has been made for accused, it is not the duty of the appellate court to scrutinizingly examine the record to search for possible errors which might be found, upon mature reflection, to have been detrimental to accused's rights; but a general or cursory examination of the record suffices.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Fortunato Medaini was convicted of murder in the second degree, and appeals from the judgment and order denying new trial. Judgment and order affirmed.

E. S. Bell, of Napa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Early of the evening of July 7, 1918, at St. Helena, Napa county, the defendant shot and killed his wife, Mary Medaini. The homicide appears to have been the result of jealousy or a suspicion on the part of the defendant that the deceased had been unduly intimate with an employé of the defendant. The defendant was arrested and in due time charged with and tried in the superior court of Napa county for the crime of murder. He interposed at the trial the defense of insanity. The jury found him guilty of murder of the second degree, and he was thereupon sentenced by the court to imprisonment in the state prison at Folsom. He appeals from the judgment and the order denying his motion for a new trial.

The transcript on appeal was filed in this court on the 31st day of January, 1919. The case was placed on the calendar of the late (April, 1919) term of this court for hearing, and the attorney for the defendant and the Attorney General regularly and duly notified of the day upon which it would be called for argument. No brief has ever been filed on behalf of the defendant in support of the appeals, nor was there any appearance by or for him when the cause was, in its regular order, called for hearing and argument. There was, therefore, no other course open to the Attorney General but to submit the case upon the record, or, perhaps, to move for a dismissal of the appeals. That officer chose the former course.

While it is perhaps the duty of a reviewing court, where a criminal case, in which no appearance by brief or otherwise has been made for the accused, has been submitted upon the record, to give the record such an examination as will enable such court to determine whether obvious errors, likewise prejudicial to the accused, have been made, still, in such cases so submitted, the law does not cast upon the appellate courts the duty of scrutinizingly examining the record for the purpose of searching for possible errors which might be found, upon mature reflection, to have been detrimental to the rights of the accused. If the record, upon its face, shows that error prejudicial to the accused has been committed—if, for instance, it plainly appears that the information states no public offense—then, no less in a case where no brief has been filed or oral argument made on behalf of the defendant than in a case wherein briefs have been filed and oral arguments presented, should a reviewing court hesitate to order a reversal. But, as stated, we do not regard it necessary, where a criminal case is submitted under such circumstances as this case has been submitted, that a reviewing court should enter into a minute examination of the facts. A general, or cursory, examination of the record is all that is required. This we have given this record. Indeed, in view of the fact that the defendant was tried for and convicted of the crime of murdering his own wife and of the further fact that he set up insanity as a legal excuse for his act, we have gone further and examined with painstaking care both the evidence and the charge of the court. The defense, as the plea of insanity implies, admitted at the trial that Medaini shot and killed his wife, and the evidence clearly discloses that, unless the accused was at the time he fired the fatal shot bereft of all sense and reason, or, in other words, was insane, the killing amounted to a deliberate, legally unprovoked, and cruel murder. As to the instructions, it is to be remarked that in its charge the court, with singular clearness, stated to the jury every principle or rule of law applicable and pertinent to the case as it was made by the information and the proofs. Nor, in our examination of the record, have we encountered any rulings touching the question of the legal propriety of any of the evidence which, even where strictly not correct, could have resulted in injury to the defendant. In a word, the cause appears to have been in all particulars well and fairly tried, and the defendant therefore accorded a fair and impartial trial.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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41 Cal. App. 45

HOWELL et al. v. PEDERSEN et al.

(Civ. 2780.)

(District Court of Appeal, First District, Division 2, California. May 2, 1919.)

1. APPEAL AND ERROR ⇒956(2)—REVIEW—DISCRETION — SETTLING BILL OF EXCEPTIONS.

The court on appeal will not review the trial court's discretion in refusing relief from failure to present a bill of exceptions in time, except in a case of clear abuse of such discretion.

2. EXCEPTIONS, BILL OF ⇒40(4)—COMPLIANCE WITH REQUIREMENTS—TIME OF FILING.

Under Code Civ. Proc. § 1054, authorizing the trial court to extend the time for the preparation of bill of exceptions, such extension must be obtained within the 10 days allowed by law for the preparation and service of the bill.

3. APPEAL AND ERROR ⇒117—EXCEPTIONS, BILL OF ⇒53(3)—DECISIONS REVIEWABLE —SETTLEMENT OF BILL OF EXCEPTIONS.

An order refusing to settle a bill of exceptions is not appealable, the only remedy being by mandamus.

4. EXCEPTIONS, BILL OF ⇒43(1)—TIME OF FILING—DEFAULT—MOTION TO RELIEVE DEFAULT—ABUSE OF DISCRETION.

Denial of plaintiffs' motion for relief from their default in failing to prepare and serve their proposed bill of exceptions within the time allowed by law was not an abuse of the court's discretion; no showing of mistake, inadvertence, surprise, or excusable neglect having been made.

5. EXCEPTIONS, BILL OF ⇒42—TIME OF FILING—OBJECTIONS TO DELAY—WAIVER—INTENT.

No intention of defendants to waive their objections to plaintiffs' failure to prepare and serve their bill of exceptions within the time allowed was shown, where upon admission of service of the bill and the stipulation setting the matter down for hearing defendants added words expressly preserving objections on account of the proposed bill not being prepared and served on time.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Suit by Elizabeth F. Howell and others against J. C. Pedersen and another. From an order refusing to settle plaintiffs' bill of exceptions and an order denying plaintiffs' motion to be relieved from their default, plaintiffs appeal. Appeal from order refusing to settle the bill of exceptions dismissed, and order denying motion for relief affirmed.

Fred S. Howell, of Petaluma, for appellants.

Kellogg & Kyle, of Santa Rosa, for respondents.

LANGDON, P. J. [1] This is an appeal from an order of the trial court refusing to settle and allow plaintiffs' bill of exceptions on appeal from the main judgment in the case, and denying plaintiffs' motion for relief from their default in failing to prepare and serve their proposed bill of exceptions within the time allowed by law therefor. The discretionary power of a trial court in proceedings of this character is not to be interfered with, except upon a clear abuse of discretion. The trial court has decided that the plaintiffs did not make a showing of excusable neglect, and it would seem that such a conclusion was warranted. The only excuse offered by plaintiffs for their failure to prepare and serve this bill of exceptions in time was that the transcript could not be secured from the reporter in time. But upon plaintiffs' own showing, the facts appear to be that on January 31, 1918, judgment was entered in the case and notice of entry of judgment was served upon plaintiffs on February 18, 1918.

[2, 3] Appellants did not apply to the court for an extension of time within the 10 days allowed by law for the preparation and service of the bill. It has been repeatedly held that an extension of time, permitted under section 1054, Code of Civil Procedure, must be obtained within the period during which the original right is still alive. Clarke v. Crane, 57 Cal. 629; Oppenheimer v. Radke & Co., 165 Cal. 220, 131 Pac. 365; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; Curtis v. Superior Court, 70 Cal. 390, 11 Pac. 652. The time within which the court might extend plaintiffs' time had expired at the date when the court made the order upon the ex parte application of the plaintiffs extending their time for 30 days, and such order could give the plaintiffs no rights in place of those which had been lost by their delay. Plaintiffs therefore were in default, and the court was justified in refusing to settle their bill of exceptions. The order refusing to settle said bill is not appealable, and the remedy is by mandamus. Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; Brode v. Goslin, 158 Cal. 699, 112 Pac. 280.

[4] We have discussed the question upon its merits, because it is linked with the question properly presented for our consideration upon this appeal, which is whether or not there has been an abuse of discretion by the trial court in refusing to grant plaintiffs' motion to be relieved from their default. We think this motion was properly denied, as the plaintiffs made no showing of mistake, inadvertence, surprise, or excusable neglect. As heretofore stated, the notice of entry of judgment was served upon February 18, 1918. Plaintiffs then had 10 days within which to prepare their bill of exceptions, or within which to ask for an extension of time for that purpose. Had they been diligent in guarding their rights, they might have had 40 days from February 18th, which would have allowed them until March 30th. It appears, also, that plaintiffs were not diligent in ordering the transcript from the reporter. It was not ordered until March 8th—18 days after notice of entry of judgment. But irrespective of this fact, and despite this delay in ordering the transcript, plaintiffs, if they had secured a proper extension of time, would yet have had the transcript in their hands 10 days before their time expired for serving their proposed bill of exceptions, for it appears by their own showing that the transcript was delivered to them 12 days after it was ordered, or on March 20th. Under such circumstances, this court cannot say that there was an abuse of discretion on the part of the trial court. It is only in exceptional cases that orders of this kind will be reversed. An appellate court is very loth to substitute its own opinion and thereby divest the trial court of the discretionary power reposed in it. Smith v. Riverside, etc., Co., 19 Cal. App. 165, 124 Pac. 870; Utah-Nevada Co. v. De Lamar, 9 Cal. App. 759, 100 Pac. 884.

[5] Appellants next contend that the defendants waived their objections to the delay of the plaintiffs in serving their proposed bill of exceptions by requesting and receiving from plaintiffs additional time within which to propose amendments to such bill. It is asserted by appellants that the stipulation requested by defendants extending such time reserved no objection to the time within which the proposed bill of exceptions was served, and that therefore that objection was waived. An examination of the stipulation relied upon discloses that the stipulation provided that the defendants and respondents should have until the 30th day of April, 1918, within which to propose any amendments or make any objections to the proposed bill of exceptions. If this language is not sufficiently broad to reserve the right now asserted by defendants and respondents, it is nevertheless true that an intention to waive is an essential element to effect a waiver. Los Angeles First National Bank v. Maxwell, 123 Cal. 360, 368, 55 Pac. 980, 69 Am. St. Rep. 64. The defendants, clearly, never intended to waive their objections, and plaintiffs had no reason to believe that they did, for upon the admission of service of the bill the defendants added the words:

> "But objections on account of not being prepared and served on time are preserved for presentation when the bill of exceptions is presented for settlement."

And the stipulation setting the matter down for hearing, which is signed by the attorneys for both parties, concludes with the words:

> "This stipulation is made with the understanding that said defendant does not waive, and does hereby expressly reserve, any and all objections that he may have on account of plaintiffs' proposed bill of exceptions in the above-entitled action not having been prepared and served within the time allowed by law."

Under these facts, it is manifest that there was never any intention to waive this objection, and such objection was not waived either in terms or by implication.

The appeal from the order refusing to settle the bill of exceptions is dismissed, and the order denying plaintiffs' motion to be relieved from their default is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

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41 Cal. App. 34

SNOW v. HARRIS. (Civ. 2660.)

(District Court of Appeal, First District, Division 1, California. May 1, 1919. Rehearing Denied by Supreme Court June 30, 1919.)

1. MASTER AND SERVANT ⚷278(1)—PERSONAL INJURY—EVIDENCE—SUFFICIENCY.

In a machinist's action for injuries by the explosion of babbit metal, *held* that the evidence did not show negligence on the part of the employer.

2. MASTER AND SERVANT ⚷265(5)—INJURIES TO SERVANT—PRESUMPTIONS AND BURDEN OF PROOF.

A presumption of negligence on the part of the master does not arise where a servant is injured by an explosion while babbitting the bearings of a machine.

3. EVIDENCE ⚷553(4)—EXPERT TESTIMONY.

In a servant's action for personal injuries, offered expert evidence to explain how the accident might have happened was rightfully rejected, where there was no evidence of facts upon which the questions could be predicated.

4. EVIDENCE ⚷553(3, 4) — HYPOTHETICAL QUESTIONS—OPINION OF EXPERT—NECESSITY OF FACT BASIS.

While hypothetical questions on which the opinion of an expert is to be based may include any stated facts which the evidence tends to prove, they must nevertheless be based on facts which are in evidence, and not upon mere surmise.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Charles H. Snow against Joseph R. Harris, for personal injuries. From a judgment of nonsuit, the plaintiff appeals. Judgment affirmed.

Clarence N. Riggins, of Napa, for appellant.

Myrick & Deering and James Walter Scott, all of San Francisco, and Wallace Rutherford, of Napa, for respondent.

KERRIGAN, J. This is an appeal from a judgment of nonsuit in an action for personal injuries.

The case has already been before the Supreme Court, where it was held that the plaintiff was a casual employé, and therefore not entitled to compensation under the Workmen's Compensation Act. Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031. Plaintiff thus being relegated to an action for damages, he seeks judgment against defendant, by whom he was employed at the time of the injury complained of, alleging that defendant was negligent in two particulars: First, in that he supplied an improper helper, whose negligence contributed to the injury; second, that he failed to supply proper tools with which to do the work. To avoid the common-law defenses on the part of the defendant of assumption of risk and act of fellow servant, plaintiff contends that the provisions of section 1 of the Roseberry Act (Stats. 1911, p. 796), abolishing these defenses and modifying the defense of contributory negligence, were not repealed by the Boynton Act (Stats. 1913, p. 279), and that they govern this action.

[1] Whether this be true or not, a discussion of the question becomes unnecessary, for, in the absence of proof of negligence, defendant cannot be held liable for the injuries complained of, and we are of the opinion that the record fails to show any negligence whatever on the part of the defendant. The trial court in granting a nonsuit so declared, and from a careful reading of the record we are of like opinion.

From the evidence, which is without conflict, it appears that the defendant was a farmer, and among other machinery which he used in cultivating his land was a caterpillar tractor. Plaintiff was employed by defendant to repair this machine, and while in the act of babbitting one of its bearings an explosion occurred, and plaintiff lost the sight of both his eyes. Plaintiff was an experienced machinist, and had agreed to do the work at a stipulated price per day, using his own tools together with those owned by defendant. On the day of the accident plaintiff had removed the boxing of the rear axle of the machine, which was separated into two halves. After babbitting the lower half he cleaned the upper part with tools and heat, placed the axle in position, and then made a mold of cardboard and clay to hold the molten metal, and caused the box to be heated by a flare torch operated by his helper. He then with the assistance of this helper poured the babbitt metal into a pour hole, and returned the pans which had contained the alloy to the side of the forge close by. After waiting for a time sufficient in his opinion to allow the metal to solidify he removed a portion of the dam he had constructed to hold the metal, and looked into the pour hole to inspect the result of his work, when of a sudden an explosion occurred, which threw the molten metal upward, causing the injury complained of. At the time of the accident, plaintiff was alone at the bearing, defendant not having been present at any time during the day; in fact, defendant had nothing to do with the work either in assisting or in the giving of instructions as to the manner in which it should be done, and nowhere in the evidence is there anything which shows that the tools used by the plaintiff contributed in any degree to the accident. Plaintiff had complete charge of the work, was experienced in babbitting bearings, and he testified that he did not know of anything that the helper did or failed to do that in any way contributed to his injury. The evidence further discloses the fact that babbitt metal explodes when brought in contact with moisture, and it is conceded that moisture in some form, either direct or indirect, was the cause of the accident. There is, however, no evidence showing how the moisture was produced. Plaintiff's theory of the accident is that the helper, while holding the blow torch on the bearing for the purpose of heating it, negligently knocked a portion of the damp clay forming the dam into the hole. There is no evidence, however, to support this contention. On the other hand, defendant suggests causes for the presence of the moisture, among which is that the plaintiff himself might have knocked the clay into the hole, or that he might have left moist clay in the box before the pouring of the molten metal commenced. Varied as are these different theories of the parties, there is no evidence as to the real cause of the presence of moisture which produced the explosion, nor is there any evidence that the accident occurred through any negligent conduct of the defendant.

[2, 3] No presumption of negligence exists in favor of plaintiff by reason of the mere happening of the accident; and he having produced no proof of any negligence on the part of defendant, and the burden being upon him so to do, it was the duty of the trial court to grant the motion complained of.

Appellant assigns as error justifying a reversal certain rulings of the trial court rejecting expert evidence to explain how the accident might have happened. The offered evidence was rightfully rejected, for the reason that there was no evidence upon which the questions could be predicated.

Where, as here, the evidence leaves the cause of the accident uncertain, and shows that any one of several causes may have produced it, it is not for the jury to guess, when there is no satisfactory foundation in the testimony for a verdict; and sympathy for the unfortunate victim of the accident does not justify a departure from the rule that the burden rests upon the plaintiff to establish negligence. It is not sufficient for an employé to show that the employer may have been negligent. The evidence must show the fact that he was. If he is unable to do this he fails in his action. Patton v. Tex. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

[4] While hypothetical questions on which the opinion of an expert is to be based may include any state of facts which the evidence tends to prove, they must, nevertheless, be based only on facts which are in evidence. Graves v. Union Oil Co., 173 Pac. 618. Here the hypothetical questions, the rejection of which is complained of, were based upon mere surmise, and not upon inferences from established facts. Inferences must be reasonable, and not possible conjectures, surmise, or speculation.

Other questions do not require consideration.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

180 Cal. 454

RICHMAN v. SAN FRANCISCO, N. & C. RY. (S. F. 7563.)

(Supreme Court of California. May 31, 1919. Rehearing Denied June 30, 1919.)

1. Appeal and Error 🔑781(6)—Dismissal of Appeal—Moot Questions.

Where, after judgment for plaintiff in a personal injury action, plaintiff assigned an undivided one-half interest therein to his attorney, and thereafter compromised with defendant without the attorney's consent, whereupon the judgment was satisfied of record, which satisfaction was subsequently vacated at the attorney's request, an appeal by defendant will not be dismissed on the ground that the controversy had been compromised and the questions were moot, since at least as to one-half of the judgment the case was not moot.

2. Master and Servant 🔑267(1) — Injuries to Servant—Evidence—Relevancy.

In a railroad employé's action for injuries in a collision, testimony concerning the stopping of the watch of one of the passengers on the wrecked train to show the time of the collision was relevant; its weight being for the jury.

3. Witnesses 🔑290 — Redirect Examination—Repetition.

In a railway conductor's action for personal injuries sustained in a wreck of his train, an objection to a question on redirect examination of defendant's expert witness, whether he would consider it safe to have in his employ an elevator man or a locomotive engineer who had had syphilis for a long period of time, was properly sustained, where the witness had already gone into the general subject of such disease exhaustively.

4. Appeal and Error 🔑1046(5)—Review—Cure of Error.

In a railway conductor's action for injuries sustained in a wreck, wherein it was claimed that the physical condition of plaintiff precluded him from properly fulfilling his duties, a remark by the court that he would rather take a wife's testimony as to the peculiar conditions of her husband than that of all the physicians, if prejudicial, was cured by subsequent admonitory instructions.

5. Damages 🔑216(7) — Injuries to Servant — Instructions — Future Pain and Suffering.

In a railway conductor's action for injuries in a collision, an instruction that the jury might allow compensation for such disability and suffering as the evidence shows is "reasonably probable" will result in the future was erroneous, as being in contravention of Civ. Code, § 3283, allowing compensation for damages "certain to result in the future."

6. Evidence 🔑472(1) — Opinion — Question for Court—Injuries to Servant—Rules—Interpretation.

In an action by a conductor for injuries in a collision, opinion evidence as to the interpretation and application of the company's printed operating rules, objected to as invading province of court and jury, was erroneous, for, if the rules required elucidation, it was the duty of the court to interpret them in view of Code Civ. Proc. § 2102.

7. Evidence 🔑501(1)—Injury to Servant —Rules—Basis of Opinion.

In an action by the conductor of an electric interurban train for personal injuries sustained in a collision, opinion of a witness as to the meaning of defendant's rules, based upon standard rules governing the operation of trains, which were different from those of defendant, was erroneous.

8. Appeal and Error 🔑1053(3)—Review—Cure of Error.

In an action by a conductor of an electric interurban train for injuries sustained in a collision, error in admitting expert evidence as to meaning and application of the operating rules *held* not cured by an instruction that if plaintiff failed to call up the train dispatcher before leaving the terminal, and such failure was the proximate cause of the accident, he could not recover.

In Bank.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Horace G. Richman against the San Francisco, Napa & Calistoga Railway. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Myrick & Deering, of San Francisco (James Walter Scott, of San Francisco, of counsel), for appellant.

Theodore A. Bell, of San Francisco, and E. S. Bell, of Napa, for respondent.

LAWLOR, J. This is an action brought to recover damages for personal injuries alleged to have been sustained by plaintiff in a railroad wreck, when two trains of the defendant company collided between Collins and Hatch, stations situated on the line of its railroad, in Napa county. The jury found a verdict for plaintiff in the sum of $15,000. The defendant has appealed from the judgment entered thereon, and from an order denying a new trial.

[1] Before considering the points relied upon for a reversal of the judgment and order denying a new trial, we will dispose of the motion to dismiss the appeal. The motion was made on the ground that, the controversy having been compromised, the questions presented were moot. After judgment the plaintiff assigned an undivided one-half interest therein to his attorney, E. S. Bell. It appeared that before the opening brief of the appellant was filed an agreement to compromise the controversy was entered into between the parties; James Irvine, the president of the company, representing the defendant, without the participation of its

counsel, and the plaintiff acting for himself, without the consent of his counsel, and satisfaction of judgment was accordingly entered in the office of the county clerk of Napa county. Mr. Bell thereupon brought an action to vacate and set aside the satisfaction of judgment, so far as it related to his undivided one-half interest. Plaintiff and the defendant company were both made parties to the suit, and upon the trial it was decreed that Bell was the owner of the interest claimed, the satisfaction of judgment was annulled and set aside, and the judgment was thereupon restored, and entered by the clerk in favor of Bell against defendant, in the sum of $7,658.25. This action, resulting in favor of Bell, was based upon the fact that notice of the assignment had been given to representatives of the defendant company prior to the settlement with plaintiff. The trial court found that the defendant company had such notice, and that it wrongfully conspired with the plaintiff to cheat and defraud Bell of his interest in the judgment. No appeal was taken from this judgment, and it has become final. It is apparent from the foregoing that there is no compromise as to half of the judgment at least, and the case is not moot. The motion to dismiss the appeal on the ground of a compromise, therefore, cannot be sustained.

The defendant is a common carrier of passengers and freight, and operates a single line electric railway between the towns of Vallejo and Calistoga. For the purpose of controlling the movement of its trains the company employs train dispatchers at its depot at Napa City, and maintains a telephone line connecting with all its main stations, including Vallejo and Collins. On the morning of June 19, 1913, plaintiff was operating one of defendant's trains in the capacity of conductor. His train was known as No. 6, and was due to leave Vallejo at about 9 o'clock, and to arrive at Collins some 16 minutes later. At this station, according to schedule, train No. 6 was to meet train No. 5, south-bound. This latter train reached Collins on schedule time, but No. 6 was late. The conductor of No. 5 called up the train dispatcher from Collins and asked for orders. He was directed to take orders, and after the dispatcher called up the agent at Vallejo, and ascertained that No. 6 was still there, received orders to meet No. 6 at Hatch. The latter train started for Collins, and at a point south thereof the two trains met in a head-on collision, were telescoped, 13 persons were killed, and many others were injured, among whom was the plaintiff. The cause of action was based upon the claim that the company was responsible for the collision because the dispatcher ordered train No. 5 out of Collins without first giving notice to train No. 6. The company contended that the plaintiff was not entitled to recover, because he took train No. 6 out of Vallejo without first calling up the dispatcher. The other facts pertinent to this appeal will appear in the discussion of the points relied upon for reversal. There are many assignments of error, but for the purposes of this opinion it will not be necessary to mention all of them.

[2] 1. The admission of testimony concerning the stopping of the watch of Tracy Fay, one of the passengers on the wrecked train, for the purpose of showing the time of the collision, is assigned as error. This testimony was to the effect that the witness discovered that, when he returned to the scene of the accident at noon, his watch had stopped at 9:30 a. m. We think criticism might more properly be addressed to the weight, rather than to the admissibility, of the testimony. The testimony was relevant for the purpose, and it was for the jury to determine the weight to be given to it. Moreover, we do not perceive that the exact time of the collision had any particular materiality.

[3] 2. Appellant assigns error to the refusal by the court to allow certain testimony concerning the effect of syphilis. It was claimed by appellant that plaintiff had been a syphilitic since he was 14 years of age. Dr. W. G. Alvarez, called by the defendant, testified at great length as to the effect of this disease on the mind and body. When being examined on redirect the following occurred:

> "Q. Would you consider it safe for example to have in your employment an elevator man, or to have in your employ a locomotive engineer, who had syphilis for some long period of time?
>
> "Mr. Bell: We object to it as incompetent, irrelevant, immaterial, and not proper redirect.
>
> "The Court: Sustained."

The witness had already gone into the general subject of syphilis and its effects so exhaustively that we cannot say that the ruling was erroneous, even though the inquiry was relevant and the question properly framed.

[4] 3. Error is assigned because of the following remark by the court with regard to the testimony of the wife of plaintiff concerning his physical condition:

> "I think a wife can beat all the physicians on earth telling about the peculiar conditions of her husband. I would rather take the wife's testimony than all the physicians as to the physical condition of her husband."

This remark was addressed to counsel in the presence of the jury touching a question of fact, and of course should not have been made. But we think that any prejudicial effect the remark may have caused at the time was cured by an admonitory instruction, that—

"You will not consider for any purpose in this case * * * any comments of the court made to counsel during the trial upon testimony, or the relative weight of the testimony of any witness, or of any class of witnesses. * * *"

4. An exception was taken to an instruction of the court upon future damages; the portion objected to reading as follows:

"If you further find that the plaintiff's injuries are permanent, and will to some extent disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as, paid now in advance, will reasonably compensate him for such further disability, pain, and suffering as the evidence shows is reasonably probable will result to him in the future, not to exceed in all the amount alleged in plaintiff's complaint."

It is urged in support of the objection that the court committed prejudicial error by the use of the phrase in the instruction, "reasonably probable will result," in contravention of section 3283 of the Civil Code, which reads:

"Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

The question of damages for future detriment was gone into at great length at the trial and the record shows that the defendant was entitled to have the jury instructed on the subject. It was testified by plaintiff and his wife that, because of the injuries to the head and back and the leg of the plaintiff, he would be incapacitated in the future; that his memory was no longer reliable; that at times his mind becomes blank and that he cannot think connectedly; that he is affected by dizziness, is deprived of sufficient sleep, and suffers continually from headache; that he has lost his hearing on the left side; and that the slightest jar to the head causes the blood to rush to it.

The meaning of section 3283, Civil Code, has been considered in a number of cases. In Melone v. Sierra Ry. Co., 151 Cal. 113, 91 Pac. 522, an instruction was given to the jury that an element of damage was "such reasonable sum as the jury shall award him on account of the pain and anxiety that he has suffered or may suffer by reason of his injuries," and further that "in estimating the damages to be awarded you may take into consideration * * * how far his injuries are permanent in their character and results, as well as the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries," and it was said that—

"These instructions were erroneous in permitting the jury to estimate prospective damages upon what they believed might be the plaintiff's future suffering. * * * It is true that in a succeeding instruction the court declared that plaintiff was entitled to recover not only such damages as he may have suffered, but also 'such damages as by the evidence it is reasonably certain he will suffer in the future.' Herein is a declaration of the true rule, but none the less the instructions upon the matter are conflicting, and it cannot be said by which the jury was guided."

The phrase "reasonably probable" was used in an instruction considered in Hersperger v. Pacific Lumber Co., 4 Cal. App. 460, 88 Pac. 587, 591. The instruction is as follows:

"In this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover for all damages which he has suffered up to the time of the trial and for all damages that it is reasonably probable that he will sustain in the future, not exceeding the sum claimed in the complaint. In estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, including the bodily and physical pain and suffering which is shown by the proof to be reasonably certain to have naturally resulted from the injury."

The court said:

"The mere reading of the whole instruction is sufficient to show there is no error in it."

That case is cited with approval in Lonergan v. Stansbury, 164 Cal. 488, 129 Pac. 770; the court holding that the instruction given in both cases was identical. The court further declared:

"The phrase 'reasonably probable' may well be omitted from all such instructions and the statutory requirement of the Civil Code (section 3283) strictly adhered to. * * * But the instruction here in question, while using the unhappy phrase 'reasonably probable,' sums up its declaration of the law with the pronouncement of the correct rule."

In other words, the two phrases "reasonably probable" and "reasonably certain" were both used, and the error in the former was cured by the latter. In the recent case of Wiley v. Young, 174 Pac. 316, it was held upon the authority of Melone v. Sierra Ry. Co., supra, that the expression "reasonably certain to result" is in accord with section 3283. The term "reasonably probable" was not used in Wiley v. Young, supra.

The instruction before us was given by the court of its own motion, and the basis of the award of future damages is not touched upon elsewhere in the charge, nor in any instruction proposed by either of the parties.

[5] The use of the expression "reasonably probable" was clearly erroneous, and might well have led the jury to believe it would be proper to allow damages for suffering or other injury which they believed the plaintiff would probably suffer in the future, instead of for such suffering and injury as they believed were certain to result. So

much is left to the discretion of the jury in the determination of the amount of damages in cases of this character, it is of great importance that their attention should be called particularly to the basis upon which, and upon which only, an award must be founded for future detriment.

The respondent concedes that the phrase "reasonably probable" does not literally comply with section 3283, but urges that the defect is cured by another instruction which the court gave:

> "I instruct you that, if plaintiff is entitled to recover, the measure of his recovery is what is termed compensatory damages; that is, such sum as will compensate him for the injuries he has sustained."

Stein v. U. R. R. Co., 159 Cal. 368, 113 Pac. 663, is cited in support of this contention. But that case uses language which expresses the view that the word "sustained" does not refer to future injury. It was said:

> "True, if the sentence stood alone, it might be open to the objection urged against it; but its vice is nullified by the very next sentence, which limits the jury's award *to the injury 'sustained'—not to a future, contingent injury.*" (Italics ours.)

It will not be necessary to consider this point further, or to appraise the gravity of the error, in view of the conclusion we have reached on the next point.

5. The court, over objection, admitted the opinions and conclusions of certain witnesses in the interpretation of the printed operating rules of the company, the application of the rules, the duty of the train dispatcher under the rules, the priority of one rule over another, as to which of two trains was superior and the relative duties of the plaintiff and the train dispatcher. This, appellant claims, was prejudicially erroneous, and constituted an invasion of the province of both the trial court and of the jury. It is to be kept in mind that train No. 6 was at Vallejo awaiting the arrival of the boat of the Monticello Steamship Company to take on its passengers. The boat, as frequently happened, was late. No. 6 was due under time-table schedule to leave Vallejo at 9:02 a. m. and to arrive at Collins at 9:18 a. m., where it was to meet No. 5. The latter train arrived at the meeting point on schedule time. No. 6 not being in sight, B. E. Patten, the conductor of No. 5, called up the dispatcher at Napa and was told to take an order. The order given was to meet No. 6 at Hatch. Three minutes later No. 5 started for the latter point, and when about 1½ miles south of Collins the trains collided.

In the controversy over the question of liability, rules 268, 230, and 203, among others, were considered and admitted in evidence. Rule 268 reads as follows:

> "When trains running in opposite directions are to be moved toward each other by train orders, the train whose rights are to be restricted must first receive the order and the complete before the order is given to the train to be moved against it or toward it."

Rule 230 provides in part:

> "All regular trains, * * * when becoming ten minutes late, must report to the dispatcher, and will also report for each successive ten minutes lost."

Rule 203 declared:

> "A train must not leave its initial station * * * without order or clearance, and until it is ascertained by asking the dispatcher whether all trains due have arrived or departed, mentioning particularly the last train due, giving the train number."

There was also a bulletin rule, of more recent adoption, to the effect that the conductor of a north-bound train at Vallejo must in every instance call up the dispatcher 5 minutes before the scheduled time for leaving.

It was admitted by plaintiff that he did not call up the dispatcher 5 minutes before the scheduled time to leave, nor when No. 6 was 10 minutes late. But he positively asserted that he telephoned the dispatcher just before leaving Vallejo, which he states was about 9:19 a. m. E. J. O'Leary, the dispatcher on duty when the collision occurred, called as a witness for the company, admitted that he did not give the restricting order to No. 6, but stated that he did call up the agent at Vallejo and learned that No. 6 was still there, loading Wells Fargo express, before he gave the order and complete to No. 5. The appellant has strongly contended that plaintiff took No. 6 out of Vallejo without calling up the dispatcher at all, and that this was the proximate cause of the collision. Plaintiff testified that he telephoned to the dispatcher, "No. 6 at Vallejo ready to leave the wharf," and that the answer came back, "No orders for No. 6," which meant that No. 6 should proceed to Collins to meet No. 5. F. M. Monning, whose wife left on No. 6, testified that the plaintiff entered the telephone booth, remained there about 2 minutes, and then came out and signaled the motorman to start the train. On the other hand, several other employés, who were listening on the telephone line when plaintiff declared he telephoned to O'Leary, flatly contradicted plaintiff on that point. Both sides agreed that the case turned on this question, for in the words of the appellant, "Around this point the trial centered." It was testified on behalf of the company that, owing to plaintiff's syphilitic condition, he might have entered the telephone booth to call up the dispatcher, but forgot to do so.

As an illustration of the objectionable testimony, we quote from the examination of W. J. Juarez, the motorman on No. 5, as to the application of rule 268 to the situation:

"Q. Mr. Juarez, taking the circumstances as they existed while you were at Collins station on that morning, June 19, 1913, there as you say on time, north-bound No. 6 not there, but due, you receiving orders through your conductor, written orders to proceed to some other station for the purpose of meeting No. 6, what was the rule under those circumstances which governed, so far as notification of No. 6 was concerned, of the orders given you?"

To this the witness replied that all he had to do was to carry out his orders.

"Mr. Bell: I have not asked you about that. I have asked you now if you know, and you do, Mr. Juarez, don't you, what the company, under that rule and practice followed, had to do with No. 6 before they gave you the order to proceed? A. Well, I suppose they had to give that train No. 6 orders."

Juarez finally stated:

"I say, with respect to that rule 268, that I never have heard whether it applied to a train at a terminal or not."

Questions of similar import were asked of the witness Patten, who testified that rule 268 applied to a train lying at a terminal and that it was the duty of the dispatcher under rule 268 to transmit the restricting order to train No. 6 before giving the "complete" to No. 5, and that he had no right under the rule to order No. 5 out of Collins until this was done. Patten was allowed to give further testimony to the effect that, in the absence of a restricting order to No. 6, that train had the right of way over the track from Vallejo to Collins as against No. 5. Again, he was permitted to testify as to which was the superior train under the circumstances presented, and further that there was no priority between the rule which required the dispatcher to give the restricting order before leting the other train move against it and the rule which required the conductor of a train at an initial or a terminal point to call up the dispatcher in each case before leaving.

[6] The admission of this testimony was clearly error. If the printed rules required elucidation, it was the duty of the court to interpret them, and not for the witnesses to establish by their opinions and conclusions the meaning of the rules and the duties of plaintiff and the dispatcher thereunder. 26 Cyc. 1472; section 2102, Code Civ. Proc. Many of the objectionable questions and answers went directly to the very question of fact in controversy. For instance, it was testified that the dispatcher had no right to order No. 5 out of Collins until the clearance was given to No. 6, and that in the absence of orders No. 6 had the right to the track from Vallejo to Collins as against No. 5. These and similar propositions of fact involving an interpretation of the printed rules were freely testified to by these witnesses. Nor was the vice of the rulings relieved by the fact that Juarez and Patten on cross-examination weakened the probative force of their direct testimony by the admission, for instance, that they did not know whether rule 268 applied to No. 6.

[7] L. G. Eby, an agent of the Southern Pacific Company, called as an expert witness by the plaintiff, testified, over objection, as to the meaning of the operating rules of the defendant company, which, he admitted, he had merely glanced at and had not studied, as compared with the standard rules governing the operation of trains in parts of the United States, Canada, and Mexico. The objections to the testimony were that he was not qualified as an expert on the subject, because he was not acquainted with the rules in controversy, that the standard rules were irrelevant and immaterial, and that his testimony consisted of opinions and conclusions based upon rules that were not those of the defendant company. This testimony should not have been allowed, even if the standard rules referred to by him could properly be made the basis of interpretation of the printed rules of the defendant company.

[8] It is insisted by the respondent that, as this testimony came from witnesses experienced and versed in railway operation, it was not improperly admitted, for the reason that it did not "involve an interpretation of the abstract language of the rule, but simply went to the application of the rule in practice." With this we cannot agree. Practically every one of the questions contained such a phrase as "rule, custom, and practice." So that an affirmative answer carried the interpretation of the printed rule. The proper mode was for the witness to state *as a fact* the custom and practice, and, if necessary, for the court to interpret the meaning of the printed rules, and then for the jury to determine what rules governed the situation. But as conducted the inquiry was calculated to take from the jury the solution of the vital questions of fact in the case.

Respondent relies on 17 Cyc. 77, but we find nothing in that citation that supports the rulings complained of. It is contended that, even if these rulings were erroneous, the error was cured, for the reason, that the pivotal question of fact in the case was whether plaintiff called up the dispatcher, and, the court having repeatedly instructed the jury that if the testimony of the plaintiff on this point were not true he could not recover, it must be implied from the verdict that the jury reached the conclusion that the plaintiff told the truth. Assuming that this reasoning is sound, yet it cannot be accepted, because the premise is false.

The court did *not* instruct the jury that if it was found that the plaintiff did not call up the dispatcher *he could not recover*. If such an instruction had been given, there might be warrant for holding that, as the jury had found in favor of the plaintiff on the question of fact, the erroneous ruling would be immaterial. But the instructions that were given to the jury on this point were to the effect that if the plaintiff failed to call up the dispatcher, *and such failure was the proximate cause of the accident*, he could not recover. It cannot, therefore, be implied from the verdict that the jury, under the evidence and the instructions, may not have concluded that the plaintiff did not call up the dispatcher, yet that this dereliction of duty was not the proximate cause of the collision, but that, relying on the testimony complained of, the proximate cause was the giving by O'Leary of the order and the complete to No. 5 without restricting No. 6. For this reason, and because of what we shall say on the next point, it cannot be held that the error in the rulings was cured.

We have considered from another angle whether the admission of this testimony was prejudicial, and this involves the question whether the opinions and conclusions of the witnesses were in fact true, for, if so, the error in allowing the interpretation to come from the witnesses, instead of from the court, would not, perhaps, be material. We are convinced, however, that the interpretation by the witnesses was not correct. In our view, rule 268 had no application to a train at an initial or terminal point. It had reference only to trains already started on a trip. Hence we must conclude that, even if the court itself had held that rule 268 did apply, we would be called upon to reverse the judgment. Further, there was other testimony that the rule did apply, but that it was not always followed. William H. Howe, a witness for the plaintiff, and who, for 6 years prior to November, 1913, when he retired, had served as conductor and dispatcher for the defendant company, and at one time was in charge of train No. 6, testified, over objection, that rule 268 did apply, but that in a number of instances, when he was in charge of No. 6, train No. 5 arrived at Vallejo without the restricting order being given by the dispatcher to him as conductor of No. 6. O'Leary testified further that he was instructed by the chief dispatcher, who was also the assistant superintendent, that it was not the practice to give orders to No. 6 when that train was held at Vallejo, and No. 5 was given clearance. He stated further that—

> "Under the settled practice of the company during the 6 months I was dispatcher and I was conductor, it was the uniform rule and custom that the conductor at Vallejo should receive his orders whether clearance or limiting—at the time he left the Vallejo wharf north-bound, and not before. It was the practice, for example, if I wanted to move train 5 down south, because of the lateness of train 6 in departing from the terminal, simply to phone my order to Collins for that train to proceed, and to give my order to the north-bound train and its conductor later on, when the north-bound train called up, 'Ready to go.' That was the custom we worked under always. The first train called would get the order."

So here was testimony tending to prove, on the one hand, that rule 268 did apply, but that it was not always followed, and, on the other hand, that rule 268 had no bearing on a train at Vallejo. In fact, O'Leary testified that he did not know about rule 268 until after the collision. With such contrariety of testimony, as to the question of the applicability of rule 268 and the custom and practice, the admission of the opinion and conclusion testimony must have inevitably entered into the solution of the question of proximate cause and prejudicially affected the rights of appellant.

We think this is the rationale of the matter. The railway was operated in connection with a steamship line, and the steamers, on account of the action of the tides, were frequently late. The company, so far as the operation of the trains was concerned, would naturally seek, in order to minimize delay to passengers, especially those making a round trip to San Francisco and other points, to expedite south-bound trains, when the boat was behind time, and so it was made the duty of the dispatcher to make all possible headway with those trains when north-bound trains were late. To accomplish this expedition, with due regard to the safety of the traveling public and the company's employés, rules 230 and 203 were put in force. To further realize this object, the bulletin rule requiring north-bound trains to call up the dispatcher 5 minutes before leaving time, was adopted. Thus under these rules the dispatcher would be left free to forward south-bound trains without being hampered by having to transmit restricting orders to north-bound trains at Vallejo. He could therefore move the south-bound trains from station to station without regard to north-bound trains until they were actually reported as being ready to leave Vallejo. Hence, if the plaintiff failed to call up the dispatcher, this was the proximate of the collision, for we entertain no doubt that the duty to establish communication with the dispatcher rested solely on the plaintiff; but if, on the other hand, he established communication with the dispatcher and received the response, "No orders for No. 6," instead of an order to meet No. 5 at Hatch, the proximate cause of the accident is traced to such erroneous order. We think that upon the entire record, including the evidence, the error in the rulings in question resulted in a miscarriage of justice. Section 4½, art. 6, Const.

Judgment and order reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; MELVIN, J.; WILBUR, J.

177 Cal. 174

HARPER v. SLOAN et al. (Sac. 2327.)

(Supreme Court of California. June 6, 1917.)

Department 2. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Opinion in department, reversed in bank (177 Cal. 174, 169 Pac. 1043), but referred to by Melvin, J., in his dissenting opinion to the opinion of the court in bank.

Frank R. Wehe, of San Francisco, and W. I. Redding, of Downieville, for appellant.

Charles F. Hanlon, of San Francisco, for respondents.

MELVIN, J. Defendants' demurrer to plaintiff's amended complaint was sustained without leave to amend. From the judgment following such order, the plaintiff appeals.

The theory of the amended complaint is that the transactions described therein were such as created a mining partnership between plaintiff and defendants, that appellant held the property of said partnership in trust, and that he was entitled to a lien thereon for certain advances made by him. The complaint avers substantially the following facts:

McGregor and Lewis owned a certain described mining claim in Sierra county. This was and is an unpatented lode mining claim possessed by virtue of a location made in 1895 in accordance with the mining laws of the United States and the local rules then in force in that county. The claim was of such a nature that large sums of money were required for its development. On December 24, 1896, McGregor and Lewis entered into a written agreement with Harper, the plaintiff in this suit, whereby the said Harper was to work and develop the claim and deposit the gross yield therefrom with one Sayles, who was to deliver such deposit to the vendors in case Harper should fail to pay the purchase price of $6,000, one-half payable by November 1, 1899, and the balance on or before May 1, 1900. It was provided that upon full payment of the purchase price McGregor and Lewis would convey their title to Harper. Immediately following the execution of the contract Harper took possession of the claim, and on February 9, 1899, entered into a written agreement with the defendants, Sloan and Dwyer, whereby Harper promised to convey to them a two-thirds interest in his contract with McGregor and Lewis upon these terms: $4,000 on or before March 1, 1899, and $3,000 on or before June 1, 1899, "and if" (to quote directly from the agreement) "in the opinion of the parties of the second part [Sloan and Dwyer] it should be necessary, the further sum of three thousand (3,000) dollars, on or before the 1st day of September, 1899." It was stipulated that all of the money so paid, with the exception of Harper's expenses, should be used to pay for work on the claim under his direction and control. The contract further provided that if McGregor and Lewis should convey to Harper under the terms of their agreement the latter would, "within a reasonable time," make a conveyance to Sloan and Dwyer of a two-thirds interest in the mine, and that "thereafter" Harper should have management and control of the operating of the mine for which he should be paid "an adequate compensation." There was also a clause in this agreement providing as follows:

> "If the development and working of the Diadem Quartz Claim should be permanently abandoned by the party of the first part [Harper] and any money paid by the parties of the second part should be unexpended, the party of the first part shall return the same to J. T. Sloan, one of the parties of the second part."

The pleading contains further averments that:

> "Upon the making of said contract last set out plaintiff, on behalf of himself and said defendants Sloan and Dwyer, continued in the possession of the said property and actually engaged in working the same and commenced to extract the mineral therefrom, and that said plaintiff and said defendants Sloan and Dwyer then actually engaged in the working and development of said claim and extraction of the mineral therefrom, and ever since have continued in the actual working of said claim, and then became, and ever since have been, mining partners, and that said mining partnership has never been dissolved, except that said defendants Sloan and Dwyer have refused to contribute their proportion of the expenses of the said working of said property other than as hereinafter alleged."

Next follow allegations that defendants paid $7,000 according to the terms of their agreement; that all of this money was expended in actual mining operations; that it became necessary for the working of said property that the further sum of $3,000 should be paid on or before September 1, 1899; that plaintiff asked Sloan and Dwyer to pay such amount, but that they refused to do so. There are statements in the pleading that plaintiff and defendants continued in the possession of the claim, "said plaintiff managing and actually working the same for said partnership as aforesaid, and continued in the said working until he had expended upon the said claim all of the said sum of

$7,000, and other sums of money, exceeding more than $2,000 advanced by himself." It is averred that after the expenditure of more than $9,000 the plaintiff Harper had extracted from the mine $8,000, out of which he paid the purchase price, $6,000, to McGregor and Lewis, who, on December 8, 1899, conveyed their interest in the property to Harper "in trust for himself and for said defendants Sloan and Dwyer as provided for in said contract, which said deed was recorded at page 143 et seq. of Book No. 15 of Deeds, Sierra County Records, to which reference is hereby had, and then and thereby said plaintiff and said Sloan and Dwyer became the owners of said mining claim in equal shares; that is to say, one-third each." We may remark, in passing, that this averment is in direct contradiction of the contracts which did not provide for a conveyance in trust by the vendors to Harper, and did not contemplate the ownership by the defendants of an interest in the claim until an actual conveyance should be made to them by Harper.

Plaintiff pleads the following excuses for not making a deed to Sloan and Dwyer of two-thirds interest in the mine: (a) Plaintiff was informed and believed that on July 17, 1899, Sloan conveyed a one-half interest in the mining property to Lord William Beresford. (b) Sloan instructed plaintiff to make no deed to any person of any portion of the mining claim until he (Sloan) should give further instructions. (c) On May 21, 1901, Dwyer conveyed all of his share in the property to Sloan. (d) Prior to July 2, 1901, Lord Beresford died and his widow, as executrix of his last will, reconveyed to Sloan. (e) Plaintiff, although always ready to execute a deed agreeably to the strict terms of his contract, was unable to ascertain to whom he should convey until further instructed by Sloan.

It is further pleaded that after the execution of the trust deed to Harper he and the defendants, as mining partners, continued to work the claim. This work was prosecuted until the end of December, 1900, but yielded no profit. Plaintiff called upon defendants to contribute to his expenses the $3,000 "as provided in the contract," but they refused to make further payments, although Sloan consented to the work and advised Harper to continue it. Acting upon said advice, and with Sloan's approval, plaintiff "continued the said work until said partnership became indebted in the sum of about $2,000, during the said year 1900." To pay this indebtedness Harper mortgaged the mine to Sayles for $1,377.84, and thereafter Sayles' assignee demanding payment and Sloan and Dwyer refusing to contribute to the settlement of said debt, Harper negotiated a loan from Sharon and executed a note and mortgage for $2,252.30 to pay the Sayles note and discharge the earlier mortgage. From December, 1901, plaintiff was unable to work the claim continuously, but each year, to and including 1913, he expended for the alleged partnership more than $100 for assessment work. Plaintiff sues for compensation for all of his time employed in the management and control of the property for more than one year and 6 months up to the end of December, 1900, and for one month of each of the following 13 years; also for the taxes paid by him until 1913, inclusive.

There are allegations that Dwyer departed from California about 4 months after entering into the contract with Harper, and did not return, and that Sloan departed at the same time, but returned to California in December, 1900, remaining but 5 months, during which time he was informed of the conditions of the mining property "and of its indebtedness, and he consented to the same and promised to pay and advance to the said partnership the whole thereof." It will be seen at once that appellant's claims against the defendants must depend upon the existence of a mining partnership as defined by section 2511 of the Civil Code, which is as follows:

> "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same."

Examining the written instrument which is pleaded as the basis of the claims of Harper against defendants, we see at once that it is not a copartnership agreement whereby from its execution Harper, Sloan, and Dwyer were to work the claim as partners. The others advanced money for the purchase of Harper's interest in the mine in case he ever acquired any interest. There was no provision by which they were to share in the output or be responsible for Harper's expenses in the operation of the property until there should have been an actual conveyance of an interest to them by Harper after he should have acquired it from the original locators. Towards them Harper did not sustain the relation of a mining partner for he had not owned nor acquired the claim with them for the purpose of working it and extracting the mineral therefrom. He was in much the same position as was the plaintiff in Stuart v. Adams, 89 Cal. 367, 26 Pac. 970, who had contracted with the owners to work the mine, pay one-half the expenses thereof, and receive one-half of the product for his labor. Such an arrangement as this court decided does not make the parties to it mining partners. Harper's arrangement with his vendors differed only from the one discussed in the Adams Case in that he was to pay all of the expenses of working the mine and to place the product in escrow, meanwhile having nothing but an option to purchase the claim and the product within a certain time for a stated amount of money. Similarly the contract of Harper with the defendants gave the latter the right to a conveyance of part of Harper's interest if he ever should purchase, after which he should be entitled to an adequate consideration for "the management and control of the operating of said mine." We see no escape from the conclusion that there was to be no partnership until Sloan and Dwyer became part owners.

The excuses offered by plaintiff in his pleading for his failure to convey are not sufficient. Sloan's rumored conveyance to Lord Beresford surely was not sufficient reason for Harper to ignore the terms of his agreement with defendants. Nor did Sloan's instructions to delay conveyance justify a change in the written agreement, and, of course, such directions were of no effect in relation to Dwyer. Nor did Lady Beresford's reconveyance to Sloan operate to change the contract. Dwyer's conveyance to Sloan had no such effect either. Both of the transactions last mentioned occurred more than a year after plaintiff obtained title, and he never had created a mining partnership nor any other sort by making the conveyance prescribed by the written agreement to be made within a reasonable time after he should become the owner of the claim. The engagement of the defendants was to buy a two-thirds interest in a mine if it should be acquired. They paid $7,000 for such interest, but Harper worked the mine on his own account, and never carried out his promise to convey. Therefore he cannot take advantage of his own violation of the agreement of sale and at this late day seek to compel defendants to pay a mortgage placed by him upon his own property without their consent. Nor may he compel them to compensate him for work done upon his own claim without authorization from them. A contract to buy an interest in a mine is not a mining contract. Prince v. Lamb, 128 Cal. 120, 60 Pac. 689. An agreement to the effect that if A. should secure a paying mine through the efforts of B., said A. would, in addition to wages, give B. an interest in the mine, is not an agreement establishing a mining partnership. Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802. An agreement that upon the happening of some contingent future event the parties to the contract will operate a mine does not constitute a mining partnership. Dorsey v. Newcomer, 121 Cal. 213–216, 53 Pac. 557.

The conveyance of the property to plaintiff in trust for him and the defendants did not create a mining partnership. Before they could be charged as partners they must have engaged in working the mine. Peterson v. Beggs, 26 Cal. App. 760, 148 Pac. 541. As there was no mining contract the whole fabric of appellant's argument is destroyed, and it follows that the superior court did not err in sustaining the demurrer.

Judgment affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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180 Cal. 400

In re SHIRLEY'S ESTATE. (L. A. 5941.)

(Supreme Court of California. May 27, 1919.)

1. Wills 🔑651—Validity of Provisions—Forfeiture in Case of Contest.

Provision of will, "Should any one to whom I have made a bequest * * * undertake to break my Will I desire such persons bequest becomes void and be set aside," is a dispositive provision, and not a mere expression of wish or desire, addressed to no particular person, and is effective to bring about a forfeiture of legacy on violation of its terms.

2. Wills 🔑639—Conditions—Specific Application.

Where words in a will are used which dispose of property or impose a condition on a bequest given elsewhere in the will, they need not be addressed to any one, as it is enough that they show the intent and will of testatrix regarding property or legacy.

3. Wills 🔑464—Ungrammatical Expression.

Civ. Code, § 1322, providing that a clear bequest cannot be affected by other words, not equally clear, in another part of the will, does not apply to a clause "Should any one to whom I have made a bequest * * * undertake to break my Will I desire such persons bequest becomes void and be set aside," though ungrammatical, since intention is clear.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

In the matter of the estate of Louise F. Shirley, deceased. Appeal by Lucy C. McKinney, legatee, from order denying her the right to participate in distribution of assets petitioned for by George Puterbaugh, executor. Order affirmed.

Henning & McGee and F. B. Andrews, all of San Diego, for appellant.

Johnson W. Puterbaugh and Eugene Daney, both of San Diego, for respondent.

SHAW, J. This is an appeal by Lucy C. McKinney, one of the legatees mentioned in the will of Louise F. Shirley, from an order and decree of the superior court made on September 19, 1918, granting the petition of the executor to partially distribute the assets of the estate, and denying the right of the appellant to participate in said distribution.

The appellant was a sister and one of the heirs at law of the testatrix. The will gave to Lucy C. McKinney a legacy of $1,000, and to 12 other persons legacies in different sums varying from $50 to $5,000, and the residue to two young sons of George H. Van Arnam. Following the residuary bequest she appointed George Puterbaugh as the executor of the will. Then follows the language which is responsible for the appeal, as follows:

> "Should any one to whom I have made a bequest of any portion of my Estate undertake to break my Will I desire such persons bequest becomes void and be set aside."

The court found that Lucy C. McKinney did undertake to break the will by contesting probate thereof; that on the trial of said contest the decision was against her, and that said will was thereupon duly admitted to probate. It is obvious that this attempt brings her within the terms of the clause just quoted, and that if said clause constitutes a condition to the legacy in her favor she has violated the condition, and thereby forfeited her right to receive such legacy.

[1] The appellant contends that the clause above quoted is not a dispositive provision of the will, but a mere expression of a wish or desire, addressed to no particular person, and entirely ineffective to bring about a forfeiture of the legacy upon a violation of its terms. In support of this construction of the clause she relies on the decisions of this court in Estate of Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071, Kauffman v. Gries, 141 Cal. 295, 74 Pac. 846, Estate of Mitchell, 160 Cal. 618, 117 Pac. 774, and Estate of Purcell, 167 Cal. 176, 138 Pac. 704. These decisions each involved the question whether or not a precatory trust was created by the terms of a will purporting to impose upon the devisee or legatee a duty to a third person with reference to the property devised or bequeathed. They are applications of the rule of interpretation governing words addressed to the devisee or legatee concerning the property devised or bequeathed to him, as distinguished from the interpretation of general or particular expressions of the testator's will not so addressed, or, as it is sometimes stated, "addressed to the executor." The distinction is thus stated in Estate of Marti (132 Cal. 671, 61 Pac. 965):

> "While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms."

Appellant seizes upon the phrase "addressed to the executor" in the above passage, and therefrom draws the inference that when the word "desire" is used, and it is not in terms or expressly addressed to any person, it is not to be construed as indicating the intention of the testator to dispose of his estate or to effect a disposition thereof, but is a mere ineffective statement of his hope or wish. The phrase quoted was used in that case only as a convenient form of expression, and the passage is not to be taken as rigidly as the appellant claims. Other words have been held equally effective. In Board v. Culp, 151 Pa. 470, 25 Atl. 118, quoted with approval in Estate of Tooley, 170 Cal. 166, 149 Pac. 574, Ann. Cas. 1917B, 516, the rule is said to be that where words of request and the like "are used in direct reference to the estate, they are prima facie testamentary and imperative, and not precatory." In Estate of Tooley, the testatrix, after a positive gift of all her property to her daughter, followed it with the statement that if the daughter died without husband or children, "I desire that any property that may be left divided equally among my sisters and brother." The word "desire," so used, was held to be a word disposing of the estate and qualifying the preceding gift thereof. The court said:

> "The rule is practically universal that words in a will indicating the wish of the testatrix regarding the disposition to be made of her property by the law at her death are to be taken as a dispositive provision," and that, where "directed to the executor or to the law and not to a devisee or legatee," the word "desire" is sufficient "to declare a disposition of the property."

[2] The fact that the clause here involved is not formally addressed or directed to any person as one by whom the bequest should be set aside is of no importance. Where words are used which dispose of property or impose a condition upon a bequest given elsewhere in the will, they need not be addressed to any one. It is enough that they show the intent and will of the testatrix regarding the property or legacy. If they do this, the court and the law will carry it out by probating the will and distributing the estate as is provided therein.

[3] The appellant also invokes the rule that a clear and distinct bequest in a will cannot be affected by any other words, not equally clear and distinct, in another part of the will. Civ. Code, § 1322. The words of the qualifying clause first above quoted are not grammatical in form, but they are entirely clear and distinct as an expression of the will of the testatrix that, if any legatee or devisee shall undertake to contest the will, the legacy given to such person shall be thereby forfeited. The rule referred to does not apply to the case.

We are of the opinion that the court below correctly construed the will, and properly held that the appellant was not entitled to the legacy. Estate of Hite, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; Estate of Miller, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868.

The order is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

180 Cal. 443

MILLIRON v. DITTMAN et al. (L. A. 4944.)

(Supreme Court of California. May 29, 1919.)

1. PRINCIPAL AND SURETY ⟹59—LIABILITY OF SURETIES—EXTENT—PUBLIC BONDS.

The liability of sureties cannot be extended beyond a fair import of the express undertaking in the bond, unless the bond be given in pursuance of a governmental order or for a public purpose, in which case the law becomes a part of the bond.

2. PRINCIPAL AND SURETY ⟹59—EXTENT OF SURETY'S LIABILITY — LAW AS PART OF BOND.

The rule that the law under which a public bond is given is part of the bond has no application where its undoubted effect would be to impose a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself.

3. MUNICIPAL CORPORATIONS ⟹703(1)—JITNEYS—BONDS — CONSTRUCTION—INCLUSION OF PROVISIONS OF ORDINANCE.

A bond given by a casualty company covering the operation of a jitney bus, not expressly obligating the insurer to pay to injured third persons damages for injuries resulting from the negligence of the insured, was properly construed to include the requirements of an ordinance that the bond be conditioned for payments directly to the damaged person or his duly authorized representative, so that the casualty company was properly joined with the insured in an action for injuries due to the negligent operation of the motorbus.

Department 2.

Appeal from the Superior Court of Los Angeles County; Frederick W. Houser, Judge.

Action by C. J. Milliron against F. G. Dittman, T. H. O'Neill, and the Pacific Coast Casualty Company. From a judgment for plaintiff against the two last-named defendants, the latter appeal. Affirmed.

V. J. Cobb and Chas. L. Evans, both of Los Angeles, for appellants.

Ward Chapman, L. M. Chapman, H. J. Fish, and Clyde R. Burr, all of Los Angeles, for respondent.

LENNON, J. This is an appeal from a judgment in favor of the plaintiff and against two of the defendants, O'Neill and Pacific Coast Casualty Company, in an action for personal injuries alleged to have been caused the plaintiff by the negligence of O'Neill. The negligence charged arose out of the operation by O'Neill of a jitney bus in which the plaintiff Milliron was riding as a passenger on July 8, 1915.

The casualty company was joined as a defendant in the action, because it had executed upon the application of the defendant O'Neill an indemnity bond pursuant to the requirements of an ordinance of the city of Los Angeles. This ordinance made it unlawful to operate a motorbus unless there should be given and kept on file in the office of the city clerk, and in full force and effect at all times during the operation of such bus, a good and sufficient bond or policy of insurance. The ordinance provided that this bond or policy of insurance should be conditioned for the payment of various specified sums of money for injury to or the death of one or more persons and for damage done to the property of others resulting from the operation of such motorbus. The ordinance further provided that—

> "Said bond or policy of insurance shall be conditioned that said bond or policy of insurance shall inure to and be for the benefit and protection of any one who shall sustain any damage or injury, or to the heirs * * * of any such person who may be so damaged or injured or suffer death by reason of negligence or misconduct on the part of the driver or operator of any motorbus operated under any such permit or from the defective construction thereof. Such bond or policy of insurance shall be a continuing liability, notwithstanding any action or recovery thereon. Said bond or policy of insurance shall also be conditioned that payments required to be made thereunder shall be made in case of injury or damage, directly to the insured or damaged person or his duly authorized representative."

The bond in question, although covenanting to pay directly to the insured such sums as might be adjudged against him as damages for injuries resulting from the operation of his motorbus, did not expressly obligate the defendant company to pay to injured third persons such sums as they might be entitled to recover as damages for injuries resulting from the negligent operation of the motorbus. The bond in question, however, did provide that—

> "In the event of a final judgment covering any loss or claim under this policy is rendered against the assured, the company guarantees the payment of said judgment direct to the plaintiff securing such judgment, provided that any action by the said plaintiff to recover under this clause is commenced within twelve months next after such final judgment shall have been rendered."

The trial court read into the bond the provision of the ordinance requiring the bond to be conditioned for its payments "directly to the * * * damaged person or his duly authorized representative." Accordingly it was held that the casualty company was properly joined as a defendant in the action and was liable to the plaintiff upon the bond. This holding is asserted to be error upon the theory that the liability of the defendant company could not be extended beyond the express words of the bond nor measured by anything outside of the bond.

[1] It is true, as the appellants contend, that the general rule is to the effect that the liability of sureties cannot be extended beyond the fair import of the express undertaking in the bond. There is, however, an exception to this general rule in the case of bonds given in pursuance of a governmental law for a public purpose. The exception is clearly and concisely stated in the case of State v. Nutter, 44 W. Va. 385, 30 S. E. 67, where it is said:

> "The law in force at the date of a public bond, fixing a certain condition for it, and saying what its obligations shall be, is a part of it as effectually as if such obligations were in words inserted in it. * * * By signing the parties adopt the law as a part of the bond. If we do not so hold we frustrate the plain purpose of the statute."

To the same effect are Crawford v. Ozark Insurance Co., 97 Ark. 549, 134 S. W. 951; State, for U. S., etc., Co. v. McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822; State v. Wotring, 56 W. Va. 394, 49 S. E. 365, and Macready v. Schenck, 41 La. Ann. 456, 6 South. 517.

[2, 3] Of course, this exception to the general rule would have no application where its undoubted effect would be to impose a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself. Graeter v. De Wolf, 112 Ind. 1, 13 N. E. 111. There is no provision, however, in the bond in question which expressly excludes a direct right of recourse by the injured party against the bonding company. Moreover, the bond as it read at the date of the accident was a contract made not only for the protection of the operator of the motorbus, but also directly for the benefit of injured passengers in so far as it expressly promised to pay directly to an injured party any amount for which the operator of the bus might be adjudged liable. To read the statutory requirement into the bond, while it accords to the plaintiff the privilege of joining the casualty company in a suit against the operator of the bus, introduces no necessary inconsistency into the contract and leaves the substantial rights of the parties unimpaired. The only ground upon which it is suggested that the rights of the defendants might be injuriously affected is that a jury might be expected to return a larger verdict for the plaintiff in a suit in which the casualty company appears as a party defendant, because they would necessarily know that the operator of the bus, whose act actually caused the injury, was insured. The jury would presumably know in any event that the operator was insured, since the law requiring the filing of the bond was one of which all persons would be presumed to have knowledge. Nor can we doubt that the casualty company must be presumed to have taken the knowledge of the jury into account in fixing its charges for executing a bond or policy of insurance issued in assumed pursuance of an ordinance unequivocally prescribing that the bond should be enforceable in favor of the persons injured by the act of the operator of the motorbus.

It is not claimed that the judgment appealed from is erroneous as to the defendant O'Neill if it is to be sustained as to the defendant casualty company. The foregoing discussion disposes, therefore, of all of the issues presented in the case.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

180 Cal. 348

STANFORD HOTEL CO. v. M. SCHWIND CO. (S. F. 8250.)

(Supreme Court of California. May 9, 1919.)

1. Action 🔑27(2)—Landlord and Tenant 🔑229(1)—Right to Remedy—Suit for Land Against Transferee of Tenant Corporation.

An action by plaintiff to recover by attachment rent under a lease from a new corporation continuing the business of the lessee corporation, which had dissolved, is not an action ex delicto for fraud, but an action upon contract, express or implied, for the direct payment of money, and therefore, within Code Civ. Proc. § 537, subd. 1, an action in which an attachment may issue.

2. Attachment 🔑4—Scope of Remedy—Legal or Equitable Action.

It is not essential under Code Civ. Proc. § 537, providing that an attachment may issue in an action upon a contract, express or implied, for the direct payment of money, that such action be strictly legal or strictly equitable or partly legal and partly equitable, if its purpose is recovery upon such contract.

3. Landlord and Tenant 🔑229(1)—Right to Remedy—Cause of Action—Contracts—Invoking Equitable Principles—Effect.

Where a lessor seeking to recover by attachment from a transferee of the lessee corporation money due as rent alleges facts showing not only that the transferee took the property as part of a scheme to defraud creditors, but that the transferee is in fact the original debtor under another name, it is entitled to an attachment under Code Civ. Proc. § 537, subd. 1, by virtue of suing for a recovery upon a contract; the fact that certain equitable principles are invoked not converting such action into one ex delicto.

4. LANDLORD AND TENANT ⚷229(1)—NATURE OF CAUSE OF ACTION.

In a suit by the lessor against a new corporation, transferee of the lessee corporation, which had dissolved, where the complaint asked that it be decreed that defendant hold the property transferred to it charged with a certain sum, plaintiff's claim for rent, with interest and costs, and that the property be sold for payment thereof, a money judgment is asked for, and the complaint sufficiently states a cause of action upon an express contract for direct payment of money entitling plaintiff to an attachment under Code Civ. Proc. § 537, subd. 1.

5. CORPORATIONS ⚷579(1) — REORGANIZATION—LIABILITIES OF ORIGINAL CORPORATION—RENT.

Where a corporation operating several restaurants reorganized under a new name, but with practically the same stockholders and directors, assigned all of its assets to the new corporation except plaintiff's lease, and continued to carry on the same business, equity will regard the new corporation a continuation of the old and hold it liable for rent due plaintiff from the former corporation.

6. CORPORATIONS ⚷580—ACTION TO ENFORCE LIABILITY AGAINST REORGANIZED CORPORATION—PARTIES—JOINDER OF FORMER CORPORATION.

Where a suit is brought by the lessor under a lease with a former corporation against a new corporation having practically the same officers and stockholders and continuing the same business, and to whom all the former corporation's property had been assigned except plaintiff's lease, to recover by attachment rent due from such former corporation, it is not necessary to make the former corporation a party defendant.

7. ATTACHMENT ⚷111 — AFFIDAVIT —AVERMENTS—NONRESIDENCE OF DEFENDANT.

Where plaintiff, seeking to attach the property of a nonresident, states a cause of action coming under Code Civ. Proc. §§ 537, 538, subd. 1, it need not show the nonresidence of the defendant in the affidavit on attachment, the nature of the cause of action rather than defendant's residence being controlling, such showing being necessary only in causes arising under subdivisions 2 and 3.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Stanford Hotel Company against M. Schwind Company, in which plaintiff prays for an attachment to issue. From an order denying defendant's motion to dissolve the attachment, defendant appeals. Order affirmed.

G. B. Benham and Edward Lande, both of San Francisco (Frank A. Duryea, of San Francisco, of counsel), for appellant.

W. W. Sanderson, of San Francisco, for respondent.

LAWLOR, J. This is an appeal from an order denying a motion to dissolve an attachment.

The Stanford Hotel Company is the lessor in a certain lease upon which the Maryland Dairy Lunch Company, a California corporation and the original debtor, is obligated in the sum of $3,617.60, as unpaid rent from March 1, 1916, to October, 1916; the monthly rental of the demised premises being $452.-25. The lunch company, prior to January 26, 1916, carried on an extensive restaurant business in San Francisco in four locations, one of which was the premises leased from the plaintiff at 250 Kearny street. One M. Schwind was the president and a director of the lunch company and the owner of nine-tenths of the capital stock thereof. From the complaint it appears that the lunch company was solvent and meeting its ordinary and current liabilities, when, some time prior to January 26, 1916, the said Schwind and the other directors of the lunch company contrived a fraudulent scheme to evade the payment of the rent due to the plaintiff and to escape further liability upon its said lease. They organized a Nevada corporation, the M. Schwind Company, the defendant in the present action, with a perpetual charter permitting the carrying on of business elsewhere than in the state of Nevada, and also providing an exemption of stockholders' liability. 996 shares of 1,000 shares of said company were issued to M. Schwind, who became a director thereof; the other four directors holding but one share each. On January 25, 1916, this corporation duly complied with the laws of California and filed its articles of incorporation. Meanwhile the Maryland Dairy Lunch Company had deliberately refused and neglected to pay its license tax and franchise tax to the state of California, thereby forfeiting its charter on March 4, 1916. On January 26, 1916, the lunch company held a meeting of its board of directors and passed a resolution selling and transferring to the defendant corporation its three places of business with the leasehold rights of occupancy in the same, and in all its property. No mention of the business carried on at 250 Kearny street was made in this bill of sale, nor was the lease included therein. The bill of sale was not acknowledged and recorded until after the dissolution of the lunch company, namely, on March 24, 1916. The M. Schwind Company continued ostensibly to carry on business at 250 Kearny street after the bill of sale was made and delivered, but before it was acknowledged and recorded, that is, until March 14, 1916, when the premises were vacated and the lease abandoned by the lunch company. It is further alleged that the purpose and effect of this transaction was to eliminate the lunch company as a corporation, and as a result there was left no property whatever to come into the hands of its directors as trustees for its creditors, and that the transfer to the M. Schwind Company was entirely without consideration; the purpose of the deal being the continuation of the business of the lunch company under a new corporation which was in substance and effect but a continuation of the old, and owned substantially by the same stockholders, and carrying on its business without interruption or delay.

The complaint was filed on October 23, 1916. The prayer was for a temporary injunction restraining the defendant corporation until after a full hearing of this cause from selling or otherwise disposing of any of the property involved in the bill of sale; that the said sale be declared void and of no effect; that it be adjudged and decreed that the defendant holds the property charged with the payment of the plaintiff's claim for $3,617.60, with interest and costs; that the property be sold for the plaintiff's claim and costs; and for other further and proper relief. On the same day Isaac Harris, president of the Stanford Hotel Company, made affidavit for the attachment of the said property. The affidavit conforms strictly to the requirements of subdivisions 1 of section 537 and section 538 of the Code of Civil Procedure. Upon the filing of the affidavit and the undertaking the writ was issued. Whereupon the defendant, on October 28, 1916, without answering the complaint, moved to dissolve the attachment upon the grounds, briefly stated: (1) That the cause of action is not one in which a writ of attachment could issue; (2) that the writ was improperly issued; (3) that the writ was irregularly issued; (4) that the affidavit upon which the writ was issued is false in the statement therein that the defendant is indebted to the plaintiff in the sum of $3,617.60 over and above all legal set-offs or counterclaims upon an express contract for the direct payment of money, to wit, to pay rent under a lease of certain real property; (5) that the affidavit is false in the statement that the contract was made and is payable in this state. The only evidence taken on the hearing of the motion was that of Isaac Harris, the president of the plaintiff corporation. The motion to dissolve was denied; whereupon the defendant appealed.

[1] 1. Appellant relies chiefly on the contention that this is not an action in which an attachment may issue, in that it appears upon the face of the complaint that the suit is not one upon contract, but that it is an action ex delicto for fraud. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1, cited by appellant in support of this contention, correctly states the law of this state that an attachment will not lie in an action ex delicto for fraud. The action in that case was held to be one of that character. But nothing declared in that case, nor in the cases therein cited, can be taken as authority supporting the contention of appellant that this is such an action. The action in Hallidie v. Enginger, supra, was brought by the plaintiff, as trustee for the stockholders of the corporation, which had forfeited its charter, to recover a sum of money received by the defendant from dividends and as proceeds from the sale of stock which the defunct corporation had been induced to sell to the defendant by his false representations. It was clearly and essentially an action grounded in fraud, and not one for the direct payment of money upon contract, express or implied. Whatever liability existed on the part of the defendant arose solely through his fraudulent representations, and consequently the gravamen of the action was fraud.

[2, 3] But such is not the case here. The recovery which is sought by the plaintiff is a definite sum of money, due on a contract of lease for the payment of rent. The question here is whether this action is one within the purview of subdivision 1 of section 537 of the Code of Civil Procedure. That subdivision does not contemplate the right of attachment in an action ex delicto for fraud. This statement is in accord with Hallidie v. Enginger, supra. The action must be one upon contract, express or implied, for the direct payment of money. If a recovery upon such a contract is the purpose of the suit, so far as the right of attachment is concerned, it is immaterial whether the action be regarded as strictly legal or strictly equitable, or partly legal and partly equitable. The subdivision does not in terms prescribe that the action must be one in law, or that it may not be one in equity, or that it may not be one of either law or equity, or of both. Hence it is not necessary in order to uphold the writ of attachment to establish the proposition that the action is either legal or equitable. What must be established is that the action is based upon contract, either express or implied, for the direct payment of money. It is clear that this action addresses itself to both the legal and the equitable powers of the court. But that circumstance will not operate to deny the plaintiff a writ of attachment if he is seeking recovery upon the breach of such contract. It is to be kept in mind that there is no suggestion that fraud entered into the making of the contract. The respective obligations of the parties thereunder were for a time performed, and then one of them committed a breach of the contract. So the basis and essence of the action is an executed contract for the direct payment of money, and in order to have satisfied any judgment that may be recovered for such breach the plaintiff sues out a writ of attachment. In order to establish the proposition that the property attached should be responsive to such a judgment, the plain-

tiff invokes certain well-recognized equitable principles. But this does not have the effect of converting the action on the express contract for the direct payment of money into one ex delicto for fraud. Consequently, even if such an action may properly be regarded as partially legal and partially equitable, it will make no difference. The plaintiff is nevertheless entitled to a writ of attachment by virtue of the fact that he is suing for a recovery upon the contract which is the gravamen of the action. In stating, as we have, that it does not matter that the relief sought partakes of both law and equity, we do not mean to be understood as holding that an attachment may be issued upon a creditors' bill to set aside transfers of property in fraud of creditors. In such a case the gravamen of the cause of action against the transferee is the fraud. But in the present action the facts alleged in the complaint make out not merely a case where the transferee took the property as part of a scheme to defraud creditors, but one where the transferee is in fact the original debtor masquerading under a different name. If the action were one against the tenant by name to recover the rent due, it could not be questioned but that it was one upon a contract for the direct payment of money. Yet that is what the present action really is.

[4] But the appellant argues in support of his contention that this is an action ex delicto for fraud that the plaintiff did not in his prayer to the complaint ask for a money judgment. The only direct reference to the claim in the prayer is in these words:

> "That it be adjudged and decreed * * * that the said defendant holds said property * * * charged with the payment of the plaintiff's claim for $3,617.60, with interest and costs; that the said property be sold for the payment of plaintiff's claim and costs."

While the prayer does not in express terms ask for a money judgment, it is nevertheless plain that such a judgment was the purpose of the suit. However, the respondent stated in oral argument that a motion would be interposed in the court below to have the complaint amended in that regard. This may be done. It was said in Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741:

> "Even on demurrer to the complaint the defendants cannot object to the prayer, and certainly, so long as the complaint contains every essential of an action upon contract, they cannot upon motion for an attachment accomplish what they could not upon demurrer; a motion to dissolve the attachment cannot reach the defects in the complaint."

It was further held in that case that a motion to dissolve an attachment could not be turned into a demurrer, but that on such motion we are—

> "simply to determine whether: (1) The complaint showed the action to be founded upon contract, express or implied; (2) whether it states facts sufficient to constitute a cause of action against the defendants; and, if not (3) does it appear therefrom that it can be so amended as to state a cause of action upon contract."

The complaint sufficiently states a cause of action upon an express contract for the direct payment of money to satisfy the requirement of subdivision 1 of section 537.

[5, 6] 2. The appellant further contends that attachment will not lie herein because of lack of privity of contract between the plaintiff and the defendant corporation. This is equally without merit. It is true that the contract was entered into between the plaintiff and the Maryland Dairy Lunch Company, and that the lunch company assigned all of its assets to the defendant corporation except this lease with the plaintiff. As the lease was not included in the bill of sale, the law will not imply a promise on the part of the defendant corporation to pay the rent. 7 R. C. L. 183; 76 Am. St. Rep. 800, note. But it is well established in this state that under circumstances such as these, where a corporation reorganizes under a new name, but with practically the same stockholders and directors, and continues to carry on the same business, a court of equity will regard the new corporation as a continuation of the former corporation, and will hold it liable for the debts of the former corporation. Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Higgins v. Cal. Petroleum Co., 122 Cal. 373, 55 Pac. 155; Id., 147 Cal. 363, 81 Pac. 1070; Strahm v. Fraser, 32 Cal. App. 447, 163 Pac. 680. The allegations of the complaint as to the scheme to avoid fraudulently the payment of the plaintiff's rent go to the point of making out, as they do, that the defendant, by name the M. Schwind Company, is, in fact, the tenant formerly by name the Maryland Dairy Lunch Company. That equity will strip off the mask of a separate corporate identity, when it is but a mask, is amply sustained by these authorities. Nor is it necessary, as asserted by appellant, to make the former corporation a party defendant. Blanc v. Paymaster Mining Co., supra.

[7] 3. Objection is raised to the sufficiency of the affidavit to support the attachment on the ground that it does not state the fact that the defendant corporation is a nonresident. The question thus presented is whether, within the meaning of sections 537 and 538 of the Code of Civil Procedure, in every case of a nonresident defendant, the fact of nonresidence must be averred in the affidavit on attachment? We think not. Under subdivisions 1 it is the nature of the cause of action against a nonresident defendant rather than the fact of his residence that controls. Only in those cases wherein the cause of action is one contemplated by either sub-

division 2 or 3 is it necessary to aver that the defendant is a nonresident. In the case at bar, while the defendant corporation is a nonresident, the cause of action comes within subdivisions 1, and, as already stated, the affidavit is in strict accord with those subdivisions. Subdivisions 1 do not mention the subject of the residence of the defendant. It is only in subdivisions 2 and 3 that the requirement appears. These latter subdivisions are drawn expressly for the benefit of those seeking to attach the property of nonresidents. It follows that in attaching property of a resident the affidavit must be drawn under subdivisions 1; but it does not follow, as claimed by appellant, that in seeking to attach the property of a nonresident the attachment cannot be sued out under subdivisions 1 without averring the fact of nonresidence. It is only when a plaintiff has a cause of action different from the kind contemplated by subdivisions 1 that advantage may be taken of the more liberal requirements of subdivisions 2 and 3. These apply only to nonresidents, and in every instance the fact of nonresidence must be averred. Where the cause of action comes under subdivisions 1 of these two sections, the residence of the defendant is immaterial. The affidavit is sufficient.

Order affirmed.

We concur: SHAW, J.; OLNEY, J.; WILBUR, J.; MELVIN, J.; LENNON, J.

180 Cal. 423

HYMAN BROS. BOX & LABEL CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8890.)

(Supreme Court of California. May 29, 1919.)

1. MASTER AND SERVANT 🔑348—WORKMEN'S COMPENSATION ACT—STATUTE APPLICABLE.

The rights of an injured servant are measured by the Workmen's Compensation Act in force at the time of the injury.

2. MASTER AND SERVANT 🔑417(3) — WORKMEN'S COMPENSATION ACT—CERTIORARI—JURISDICTIONAL QUESTION.

Determination of question whether or not certain described actions of an employé amounted to willful misconduct within the Workmen's Compensation Act goes to the jurisdiction of the Industrial Accident Commission, and therefore is reviewable on certiorari.

3. MASTER AND SERVANT 🔑380—WORKMEN'S COMPENSATION ACT — "WILLFUL MISCONDUCT."

A 20-year old employé working at a press was not, as a matter of law, guilty of willful misconduct within the Workmen's Compensation Act in catching at certain falling or loose cards, so that his hand was caught between the bed and platen of the press, though he had been warned against the danger of so doing; the act being possibly instinctive.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

4. MASTER AND SERVANT 🔑385(11) — WORKMEN'S COMPENSATION ACT — COMPENSATION TO INJURED MINOR—"AFTER."

Under Workmen's Compensation Act 1913, § 17c, as amended by St. 1915, p. 1086, § 6, in case of injury to an employé in his twentieth year, the Industrial Accident Commission had no power to compute compensation on basis of probable wages which employé might obtain long after reaching his majority; "after," as used in the section in relation to the average weekly earnings of a minor employé being the weekly sum he would probably be able to earn "after" attaining the age of 21 years, meaning "at."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, After.]

In Bank.

Certiorari by the Hyman Bros. Box & Label Company and the Ætna Life Insurance Company, to review an award of the Industrial Accident Commission under the Workmen's Compensation Act in favor of Fred Weiss, a minor, represented by Mathiew Weiss, his guardian ad litem and trustee. Award annulled, and matter remanded to commission.

E. L. Stockwell and Redman & Alexander, all of San Francisco, for petitioners.

Christopher M. Bradley and Warren H. Pillsbury, both of San Francisco, for respondent.

MELVIN, J. Certiorari to review the award of the Industrial Accident Commission in favor of Fred Weiss, who was injured by having his hand caught in a printing press to which he was "feeding" pieces of pasteboard that were cut by the machinery into proper shape for use in the making of pasteboard boxes.

[1] The injury was suffered by the applicant for compensation in the month of December, 1917, and his rights must be measured by the Workmen's Compensation Act of 1913, as amended in 1915 (St. 1915, p. 1079), which was then in force.

The applicant was 20 years of age at the time of the injury. He had worked for the Hyman Bros. Box & Label Company, generally as a "press feeder," three times, his terms of employment aggregating about 19 months. He had worked for another corporation, also as a press feeder, for 2 years and 2 months. It thus appears that he was an experienced workman almost of the age of majority.

The press at which Mr. Weiss was working when he was injured was equipped with a stationary upright plate called the "bed" and a plate called the "platen," which repeatedly opened and closed against the "bed." In operating the press he stood in front of it, removing the cut pasteboard with his left hand and inserting the uncut sheets with his right hand. Sometimes a cardboard sheet would slip off the bed of the press and fall into the body of the press, and sometimes some of the uncut pieces would fall into the press from the "feed board" upon which the operator kept a supply. In such case the press could be stopped at once by moving a lever, and the card or cards could be removed without danger. The injury to the applicant occurred while he was reaching into the body of the moving press for a sheet or sheets which had fallen. Asked by the examiner if that was a proper thing for him to do, he said, "Well, it might not have been," and to the question "Why not?" he replied as follows:

> "When I first came to Hyman Bros. Box & Label Company, I was told not to grab any sheets, when I first came there. That was 3 or 3½ or 4 years ago. Then I left Hyman Bros. again and came back, after feeding that many years, and, being that I was experienced in feeding, I was not told that any more."

Following this statement the questions and answers were as follows:

> "You knew then that that instruction had been given you, and you knew it was not a proper thing to do? A. Yes.
>
> "Q. Had anybody ever seen you do that before, any of the foremen? A. I don't know. I couldn't tell you that.
>
> "Q. You had done it two or three times before? A. Yes, sir.
>
> "Q. And you did it this time? A. Yes, sir."

At another place in the return to the writ his testimony is reported as follows:

> "Q. Mr. Weiss, if you were reaching into that machine to take out loose cards that had fallen in there while the machine was in motion, you were doing something you knew was not exactly proper, weren't you? A. The loose ones, you mean?
>
> "Q. Yes. A. Yes, sir.
>
> "Q. But nobody had said anything to you in the last year or two about doing that? A. No, sir.
>
> "Q. But when you first came there, as I understand you, you were instructed never to reach into the machine? A. When I first started to learn. That was the first place I fed. I was just starting to learn to feed at that time.
>
> "Q. What did they say to you? A. They told me, 'You don't want to put your hand into the machine if any sheets fall down, because you can get more sheets than you can hands.'
>
> "Q. What would have been the right thing to have done if those sheets had fallen in there? A. Stop the machine. It didn't do any harm, and you could still keep running."

In his application to the Industrial Accident Commission for compensation Mr. Weiss had described the occasion of the injury as follows:

> "Some sheets of box board dropped from the feed board into the press, and applicant reached with his left hand to catch them; the left hand and arm being caught between bed and platen."

[2] The Industrial Accident Commission found that in attempting to catch the card "the employé acted instinctively without reflection, and such act did not constitute willful misconduct, and that therefore said injury was not caused by willful misconduct of the employé." Petitioners attack this finding as contrary to the evidence. This they say, is the case of an employé who, with full appreciation of the danger, violated specific instructions given him for his own protection. The question before us, therefore, is whether or not the described actions of the employé amounted to willful misconduct. That an answer to such a problem goes to the jurisdiction of the Industrial Accident Commission is settled by decisions of this court. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35; Fidelity & Deposit Co. v. Industrial Accident Commission, 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903.

[3] The doctrine that an unpremeditated and impulsive act in violation of orders may not be willful misconduct finds some support in the authorities, but usually nonage is an element of the decisions in which such doctrine has been upheld. It seems to us, however, that the age of the person injured does not necessarily make a material difference. The tendency to recover something falling from a machine; to reach for a hat blown off the head by a sudden gust of wind; to apply the brakes to a "skidding" automobile —in short to perform acts of many sorts upon the impulse of the moment, is not the failing of youth alone. The true tests to be applied have reference to the nature of the work being performed and the circumstances of each particular case. This court has been at pains more than once to define "willful misconduct." Perhaps the best definition (and, incidentally, the one cited by both parties to this controversy) is the one found in the opinion in Great Western Power Co. v. Industrial Accident Commission, 170 Cal. 180, at page 189, 149 Pac. 35, 40. The court used this language:

> "Willful misconduct means something more than negligence. It does not include every violation or disregard of a rule. Casey v. Humphreys (1913) 6 B. W. C. C. 520. But it cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct. Brooker v. Warner, 23 L. T. R. 201."

In that case (known in the profession as the "Mayfield Case"), the applicant had entered upon the duty of handling wires used for the transmission of high tension electric current, without putting on the nonconducting gloves which the rules of his employer, well understood by him, required him to wear at such times. From the very nature of the act it was one which involved deliberation and a willful disobedience of a salutary rule. There was no room for the application of the doctrine of sudden impulse. The facts of the present case are vastly different. Admittedly, the petitioner Weiss knew the rule. Admittedly, he did something in apparent violation of the rule, which, if it had been the result of deliberate intention, would have amounted to willful misconduct; but the circumstances were such that any person, experienced or not, might have impulsively put himself in jeopardy as this young man did, without any intent to violate a known rule. There is evidence to support the conclusion reached by the Industrial Accident Commission, and we are of the opinion that upon this branch of the case a correct conclusion was reached. At the rate of the running of the press, the feeder was given at most a little more than one second for the entire operation of removing each cut piece of cardboard and inserting one that was uncut. Upon seeing a card fall into the machinery he was given but the smallest degree of time for deliberation and for determining whether or not he should reach for the pasteboard. It needs no argument to convince a court that a person in such a situation will not be judged by the same standards as one who breaks a rule by means involving time for reflection and excluding the possibility of sudden impulse. It is doubtless true that such an accident might come under the doctrine of the "Mayfield Case," as, for example, where an operative habitually and intentionally ignored the rule; and if the commissioners had believed the testimony of one witness who stated that after the injury Weiss admitted reaching into the moving press for fallen cards hundreds of times before, a finding of willful misconduct would have resulted. But the applicant denied the interview and the alleged statements attributed to him. Therefore we cannot disturb the finding made by the triers of facts.

The authorities sustain the views expressed above. In Whitehead v. Reader, [1901] 2 K. B. 48, it was held that where a man tried to replace a belt which had slipped from the machinery, such act may be regarded as venial, and not willful misconduct on his part. In McNicholas v. Dawson, [1899] 1 Q. B. 773, it was announced that each case must depend upon its own peculiar facts, and that the breaking of rules does not necessarily constitute serious misconduct. In Peru Basket Co. v. Kuntz (Ind. App.) 122 N. E. 349, it was held that an employé with defective eyesight, who inadvertently placed his hand contrary to directions in a place where it was caught by a cutting machine, was not guilty of willful disobedience.

Petitioners have cited many authorities to the effect that where a servant goes outside of the scope of his authority, although still upon the employer's premises, he may not recover for any injury. Typical of such decisions is Williamson v. Industrial Accident Commission, 171 Pac. 797. The facts there disclosed were these: The applicant for compensation had gratuitously undertaken to clean a light well. She was injured while performing this task, but it was held that as she was not engaged to do that sort of work she was not entitled to compensation for her injuries. Undoubtedly that and similar authorities announce a correct rule, but one having no application to the facts now before us. Not one of them involves the conduct of an employé confronted with a sudden and unexpected situation furnishing almost irresistible occasion for impulsive action.

[4] Petitioners' only other objection is to the amount of the award which, it is asserted, was in excess of that which the commission was empowered to give. With this view we agree.

Section 17c of the Workmen's Compensation Act is in its essential parts as follows:

> "If the injured employé is under twenty-one years of age, * * * his average weekly earnings shall be deemed * * * to be the weekly sum, that under ordinary circumstances he would probably be able to earn after attaining the age of twenty-one years, in the occupation in which he was employed at the time of the injury, or the occupation to which he would reasonably have been promoted, if he had not been injured." St. 1915, p. 1086, § 6.

The Industrial Accident Commission made the award upon the assumption that "after attaining the age of twenty-one years" means a reasonable time after majority. It was the theory that if the wages being earned at the time of injury were essentially "boy's wages," then the commission might base the amount of compensation upon "the adult's wages which the same individual would be expected to reach within the few months, or perhaps even a few years after passing the age of twenty-one."

With this view of the law we cannot agree. The infirmity of the rule must be apparent when we remember that there is no rule by which the exact difference between "boy's wages" and "man's wages" may be computed. This applicant was in his twenty-first year at the time of the injury. Under the statute quoted above the commission was bound to find his probable earnings at the age of 21 years. Such an interpretation of the word "after" is fully in accord with sound reason and authority. For example, bequests to take effect "after death" vest at death. In re Swinburne, 16 R. I. 208, 14 Atl. 850; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Atwell's Executors v. Barney, Dud. (Ga.) 207. In 2 C. J. 395, among the definitions of "after" given are "as soon as; at or immediately after; on; simultaneously; upon." That the framers of the Compensation Act intended the word "after" to mean "at" is obvious when we have in mind that different parts of a statute are to be so construed as to make them consistent and harmonious, giving proper effect to each of them. If the young man had been 21 years and 1 day old when he was injured, the commission would have been under the necessity of fixing his compensation in accordance with his wages at that time. To hold that because he was a few months under the age of 21 a much more flexible rule should apply would be an interpretation of the statute in a manner out of harmony with the part having reference to adults. Therefore we must hold that the Industrial Accident Commission had no power to compute the compensation upon the basis of probable wages which appellant might obtain long after reaching the age of 21 years.

The award is annulled, and the matter is remanded to the Industrial Accident Commission, to the end that such proceedings may be taken as are not inconsistent with the views herein expressed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

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180 Cal. 416

WESTERN PAC. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 8959.)

(Supreme Court of California. May 29, 1919.)

1. Master and Servant ⚿380—Workmen's Compensation Act—Intentional Disobedience.

Where a young man of 18 operating a drill with an upright shaft, which machine carried the warning sign, "Stop before repairing, oiling," etc., on seeing a stream of grease running down the framework made a dive with a cloth at it, so that his hand was drawn into the machine, it was not as a matter of law intentional and willful disobedience to exclude him from recovering compensation under the compensation act, but the commission could find he was not so disobedient.

2. Master and Servant ⚿385(11) — Workmen's Compensation Act—Minor Employé—Amount of Compensation.

The Workmen's Compensation Act in case of injury to a minor employé justifies a finding of compensation based on the probable wage of the employé when he shall reach 21, not on that which he would be likely to earn within a reasonable time after attaining such age.

In Bank.

Certiorari by the Western Pacific Railroad Company to review the action of the Industrial Accident Commission in awarding compensation under the Workmen's Compensation Act (St. 1915, p. 1079) to Earle Dean, a minor, represented by J. L. Dean, his guardian ad litem, and trustee. Award annulled, and matter remanded to the commission.

Henley C. Booth, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. A writ of certiorari was issued for the purpose of reviewing the action of the Industrial Accident Commission in awarding compensation to Earle Dean. The questions involved are very similar to those discussed and decided in Hyman Bros. Box & Label Co. and Ætna Life Insurance Co. v. Industrial Accident Commission, S. F. No. 8890, 181 Pac. 784, this day decided. In this proceeding, as in that one, the two contentions made by the petitioner were: (1) That the injury suffered was caused by the young man's serious and willful misconduct; and (2) that the commission exceeded its jurisdiction in fixing the basis for computing the average annual earnings of the injured minor.

The facts as disclosed by the testimony, which supports the findings, are in brief as follows:

Earle Dean was an intelligent young fellow, nearly 18 years of age. He had been set to operating a drill press, to which was affixed a metallic sign bearing words of warning.

The machine consisted of a drill with an upright shaft meshed into gearings upon a horizontal shaft. In an opinion filed by two of the members of the Industrial Accident Commission the injury and its cause are discussed as follows:

"The vertical shaft at the time of the injury was revolving slowly, and it was easier to wipe it while in motion than when still. While applicant was wiping it he saw a stream of grease running down the framework of the machine from the upper shaft, and, without thinking about the consequences likely to flow from his act, made a dive with his cloth at this stream of grease. The gearing caught the cloth and drew his hand into it, resulting in the loss of two fingers.

"It is clear that the sign warning against wiping the machine while in motion was intended to cover just such unforeseen and unlikely injuries as this.

"It follows, therefore, that if the warning sign, 'Stop this Machine before Repairing, Oiling, Adjusting or Wiping' constituted a safety order and regulation prescribed by the employer, the wiping of the machine by the employé, with full knowledge of the existence of the order, and of the consequences likely to result from its violation, constituted willful misconduct.

"There is no question that applicant knew of the existence of this warning sign, but it is in evidence that he did not know of the consequences likely to result from disobeying it. The reaching for the stream of oil going down the frame of the machine was in obedience to an impulse, thoughtless of danger. He knew better than to try to wipe the gearings while the machine was in motion, and had never done so. Neither the employer's superintendent nor the young man in whose custody applicant was placed had explained to him the risk attendant upon such wiping. Therefore one of the factors of willfulness as laid down by our Supreme Court in the Mayfield Case (Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 1 I. A. C. 669), to wit, 'Knowledge of the consequences likely to result from disobedience,' was wanting."

[1] It was held accordingly that—

"Neither of the acts of cleaning said drill nor wiping said shaft was intentionally and deliberately disobedient; that neither of said acts was an act of serious and willful misconduct, and the said injury was not caused by the serious and willful misconduct of the employé."

We cannot say that this finding was not justified by the evidence. It is true that wiping the drill while it was slowly revolving was in violation of the printed warning, but that act did not cause the injury. If the applicant had been holding a cloth in his hand for any purpose and had done the same impulsive act, he would have been entitled to compensation under the authority of the Hyman Case and the cases cited in the opinion therein. The real cause of the injury was the unpremeditated effort to arrest the sudden stream of grease.

[2] The finding with reference to the amount of compensation was based not upon the probable wage of the applicant at the time he should reach the age of 21 years, but upon that which he would be likely to earn "within a reasonable time after attaining the age of 21 years." This was a computation not justified by the statute. Upon the authority of Hyman Bros. Box & Label Co. and Ætna Life Insurance Co. v. Industrial Accident Commission, supra, it necessitates the granting of petitioner's prayer.

The award is annulled and the matter is remanded to the Industrial Accident Commission, to the end that such proceedings may be taken as are not inconsistent with the views herein expressed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

OLNEY, J., deeming himself disqualified, did not participate in the foregoing decision.

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180 Cal. 497

PERRY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

PACIFIC GAS & ELECTRIC CO. v. SAME.

(S. F. 8918, 8910.)

(Supreme Court of California. June 5, 1919.)

1. Master and Servant ⟹417(7) — Workmen's Compensation — Proceedings — Weight of Hearsay Evidence.

In workmen's compensation case the weight to be given hearsay evidence made admissible by St. 1917, p. 871, § 60a, is for the Industrial Accident Commission.

2. Master and Servant ⟹404—Workmen's Compensation — Evidence—Transaction with Deceased.

In workmen's compensation case, testimony by employer and his wife as to statements by deceased employé is admissible under the statute, though inadmissible at common law, because of their interest in the controversy.

3. Master and Servant ⟹417(7) — Workmen's Compensation — Review — Conclusiveness of Finding.

Industrial Accident Commission's finding that the relation of employer and employé existed is conclusive upon Supreme Court upon petition to review the commission's order.

4. Master and Servant ⟹347—Workmen's Compensation — Constitutionality of Statute.

Workmen's Compensation Act of 1917, § 25, relating to liability of "principal employers and contracting employers, general or intermediate, for compensation under this act when other than the immediate employer of injured employé," is unconstitutional in so far as it attempts to authorize awarding of compensation against a third person not an employer, notwithstanding Const. art. 20, § 21, as amended October, 1911, and November, 1918, and article 20, § 17½, as amended November, 1914.

5. Constitutional Law ⟹20 — Construction—Legislative Definition.

Meaning of terms of constitutional amendment must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition; for such extension would, in effect, be an amendment of the Constitution if accepted as authoritative.

In Bank.

Proceedings under Workmen's Compensation Act by Louise Kendall for compensation for death of Robert E. Kendall, opposed by C. E. Perry, immediate employer, and the

Pacific Gas & Electric Company, as principal employer. Award made by Industrial Accident Commission, and the employers file petitions for writ of review. Order awarding compensation against C. E. Perry affirmed, and that portion of order awarding compensation against the Pacific Gas & Electric Company reversed.

William B. Bosley, of San Francisco, and John Coghlan, of Madera, for petitioner Pacific Gas & Electric Co.

Gilbert D. Ferrell, of San Francisco, for petitioner Perry.

Christopher M. Bradley, of San Francisco, for respondents.

WILBUR, J. Two petitions are filed to review the same order of the Industrial Accident Commission, awarding compensation for the death of Robert E. Kendall. The award was made under the provisions of section 25 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831), against C. E. Perry as the immediate employer, and against the Pacific Gas & Electric Company as the principal employer.

Both petitioners claim that the evidence is insufficient to show that the relation of employer and employé existed between Perry and the deceased. The only question of fact in the case is whether the relation between Perry and the deceased was that of employer and employé, or that of a copartnership. It appears from the evidence that Perry, as an independent contractor, entered into a contract with the petitioner Pacific Gas & Electric Company to furnish for $20 a day, a five-ton road roller, with a man and necessary gasoline and supplies, for the purpose of rolling the earth that had been filled into a trench in which the gas mains of the petitioning company had been laid. After the making of this contract Perry entered into an arrangement with the deceased by which the deceased operated the roller in question. The deceased was crushed between a heavy automobile truck and the road roller while so engaged, and so injured that he died. In the absence of other evidence the law would imply a contract of employment. That a proposition was made by Perry to the deceased by which the latter was to operate the road roller upon a "fifty-fifty basis" is established by the testimony of Perry and others, and is found by the commission to be a fact. The commission also found that the proposition was never accepted, but was still under consideration at the time of the fatal accident. Perry and his wife testified to conversations with the deceased tending to show an acceptance of Perry's proposition. To rebut this evidence the testimony of decedent's wife, his sister, and other witnesses was received to prove declarations of the deceased made from time to time and up to the day before the accident, to the effect that the deal between Perry and himself had not been consummated. This was hearsay, and petitioner Perry, conceding its admissibility under the express provisions of the statute (Stats. 1917, § 60a), states:

> "It may be said that it is for the commission alone to say as to the weight or credibility to be given to this evidence. If so, then the commission may, arbitrarily or otherwise, as in the present case, disregard in toto all evidence heretofore considered by the law and the courts as admissible and entitled to any consideration at all, and base its findings on the sandy foundations of some hearsay evidence, giving to such hearsay as great or greater weight than it would be entitled if it were concededly of the most competent character, without limitation on the commission of any sort, or redress on the part of one aggrieved thereby."

[1] It being granted that the testimony was admissible, it follows, of course, that the weight of the evidence is to be determined by the commission. It is true that, when we depart from well-recognized principles of law concerning the admissibility of evidence, we embark upon a sea of difficulty. This was pointed out in August, 1915, in Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, concerning hearsay evidence. The Legislature, however, has since expressly provided that neither the commission nor its referees—

> "shall be bound by the common law or statutory rules of evidence or procedure, * * * nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure." Stats. 1917, p. 871, § 60a.

Similar provisions of the law of 1915 have been considered by this court and upheld. Stats. 1915, p. 1102, § 77a; Western Indemnity Co. v. Industrial Accident Com'n, 174 Cal. 315, 163 Pac. 60; Employers' Liability Ass'n Co. v. Industrial Accident Com'n, 177 Pac. 273.

[2, 3] It may be remarked, however, in this connection that the testimony of both Perry and his wife upon which he relies to establish the fact of acceptance by deceased, although permitted by our statute, was inadmissible under the common law, on the ground of their interest in the controversy. 1 Greenleaf on Ev., §§ 326, 328c, 333b, 334, 335, 341; Dawley v. Ayers, 23 Cal. 108. The finding of the commission that the relationship between Perry and the deceased was that of employer and employé is binding upon this court.

[4, 5] The Pacific Gas & Electric Company asks for a review on the additional ground that section 25 of the act of 1917 is unconstitutional, and that therefore the commission had no jurisdiction to entertain the proceeding or to make the award against it. It

has been held that the state Constitution did not contemplate a law authorizing an award of compensation by the Industrial Accident Commission against some person other than the employer. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390. It was therefore held that section 30 of the Workmen's Compensation, etc., Act of 1913 (Stats. 1913, c. 176, p. 294) was violative of article 20, § 21, of the Constitution. The Workmen's Compensation, etc., Act of 1917 changes the language of the corresponding section (25), so that instead of using the word "principals" the words "principal employers" are used, and instead of the word "contractors" the words "contracting employers, general or intermediate," are used (section 30, Stats. 1917, p. 853); but the change does not meet the constitutional difficulty, for the reason that the terms "employers," "employés" and "employment," as used in section 21, art. 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition, for such extension would, in effect, be an amendment of the Constitution, if accepted as authoritative. See Employers' Liability Assurance Co. v. Industrial Accident Com'n, 177 Pac. 273, and cases there cited. It would follow, therefore, that the reasons for holding section 30 of the Workmen's Compensation Act of 1913 unconstitutional would apply with equal force to section 25 of the act of 1917. Carstens v. Pillsbury and other cases supra. Respondent, however, contends that the legislative power was enlarged by the addition of section 17½, art. 20, to the Constitution by an amendment adopted November 3, 1914, and that such amendment authorizes the legislation in question. This amendment was in force at the time of the decision in Carstens v. Pillsbury, supra, decided in 1916, and no contention was then made by respondents that it authorized the legislation in question. It provides that:

> "The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employés. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

It is contended that the language "and may provide for the comfort, health, safety and general welfare of any and all employés" and the last sentence of the amendment "gives unlimited scope to the Legislature in conferring jurisdiction upon respondent commission." The Workmen's Compensation Act of 1917 provides in section 1:

> "This act and each and every part thereof is an expression of the police power and is also intended to make effective and apply to a complete system of workmen's compensation the provisions of section seventeen and one-half of article twenty and section twenty-one of article twenty of the Constitution of the state of California. A complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employés and those dependent upon them for support to the extent of relieving from the consequences of any injury incurred by employés in the course of their employment, irrespective of the fault of any party," etc.

These recitals in the legislative act by which it is sought to designate the source of constitutional power to enact the statute have no weight other than as an expression of the legislative opinion that the law is constitutional—an inference which arises with equal force from the fact of its enactment. It is sufficient for the purposes of this case to say that section 17½ only purports, so far as here involved, to authorize legislation with reference to "employés," and its application, therefore, must be based upon the existence of an employment. The same considerations that led this court to hold unconstitutional the effort of the Legislature to extend the provisions of the Workmen's Compensation Act to relations other than those of employer and employé would apply with equal force to legislation under this section. It is not, therefore, necessary for us, in this action, to further construe section 17½. It is not improper to observe, however, that the printed arguments for and against that amendment, submitted with the proposed amendment, to the people at the election in 1914, are wholly confined to a consideration of the law as affecting the establishment of a minimum wage for women and minors. It is true, of course, that this fact would not limit the plain language of the constitutional provision in question. But, in view of its broad general terms, that fact is worthy of consideration in ascertaining the intent of the people in adopting the amendment. From these considerations it is manifest that no authority is thereby given to impose liability upon third persons for injuries to employés.

Respondent calls our attention to an amendment of section 21, art. 20, adopted at the general election in November, 1918. This amendment completely revises that section. As it was adopted long after the accident in question, it is conceded that it has no application, save, as is contended, that the last paragraph of the amendment has—

> "swept away any technical defect which might have existed to hamper the full exercise of jurisdiction by the Industrial Accident Commis-

sion under the statute which was in force when the amendment was adopted. The portion of the amendment thus relied upon is as follows: 'Nothing contained herein shall be taken or construed to hamper or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state, or the state compensation insurance fund, the creation and existence of which, *with all the functions vested in them* are hereby ratified and confirmed.'" (Italics ours.)

For the purposes of this case it is sufficient to notice that, so far as the amendment in effect ratifies and confirms existing legislation purporting to vest power in the commission to award compensation against persons other than the employer, such power never was vested in the commission, for the reason that the legislative attempt to vest such power was unconstitutional and void. Carstens v. Pillsbury, supra. The amendment does not attempt to ratify this futile legislation, but only to ratify in the commission "functions vested in them." This amendment did not, therefore, purport to extend the power of the commission beyond that which had theretofore been lawfully vested in them. The fact, if it be a fact, that the commission was exercising the functions provided by the law of 1917 (section 25), that is, that they were in fact awarding compensation to employés against others than their employers, does not "vest" such functions within the meaning of the amendment, which must obviously refer to legal authority. It should be observed that the amendment did not attempt to ratify the Workmen's Compensation Act of 1917, but merely to confirm powers already lawfully vested in the commission. This distinction can be best emphasized, perhaps, by calling attention to the difference between the language under consideration and that of the constitutional amendment of October 10, 1911, with relation to the Railroad Commission and the Railroad Commission Act (Const. art. 12, § 22), wherein it was provided as follows:

> "The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this state approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision. * * *"

In the latter case the legislation was expressly ratified and the method of its interpretation pointed out in the constitutional amendment, while the amendment under consideration merely purports to ratify powers and functions already vested in the commission. If it was proposed to ratify and confirm legislation otherwise unconstitutional, that purpose should have been clearly expressed.

It follows, then, that section 25 of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 853) is unconstitutional in so far as it attempts to authorize the awarding of compensation against a third person not an employer, for the same reason that the previous statute was unconstitutional, and that the amendment to section 21 of article 20 of the Constitution does not ratify the legislation condemned as unconstitutional in Carstens v. Pillsbury, supra.

Petitioner Perry also complains that the award was excessive, but, upon the basis of his own testimony that one could work at the business 260 days in a year at $6 to $7 a day, the award was not excessive.

The order awarding compensation against petitioner C. E. Perry is affirmed, and that portion of the order seeking to award compensation against the Pacific Gas & Electric Company is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; MELVIN, J.; OLNEY, J.

LAWLOR, J. (concurring). I concur specially in the judgment and in what is said on the question whether the relationship of employer and employé existed between C. E. Perry and the deceased. I also concur in the judgment on the constitutional question. This I would not be prepared to do, however, if the questions decided in Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218, and Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222, were now presented for the first time. I dissented in those cases principally for the reason that, in my opinion, the grant of power to the Legislature (section 21, art. 20, Const.) authorized that body, in order to more fully realize the fundamental objects of the new order of rights and liabilities, to create and enforce a liability against the owner, the general contractor, and the subcontractor as well as the immediate employer of the injured workman. To this view I still adhere, but, the contrary opinion having become the settled law of the state, I think the decision reached herein must be accepted.

180 Cal. 478

In re WALKER'S ESTATE.

WALKER et al. v. NASON.

(L. A. No. 5854.)

(Supreme Court of California. June 5, 1919.)

1. Appeal and Error ⚷1067—Refusal of Instruction—Harmless Error.

Though appellant was entitled to a specific instruction on an issue, yet where issue was easily comprehended, and jury could not have failed to understand from given instruction that verdict would go for appellant if they found issue in his favor, refusal of specific instruction was not prejudicial.

2. Bastards ⚷5—Legitimacy—Evidence of Prior Acts of Infidelity.

That wife had given birth to an illegitimate child was inadmissible to show that later children were illegitimate, under Civ. Code, § 194, as to children born within 10 months after dissolution of marriage being presumed legitimate.

3. Bastards ⚷3—Legitimacy—Presumption.

The presumption of legitimacy goes at least to the extent that, if by the laws of nature it is possible that the husband is the father, legitimacy is conclusively presumed, except where husband and wife are white and the child a mulatto.

4. Appeal and Error ⚷1097(1)—Law of Case—Conflict.

Where two views adopted on former appeal are in direct conflict, neither is the law of the case, and it is necessary to examine the question de novo.

5. Bastards ⚷5—Evidence of Nonintercourse—Admissibility.

The English rule permitting evidence of nonintercourse, even where the parties are cohabiting, is not the rule in California, in view of Code Civ. Proc. § 1962, subd. 5.

6. Bastards ⚷5—Evidence—Admissibility.

It is always permissible to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race and color such that it could not have been conceived by the husband.

7. Bastards ⚷5—Witnesses ⚷57—Evidence of Nonintercourse—Admissibility.

The fact that it was not possible by the laws of nature for the husband to be the father, where that fact is in issue, is to be inquired into in the same manner as any other fact which is the subject of judicial inquiry, and any competent evidence relevant to the question is admissible as in other cases, but it is the rule in California, as in many jurisdictions, that neither the husband nor the wife is competent to testify to lack of intercourse.

8. Bastards ⚷6—Illegitimacy—Proof—Sufficiency.

Evidence that the husband could not by the laws of nature be the father, as, for example, because of lack of intercourse with the mother, is not required to be such as to prove it beyond any reasonable doubt; it being essential only that proof be clear and satisfactory.

9. Bastards ⚷6—Legitimacy—Presumption—General Rule.

The rule that presumption of legitimacy is conclusive, if it were possible by the laws of nature for the husband to be the father, does not operate to change the general rule that in civil cases the issue is to be determined upon the preponderance of the evidence.

10. Bastards ⚷5—Illegitimacy—Evidence—Admissibility.

On issue of illegitimacy, court did not err in not confining the evidence to a showing of want of opportunity for intercourse between deceased and his wife.

11. Appeal and Error ⚷1214—Decision in Accordance with Mandate of Court on Appeal—Review.

Where one of the grounds upon which a second trial was directed was the admission of evidence in question, error cannot be predicated upon its rejection by the trial court, regardless of whether ruling is not, in the present judgment of the court on appeal, reconcilable with the principle underlying other rulings in the same decision; the ruling being specific and constituting a mandate to the lower court.

12. Bastards ⚷3, 5—Legitimacy—Presumption.

On issue of nonintercourse by husband, evidence of wife's relation with other men is wholly immaterial, since such relation may have existed, and yet, if intercourse were had with husband during period of possible conception, the presumption is conclusive that the children are his.

13. Appeal and Error ⚷1064(2)—Erroneous Instruction—Harmless Error.

In controversy involving question whether two children were the children of deceased and entitled to share in his estate, instruction that interlocutory decree for deceased husband in divorce suit, standing alone, was entitled to little weight, while clearly an instruction on the weight of evidence, *held* not prejudicial.

14. Bastards ⚷6—Illegitimacy—Proof.

Before the jury can find that the children in question are illegitimate, they must find on clear and satisfactory proof that decedent, alleged husband, "could not be their father."

15. Executors and Administrators ⚷33—Discharge of Administratrix as Affecting Jurisdiction.

The court did not lose jurisdiction of estate by order discharging administratrix, since order was founded and conditioned on decree of distribution, which, when vacated on appeal, left the matter as if no decree had been made.

Department 1.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

In the matter of the estate of Cornelius Walker, deceased. Mabel A. Nason, as administratrix, filed her final account and petition for distribution to her as the only heir, whereupon Mrs. Mabel E. Walker, as guardian of her two sons, filed a counterpetition for distribution. From a decree of distribution rendered, Nason appeals. Affirmed.

See, also, Nason v. Superior Court of Los Angeles County, 179 P. 454.

Geo. M. Harker, of Los Angeles, for appellant.

Schmidt & Riggins, of Los Angeles, for respondent.

OLNEY, J. The decedent, Cornelius Walker, died intestate November 20, 1913. He left surviving him as his only heirs, then in being, his wife, Mabel E. Walker, and a daughter by a previous marriage, Mabel A. Nason. A few months before his death—that is, on July 3, 1913—he had secured an interlocutory decree of divorce from his wife on the ground of desertion. He had also made a property settlement with her, whereby she released any interest in his estate, with the result that on his death his daughter was the only heir then in being who was interested in the estate.

On April 11, 1914, something under five months after the decedent's death and nine months and eight days after the interlocutory decree of divorce, his widow gave birth to twin sons, who were named Edwin N. Walker and E. Earl Walker.

On the death of Walker, his daughter was appointed administratrix of his estate, and something more than a year later filed her final account as such, and petitioned that the estate be distributed to her as the only heir. Thereupon Mrs. Walker, as the guardian of her twin sons mentioned, filed a counter petition for distribution of the estate equally to them with the daughter, as being children of Walker. To this petition the daughter filed an answer, denying that the twins were the children of Walker, and alleging that they were illegitimate.

The issue of legitimacy so presented has been tried twice, each time before a jury. On the first trial the jury found the children illegitimate; an appeal was taken on their behalf, and a new trial ordered by this court for errors in the admission of evidence and the giving of instructions. Estate of Walker, 176 Cal. 402, 168 Pac. 689. On the second trial the jury found the children legitimate, and a decree of distribution was made, based upon this verdict. From this decree the present appeal is prosecuted by the daughter, Mrs. Nason.

On the first appeal it was held, in effect, that under section 194 of the Civil Code, providing that a child born within 10 months after the dissolution of the marriage of the mother is presumed legitimate, the children here involved must be presumed legitimate, and that this presumption could be overcome only by proper and sufficient evidence showing one or more of three alternatives, namely: Either (1) that the husband was impotent; or (2) that he was entirely absent from his wife during the period when the children must have been begotten; or (3) that he was present with his wife only "under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."

It appeared at the second trial, as at the first, that Walker was not entirely absent from his wife during the period of possible conception. It should, in fact, be noted that his wife testified to acts of intercourse during this period. The second of the alternatives mentioned was therefore not present in the case, and the trial revolved around the other two—the questions as to the impotency of the decedent, and as to his having been present with his wife only "under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."

[1] The serious questions on this appeal arise in connection with the second of these two last-mentioned alternatives. Before discussing them, it may be well to dispose of the single question in connection with the first—the alleged impotency of the decedent. The appellant requested, and was refused, a concise and specific instruction that if the jury found the decedent impotent their verdict should be for the appellant. There was evidence sufficient to warrant the jury in so finding, and the appellant was entitled to have the issue so presented submitted to the jury by a direct and specific instruction. It was covered in the instructions given, but not so clearly and definitely as in the one requested. The question involved, however, is one so easily and completely appreciable by a jury as well nigh to preclude the possibility of confusion or misunderstanding. The jury could not have failed to understand from the instructions given, taken in connection with the whole course of the trial, both that they were to pass on the alleged impotency of the decedent, and also that, if they found him impotent, their verdict should be for appellant. This, after all, was the only purpose of the particular instruction requested, and, that purpose being accomplished, it cannot be said that the refusal to give the particular instruction requested was prejudicial.

Passing now to the questions arising in connection with the second alternative involved here, namely, that Walker was present with his wife during the time of possible conception only under circumstances "such as afford clear and satisfactory proof that there was no sexual intercourse," it is not clear just what meaning should be given to the decision on the first appeal. There are two possible views, each in accordance with a rule found in other jurisdictions.

The first of these is that, where it appears that the husband and wife have met during the time when the child must have been begotten, the presumption of legitimacy can be overcome only by it being made to appear that the circumstances under which the husband and wife met were such as to afford no opportunity for sexual intercourse, even if they had been so minded, or, putting it conversely, that, if they met under circumstances which did afford such opportunity, it is conclusively presumed that intercourse did take place, and the child legitimate, and evidence that intercourse did not in fact take place is not admissible. The second possible view is that, even though the parties met under circumstances which afforded an opportunity for intercourse, yet the presumption of legitimacy can be overcome by showing that it was not in fact indulged in, and evidence showing, or tending to show, this is admissible.

The necessity for a determination as between these two possible constructions arises from the fact that if the first construction is the true one, and therefore the law of the case, it is practically an end of this appeal, since every error contended for by the appellant becomes immaterial, if the evidence should have been confined to a showing that the parties met only under circumstances which did not afford an opportunity for intercourse. There was practically no such evidence, although it did appear that the parties had met. The cause was not tried by the lower court on that theory, and was submitted to the jury on a hypothesis much more favorable to the appellant than that to which she was entitled, if the issue and the evidence should have been so confined.

In support of the view that the evidence should not be so confined is the ruling on the first appeal that evidence of the relations between the parties, and of their hostile feelings towards each other, was admissible "as tending to establish a relationship from which, depending upon other circumstances established and evidence of the disposition and character of the parties, the jury might fairly draw the inference that, notwithstanding opportunity therefor, intercourse was not had on the occasion when the husband visited his wife." For the purpose of showing such relationship, the introduction in evidence of the interlocutory decree of divorce was approved, as was also evidence of quarrels between the parties, of the exchange of abusive epithets between them, and of statements on the part of the husband indicating feeling against his wife. The admission of such evidence, and the ground upon which its admission is expressly put, cannot be reconciled with the view that, when once it appears that the parties have met under circumstances which permitted intercourse if they were so inclined, it is conclusively presumed that it took place, and that the evidence must be confined to showing that the parties did not meet under such circumstances.

[2] On the other hand, in support of the view that the issue and the evidence should be so confined, is the ruling on the former appeal that evidence was not admissible that the wife had given birth to an illegitimate child on February 1, 1913, about a month prior to the husband commencing his suit for divorce, and about five months prior to the interlocutory decree and the period of possible conception of the children here involved, and that this fact was known to the husband. Evidence merely that the wife had given birth to an illegitimate child was clearly inadmissible under either rule, or, in fact, under any rule. Standing alone, it would not tend to show that the husband did not have intercourse with the mother five months later, and if such intercourse was had the presumption that the children here are the fruit of it is conclusive.

[3] There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted. The only exception to this, if it really be an exception, is where it is clear that, although the husband had intercourse with the wife, yet by the laws of nature it is impossible for him to have been the father, as, for instance, where husband and wife are white and the child a mulatto. But when the evidence goes further than merely showing a previous illegitimate birth from the mother, and shows that the husband knew of this fact, it is not possible to reconcile its exclusion with a rule admitting evidence of the relationship and feeling between the parties to rebut any inference that intercourse took place between them on the occasions when they met. It is difficult to conceive of anything which would more profoundly affect their relations than the knowledge or belief on the husband's part that his wife had a few months before given birth to a child conceived in adultery.

[4] These two views are both adopted on the former appeal. They are in direct conflict, with the result that neither is the law of the case (Gage v. Downey, 94 Cal. 241,

29 Pac. 635), and it is necessary to examine the question de novo. The old English rule, at least as generally stated, was that if the husband were within the king's dominion and were not incapable of procreation, the child was presumed legitimate regardless of all other facts. It was carried to ridiculous extremes:

> "Although a woman has issue in adultery, nevertheless, by the common law, if her husband is able to beget children and is within the four seas, the issue is not regarded as bastard. And this presumption is so strong that if a feme covert goes into another country and there takes a husband and has issue by him, the first husband being within the four seas, the issue is a mulier; but it is otherwise if the baron be over the seas." (4 Viner, Abr. Bastard, A, 2, p. 216.)

In modern times this harsh rule, like other similar rules of the common law, has been much modified, so that in general the actual fact may be examined into and the question not determined by formal rules.

Much the same change is apparently found in the Roman law. In the very interesting preface by Denis Le Marchant to his report published in 1828 of the Gardner Peerage Case, p. xiii, it is said:

> "The earliest authority on this subject to which we can safely refer is contained in the Digest, from whence it has descended into most of the Codes of modern Europe. The same definition of legitimacy, though expressed in different terms, is given by two of the great Roman jurists. Paulus declares 'marriage to be proof of paternity,' whilst according to Ulpian 'the issue of a man and his wife are legitimate.' This definition did not originate with either of the writers by whom it is recorded. It probably was of great antiquity; for Julianus, who preceded them by more than a century, tacitly admits it, by determining it to be inapplicable to cases of nonaccess between a husband and wife; 'so that, although a husband who lived constantly with his wife should not be allowed to withhold his recognition of her child, yet where he had been very long absent from her, and she had borne a child during such absence, the law pronounced the child not to be his.' Scævola and Ulpian admitted this doctrine, but considering the presumption in favor of legitimacy to be still too strong, they allowed not only the fact of access, but of sexual intercourse, to be disputed; and 'if it could be satisfactorily established that either from intervening infirmity, or from any other cause, no sexual intercourse between husband and wife had taken place, or if the husband had been in such a state of health as disqualified him from generating, the child who might have been born under these circumstances in the house of the husband, notwithstanding the publicity of its birth, was not the child of the husband.' The causes of adulterine bastardy were thus reduced to two, the impotence of the husband and the absence of sexual intercourse between the husband and wife when the period of the wife's gestation commenced."

The matter of the presumptions in cases of alleged adulterine bastardy came up in England in 1811 for elaborate discussion in the Banbury Peerage Case, reported in the appendix (page 389) to Le Marchant's report of the Gardner Case just mentioned. William, Earl of Banbury, had died in 1632, supposedly childless, but in 1661 one Nicholas laid claim to the dignity of the earldom, as the earl's son. From that time on the matter had been one of frequently recurring dispute. The evidence showed clearly that Nicholas was the son of the earl's wife. He was born about a year before the earl's death. The earl at the time was 80 years of age, while his wife was much younger. They had been married for some 21 years without fruition of the marriage. The birth of Nicholas—or at least the fact that Lady Banbury was his mother—was apparently unknown to the earl. There was much evidence which made it fairly certain that Nicholas was, in fact, not the son of the earl, but of one Lord Vaux. Under these circumstances the committee of the House of Lords proposed several questions to the judges, and, among others, the question (page 430) whether the presumption of legitimacy could "be lawfully rebutted by evidence that such access did not take place between the husband and wife as by the law of nature is necessary to admit the husband to be the father of the child." The answer to this question and further questions to the judges which followed, together with their answers, are thus reported (pages 433-436):

> "The Lord Chief Justice of the Court of Common Pleas (Sir James Mansfield), having conferred with his brethren, informed the committee that they were unanimously of opinion: 'That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption.'
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> "The following question was then put to the judges: 'Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always by the law of England prima facie evidence that such child is legitimate; and whether, in every case in which there is prima facie evidence of any right existing in any person, the onus probandi be always, or be not always, upon the person or party calling such right in question; whether such prima facie evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife as by the laws of nature is necessary in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of nonaccess, or of nongenerating access (as the case may be) may always be lawfully proved, and can only be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary by the laws of England that a physical fact be proved.'

"The following question was also proposed to the judges: 'Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child; the husband not being impotent, except such proof as goes to negative the fact of generating access?' 'Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?' To which the judges answered: 'That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of the child (by which they understood proof of sexual intercourse between them), no evidence could be received, except it tended to falsify the proof that such intercourse had taken place, such proof must be regulated by the same principles as were applicable to the establishment of any other fact.'

"Afterwards, the following questions were put to the judges: '(1) Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place after the marriage, between the husband and wife (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence sufficient to establish the fact of such nonaccess, as negatives such presumption of sexual intercourse, within the period when, according to the laws of nature, he might be the father of such child? (2) Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce) can be legally resisted, by the proof of any other facts or circumstances than such as are sufficient to establish the fact of nonaccess during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such nonaccess can be legally left to a jury, upon a trial, in the courts of law, to repel the presumption of the legitimacy of a child so circumstanced?'

"The Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the judges as follows: '(1) That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child. (2) That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place between the husband and the wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is whether the husband was the father of such child; and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband, by the laws of nature, could be the father of such child. The nonexistence of sexual intercourse is generally expressed by the words "nonaccess of the husband to the wife"; and we understand those expressions, as applied to the present question, as meaning the same thing, because, in one sense of the word "access," the husband may be said to have access to his wife, as being in the same place, or the same house, and yet, under such circumstances as, instead of proving, tend to disprove that any sexual intercourse took place between them.'"

For the purposes of the present discussion two points in connection with these questions and answers are to be particularly noted: First, it was declared specifically that, although the husband and wife might have had opportunities for access to each other, yet evidence was admissible to rebut any inference from this that they did in fact have it; second, that the word "access" is used in the sense of sexual intercourse. The importance of this second point lies in the fact that there has been confusion as to the meaning of the word in this connection. It has been assumed that it meant only "access" in the sense that the husband saw or visited his wife—had "access" to her presence. It is largely from this misunderstanding of the sense in which this particular word was used that the impression has arisen that when "access" by the husband to the wife, in the sense of their meeting so as to afford an opportunity for sexual intercourse, is shown, the matter is concluded, and proof that intercourse did not take place is not admissible. An instance of this confusion is Bury v. Philpot, 2 My. & K. 349, 39 Eng. Rep. Full Reprint, 977, decided in 1834 and frequently cited, wherein the Master of the Rolls, Sir John Leach, declared:

> "Access is such access as affords opportunity of sexual intercourse; and where the fact of such access between husband and wife within a period capable of raising the legal inference as to the legitimacy of an after-born child is not disputed, probabilities can have no weight; and a case ought never to be sent to a jury."

Upon the delivery in the Banbury Case of the answers quoted, Lord Redesdale (page 436), Lord Ellenborough (page 455) and Lord Eldon (page 484) delivered opinions following the rules contained in the answers and holding that Nicholas was illegitimate. Lord Erskine (page 464) delivered an opinion to the contrary, maintaining that the presumption of legitimacy could be overcome only by proof of nonaccess in the sense of a lack of opportunity for sexual intercourse. The committee then divided; the majority presenting a report against the claimant, a descendant of Nicholas, which was adopted by the House.

The answers to the questions so propounded have ever since been followed as the law of England, notwithstanding Bury v. Philpot, supra. Thus in the leading case of Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Rep. Full Reprint, 457, from which the language quoted on the first appeal in this case as stating the general principles applicable is taken, Lord Langdale said:

> "In the course of the investigation I apprehend that evidence of every kind, direct or presumptive, may be adduced, for the purpose of showing the absence of sexual intercourse, which, in cases where there has been some society, intercourse, or access, has been called nongenerating access. We have therefore to attend to the conduct and the feelings, as evidenced by the conduct of the parties towards each other and the offspring, and even to the declarations accompanying acts, which are properly evidence. Such circumstances are of no avail against proper evidence of generating access; but they may have weight, when the effect of that evidence is doubtful."

See, also, Morris v. Davies, 5 Cl. & Fin. 163; Cope v. Cope, 5 Car & P. 604, 24 Eng. C. L. 730; Reg. v. Mansfield, 1 G. & D. 7, 1 Q. B. 444; Gordon v. Gordon, [1903] Pr. Div. 141.

Any detailed consideration of the American cases is unnecessary, for they, like the subsequent English cases, in the main look back to the Banbury Peerage Case and Hargrave v. Hargrave, supra, in order to determine the rule of the common law, and the differences between the American cases are largely due to a misinterpretation of one or the other of these two leading English cases. See, for an instance, Scanlon v. Walshe, 81 Md. 118, 130, 131, 31 Atl. 498, 48 Am. St. Rep. 488. The result of the American decisions is thus stated and correctly, in 3 Rul. C. L. 728:

> "But there is considerable conflict of authority on the question whether opportunity of sexual intercourse between them (husband and wife) must be shown to have been impossible to rebut the presumption (of legitimacy). There are authorities which take the position that the question to be presented to the jury in a case of this character is not whether the mother of the child and her husband did or did not have sexual intercourse at or about the time the wife became pregnant, but whether the opportunity for sexual intercourse by any possibility presented itself to them. If it did, then, unless impotency can be shown, the presumption of legitimacy is conclusive. On the other hand, according to this view, if the opportunity could not by any possibility have presented itself to them then the presumption is rebutted. The authorities which take these views are in the minority; the great weight of authority being to the effect that access—that is, an opportunity for sexual intercourse—need not be shown to have been impossible, and that, where an opportunity for sexual intercourse is shown, the presumption favoring legitimacy, while very strong, is not conclusive, and may be rebutted by showing that intercourse did not in fact take place."

[5, 6] The English rule would seem to go so far as to permit evidence of nonintercourse even where the parties are cohabiting; i. e., living together in the same house or apartments. Such is not the rule in this state. Section 1962, subd. 5, Code Civ. Proc.; Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175. But with this statutory exception the true rule in America, as well as England, is, we believe, that if it is possible by the laws of nature for the husband to be the father (that is, if there was coition and no impotency), no inquiry will be permitted into the probabilities of the case one way or the other, but the presumption of legitimacy is conclusive; and, on the other hand, it is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race or color such that it could not have been conceived by the husband.

[7] The fact that it was not possible by the laws of nature for the husband to be the father, where that fact is in issue, is to be inquired into in the same manner as any other fact which is the subject of judicial inquiry, and any competent evidence relevant to the question is admissible as in other cases; it being the rule, however, in California, as in many jurisdictions, that neither the husband nor the wife is competent to testify to lack of intercourse. Estate of Mills, supra.

[8, 9] It should perhaps be noted that, when it is said that the presumption of legitimacy is conclusive if it were possible by the laws of nature for the husband to be the father, it is not meant that the proof of the fact of such impossibility must itself be beyond possibility of doubt. The two things are very different. The fact to be proven is that the husband could not by the laws of nature be the father, as, for example, because of lack of intercourse with the mother. The evidence of that fact is not required to be such as to prove it beyond any possibility of doubt. A jury would be justified in finding a lack of intercourse, with the consequence that it was impossible that the husband be the father upon evidence which did not show such lack beyond possibility of question. The presumption of legitimacy is strong, and the proof of impotency or nonintercourse must be clear and satisfactory, but this is all. The presumption does not operate to change the general rule that in civil cases the issue is to be determined upon the preponderance of evidence, but, like other presumptions, operates under and beneath that rule.

[10] It remains to apply the foregoing

views to the particular case. It is apparent at once that the action of the lower court in not confining the evidence to a showing of want of opportunity for intercourse between Walker and his wife was correct, and that errors complained of by appellant must be judged on the basis that although such opportunity did appear, yet evidence to the point that intercourse during the critical period did not take place was admissible, and the question of whether it did or did not was the real question to be submitted to and decided by the jury.

[11] Of the rulings of the lower court complained of, the most prejudicial to the appellant was the rejection of evidence, both direct and on cross-examination, that Mrs. Walker had given birth to an illegitimate child some five months before Walker must have had intercourse with her, if the children here involved are really his, and that Walker knew of this fact. Such evidence, if admitted, might well have resulted in a different verdict. The matter, however, is concluded by the decision of this court on the former appeal. One of the grounds, if not the principal ground, upon which a second trial was directed, was the admission of this very evidence at the first trial. It is true, as we have said, that such ruling was not, in our present judgment, reconcilable with the principle underlying other rulings in the same decision, nor with the true rule applicable in such cases. But, whatever may be said as to the reasons for it, the ruling itself is specific, and constituted a mandate to the lower court which it was bound to follow. Error cannot be predicated upon the action of the lower court in so doing. The ruling is the law of the case, and does not come within the principle of Gage v. Downey, supra.

[12] Complaint is made that the trial court refused to permit evidence as to who was the father of the twins other than Walker, and at the same time refused to instruct the jury that it was not necessary for them to find who the father was, if Walker was not. But it is clear from what has been said that the evidence was properly confined to proving nonintercourse by the husband. On that issue evidence of relations by the wife with another man or other men is wholly immaterial. Such relations may have existed, and yet, if intercourse were had with the husband during the period of possible conception, the presumption is conclusive that the children are his. As to the refusal to charge the jury that they need not find who the father was, if Walker was not, the jury were explicitly instructed that the only question for them to determine was whether the children were the children of Walker. The instructions given and the whole course of the trial make it plain that the jury could not have been misled on this point, or have conceived it their duty to find Walker to be the father unless they could determine the identity of the man who was.

The lower court several times charged the jury that the presumption of legitimacy could be overcome only by "clear and satisfactory" evidence, to which was added on one occasion the adjective "convincing" and on another the adjective "certain," and the giving of such instructions is assigned as error; that the presumption of legitimacy can be overcome only by clear and satisfactory proof is the law. If it were intended by the adjectives "certain" and "convincing" to instruct the jury that the proof must go beyond a reasonable doubt, and change the rule that civil cases are to be determined upon the preponderance of evidence the instruction was incorrect. It does not, however, admit of this interpretation. The jury was expressly instructed that they were to determine the issue by a preponderance of evidence and the context of the instructions containing the adjectives in question makes it plain that they were used in the same sense as "clear and satisfactory," and must have been so understood.

The trial court charged the jury with relation to the decree of interlocutory divorce as follows:

> "The interlocutory decree was admissible, among other things, as tending to establish a relationship from which, depending upon other circumstances proved and evidence of the disposition and character of the parties, from which (sic) you might fairly draw the inference that, notwithstanding opportunity therefor, sexual intercourse was not had on the occasions when the husband visited the wife. Nevertheless, standing alone, such decree is entitled to little weight. It did not dissolve nor affect the relationship of husband and wife. It was merely a judicial determination that at the time the children were begotten the wife was not living with her husband; that is, dwelling in the same house with him as his wife."

[13] The portion of this instruction as to the little weight to be given to the fact of an interlocutory decree between the parties is clearly an instruction as to the weight of evidence, and under our constitutional prohibition of such instructions its giving was error. It is true that the instruction is in almost the exact language used by this court on the former appeal in commenting on the interlocutory decree. But the views of an appellate court on the weight of evidence are no more the proper subject of a charge to the jury than similar views of the trial court. If we could bring ourselves to believe that possibly this instruction had had any effect on the jury we would send the cause back for a new trial without hesitation. But we cannot bring ourselves so to believe.

The material point of the interlocutory decree was that it suspended marital rights and obligations and the usual incidents of the marital relation, and destroyed any inference or presumption from the fact of marriage that the parties were living together or having intercourse. But there could have been no mistake in the minds of the jury upon this point. They were charged, probably more favorably to the appellant than the strict rule would warrant, that there was an actual presumption of law arising from the interlocutory decree that the parties did not cohabit, which presumption had to be overcome by evidence, and that in the absence of a reconciliation between them cohabitation would be an act essentially immoral, and there was a presumption of law that an immoral act is not indulged in. Such instructions must have made it clear to the jury just what the effect of the interlocutory decree was, and just what part it could properly play in enabling them to determine the final question of fact submitted to them: Did or did not Walker have intercourse with his wife during the period of possible conception of the children here involved? In view of this, it is not possible to say that the single sentence with regard to the weight to be given the interlocutory decree, standing alone, was prejudicial.

[14] The appellant also complains that the jury were instructed that, before they could find the children illegitimate, they must find on clear and satisfactory proof that "Walker could not be their father." But such instruction, as we have seen, is a correct statement of the law. Counsel has confused the proving by a preponderance of evidence that the husband could not possibly be the father (as to which the jury was accurately charged) with proving beyond a doubt that he could not be. This matter we have already discussed.

The foregoing are the more serious contentions of appellant with respect to the evidence and the instructions. There are quite a number of others, but their discussion would not be helpful, and would still further lengthen this already long opinion. Suffice it to say that the facts of this case are such that we have examined the record carefully, with a view to ascertaining if there were any respect in which it could be fairly said that the jury might have been misled or confused, and that we have found none. Much might be said in regard to the weight of evidence, but that was a matter solely for the trial court, on a motion for a new trial.

The appellant also complains of alleged misconduct at the trial by opposing counsel. We find no basis for such complaint. The particular conduct most relied on is certain remarks to the jury in the course of argument. But the making of such remarks is denied by opposing counsel, they were not assigned as misconduct at the time, and they were urged before the lower court on a motion for a new trial, and a new trial denied. The trial court was in a better position to pass on the merits of such a complaint, and was also much freer to act, than an appellate court, if the trial seemed to it in any respect unfair.

The last point made by appellant is that the court did not have jurisdiction to make the decree of distribution appealed from; that it had jurisdiction only to preside at the trial "and issue judgment on the verdict," whatever may be meant by that. Now the issue tried was an issue made by the petitions for distribution and the answers thereto. The trial having determined the issue, the decree followed as of course. The point apparently relied on to sustain the appellant's position is that pending the first appeal, and while the first decree of distribution was in effect, the appellant, being the administratrix of the estate, as such administratrix delivered to herself as the only distributee under the decree all the property of the estate, and then had herself discharged as administratrix. All that this really means is that, the first decree of distribution, under which the appellant received the property, having been vacated, the appellant now has property to which she is not entitled and for which she must account. Heydenfeldt v. Superior Court, 117 Cal. 348, 49 Pac. 210; Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Ashton v. Heydenfeldt, 127 Cal. 442, 59 Pac. 759; Ashton v. Heggerty, 130 Cal. 516, 62 Pac. 934; Ashton v. Zeila, etc., Co., 134 Cal. 408, 66 Pac. 494.

It cannot affect the right of the minor children to have a decree distributing to them their part of the estate upon the issue as to their heirship being determined in their favor.

[15] The court did not lose jurisdiction of the estate by the order discharging the administratrix. That order was founded and conditioned on the first decree of distribution, and, this decree having been vacated on appeal, the matter stood as though no decree had ever been made. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

Decree of distribution affirmed.

We concur: SHAW, J.; LAWLOR, J.

41 Cal. App. 8

TREMBLE v. TUMAN et al. (Civ. 2639.)

(District Court of Appeal, First District, Division 2, California. April 29, 1919. Rehearing Denied May 29, 1919; Denied by Supreme Court June 26, 1919.)

1. Appeal and Error 🔑1099(11)—Judgment—Law of Case.

Where on appeal by an owner who sued a contractor and surety judgment for the surety, which was based on special verdicts notwithstanding a general verdict for the owner, it was reversed by the Supreme Court on the ground that under the pleadings the general verdict and special verdicts were not inconsistent, such ruling is the law of the case, and will govern on appeal by the surety from a second judgment in favor of the owner if there is any evidence to sustain the general verdict.

2. Appeal and Error 🔑1002—Review—Verdict.

A verdict on conflicting evidence will not be disturbed on appeal.

3. Contracts 🔑322(4) — Building Contracts—Actions—Evidence.

In an action by the owner against a contractor on building contract and surety, evidence *held* to warrant the finding that the contractor had abandoned his work so that the owner was warranted in completing the same, and holding the contractor and surety liable.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by C. E. Tremble against G. E. Tuman and the United States Fidelity & Guaranty Company. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant.

John W. Stetson, of Oakland, for plaintiff and respondent.

Gavin McNab, of San Francisco, and Clarence Coonan, of Eureka, for defendant and respondent.

BRITTAIN, J. In a suit by the owner against the contractor and his surety for damages for breach of a building contract, judgment was entered in favor of the owner and against the contractor, and in favor of the surety against the owner. The plaintiff appealed on the judgment roll from that part of the judgment in favor of the surety. Prior to the establishment of two divisions thereof, the District Court of Appeal of the First Appellate District affirmed the judgment. On rehearing the Supreme Court reversed both the decision of the District Court of Appeal and the judgment, directing the trial court to enter judgment in favor of the owner and against the surety. Tremble v. Tuman, 175 Cal. 696, 167 Pac. 142. From the judgment so entered the surety appeals, bringing up a bill of exceptions. The principal contention is that the evidence does not support the judgment.

The building contract was made in May, 1911, for the erection of a building to cost $30,000. Coincident with its execution, the appellant surety company executed its bond in the sum of $7,500 to the owner for the faithful performance of the contract. The plaintiff alleged abandonment of the work by the contractor on October 24, 1911, and damages amounting to $7,894.10. She prayed for judgment of $7,500 against the contractor and the surety. The suit was commenced in June, 1913. The issues of fact were submitted to a jury, which returned a general verdict against the defendants jointly for $5,000 and against the contractor alone for $850. To four questions submitted to the jury it answered: (1) The owner's architect did not delay the contractor's work by failure to furnish plans, specifications, or working detail drawings; (2) either the owner or her architect ordered the contractor to do extra work, but no delay was caused thereby; (3) the contractor did not have men working on the building every working day between October 24, 1911, and November 14, 1911; and (4) to the question, "Did Mrs. Tremble or Mr. Reed [her architect] take the job away from the defendant contractor and finish the building herself; if so, when did she take over the job?" the answer was, "Yes; November 14, 1911."

[1] The surety moved for a judgment according to the special verdicts and not in accordance with the general verdict, on the ground that the two verdicts were inconsistent. The motion was granted, and the first judgment entered in favor of the surety. That judgment was reversed by the Supreme Court. The only matter necessarily decided on the first appeal was that under the pleadings the general verdict and the special verdicts were not inconsistent, because the issue of abandonment was presented to the jury and determined by it in the general verdict. This is the law of the case. The determination is conclusive if there was any evidence to sustain the general verdict.

[2, 3] On behalf of the appellant it is contended there was no abandonment merely by reason of the failure of the contractor to act under a notice referring to section 14 of the contract, and further that, apart from abandonment based upon the construction of that section of the contract, there was no evidence of abandonment to support the general verdict. Section 14 provided that, should the contractor fail or refuse "to supply a sufficiency of materials or workmen to complete the contract within the time limited herein * * * for a period of more than three days after having been notified by the owner

in writing to furnish the same, the owner shall have power to furnish and provide said materials or workmen to finish the said work; and the reasonable expenses thereof shall be deducted from the amount of the contract price." The appellant presents a lengthy argument upon the interpretation to be given to this clause and relies on a case where a similar provision was construed. American-Hawaiian Engineering & Construction Company v. Butler, 165 Cal. 497–510, 133 Pac. 280, Ann. Cas. 1916C, 44. On behalf of the respondent it is contended the two cases may be distinguished. It is not necessary to determine the question thus presented. The determination of the jury upon the issue of abandonment is supported by ample evidence irrespective of the provisions of section 14 of the contract.

Various witnesses, some testifying for the plaintiff and some for the defendants, made statements of facts which are summarized below. The contractor was sick. He visited the work only two or three times. One Graves assumed charge of the work for the contractor. The work was delayed. Some of the materialmen were unpaid and refused to furnish further material. Notice was given to supply men and material on October 24, 1911, after which the contractor had no further consultations about the building or the further progress in connection with it, and gave no directions or orders. The average number of men employed on the work for a month was about three—at times as low as two. The work being done was practically nothing, and the job was at a standstill. The subcontractors were not being paid, they were in charge of Cook, the foreman. He was not half working; he was getting no money and was sore. He was not there all the time. On the Monday following the giving of the notice to supply men and material, and on the succeeding Saturday, and the Monday following that, there was no one on the job, nor was there any one working on November 14, 1911, when the owner took charge of the working hours. The architect testified that Graves and he arrived at the conclusion that Tuman could not make any further progress. Tuman had contracted to finance the work in a particular way. He failed to finance the work in that way, and was unable to finance it in any other way.

As against the evidence summarized above, counsel for the appellant admit Mr. Tuman's financial difficulties, but argue there is no evidence that because of such fact Mr. Tuman ever decided to abandon the work, and that the evidence of his financial condition did not show it was impossible for Tuman to complete the work. On the contrary, it is argued that, while Graves, as Tuman's agent, had difficulty in securing funds, and one or two of his attempts to secure them failed before the plaintiff finally took the work out of the hands of Tuman, Graves was successful in making financial arrangements which would insure the completion of the work, though possibly not pay all laborers or materialmen or subcontractors.

This arrangement was one made by Graves with three others, by which on November 6, 1911, 13 days after the notice was given, $10,000 was deposited in the Crocker Bank in the name of G. E. Tuman Company, a corporation. The building contract was with Tuman individually. He did not participate in the formation of the corporation, and was not a director until after his recovery in the following January. The corporation was formed primarily for the purpose of assisting Mr. Tuman in financing his matters while he was financially unable to attend to them himself. His financial difficulties related somewhat to the whole volume of the work that he was doing. The corporation was not to take over the work, and the directors of the corporation were to pass on any of Mr. Tuman's bills that were presented for payment. Between the date of the notice and that when the owner took over the work Reed and Graves had consultations in which Graves assured Reed he hoped to be able to finance the work, but finally, according to the evidence of Mr. Reed, when the latter told him the owner was going to take over the work, Graves said that was the only thing which could be done, that he could not get any money for anything, and that he could not get any money to complete the tile contract, that he could not get any money to pay labor, and that his hands were practically tied. He did not tell Reed he had made arrangements for money for the tile contractor. He never consented in so many words that Mrs. Tremble should take the job out of his or Tuman's hands, nor did he ever object to her doing so.

Counsel for the appellant admit it would be impossible for a contractor to avoid liability for having abandoned the work by merely keeping sufficient workmen on the job to sustain the appearance of continuance of the work, but they argue that abandonment is a question of intention. It may be shown by conduct. In law, the word "abandonment" does not necessarily imply a willful or culpable disregard of the contractor's obligations. It may, as in this case, be applied to a condition of affairs where, through misfortune the contractor is unable to finance his contract, or by reason of his mental or physical incapacity be precluded from carrying on his work or attending to the business incident to it. The cases cited by the appellant upon this subject lay down no other rule. Apart from any question of the interpretation of section 14 of the contract, the most that could be said upon the subject of abandonment is that the jury determined the fact upon conflicting evidence. On appeal this court is bound by such a determination.

It is contended on behalf of the appellant that abandonment cannot take place unless the contractor intends to abandon; in other words, unless he expressly or impliedly agrees to quit. It is further argued that the contractor did agree to quit, and therefore the contract was abrogated so that the surety was released; further, that if the contractor did not agree to quit or intend to abandon the work, the owner's interposition amounted to a prevention of performance on the part of the contractor, by which the surety was released. From this it would appear the position of the appellant on the question of abandonment is that the contractor did not agree to quit, and on the question of the surety's liability that he did agree to quit; further, that upon whichever of these two positions the court may stand, the result will be the release of the surety. No true dilemma is presented. The fallacy is in the shifting positions. Either the contractor abandoned the work or he did not. The jury determined that he did. The surety is bound by that determination.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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40 Cal. App. 753

GOOD v. BROWN et ux. (Civ. 1685.)

(District Court of Appeal. Third District, California. April 22, 1919. Rehearing Denied by Supreme Court June 19, 1919.)

1. APPEAL AND ERROR ⚷1010(1)—EVIDENCE TO SUSTAIN FINDING.

On appeal in suit to foreclose mortgage on community real estate, finding that there was no agreement as contended by mortgagors that the mortgagee should resort first to personal property of the husband upon which he had a prior mortgage will be sustained, where the mortgagee testified positively that there was no such agreement.

2. HUSBAND AND WIFE ⚷267(6)—COMMUNITY PROPERTY—MORTGAGE BY HUSBAND AND WIFE—WIFE AS SURETY.

Where the mortgagee promised to furnish groceries, to perform other acts, and bring no action until after harvest, there was sufficient consideration for a mortgage of the wife's interest in community real estate, and she was a principal to the mortgage executed by both her and her husband, and not a surety, so as to be entitled to demand property of the principal to be first applied within Civ. Code, § 2850.

3. MORTGAGES ⚷411—FORECLOSURE—COMPELLING FORECLOSURE OF PRIOR MORTGAGE.

Generally, the foreclosure of a mortgage will not be barred by the existence of another prior mortgage real or chattel which is security for the same debt.

4. HOMESTEAD ⚷108—MORTGAGE—FORECLOSURE—EXHAUSTION OF OTHER PROPERTY.

Where husband and wife executed a mortgage upon community real estate, their homestead, as security for the husband's debt, the mortgagee upon suit to foreclose can be compelled to first exhaust a chattel mortgage upon personal property which was also community property before demanding a sale of the homestead.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Foreclosure action by R. E. L. Good against George S. Brown and wife. From a judgment for plaintiff, defendants appeal. Reversed.

Ernest Klette, of Fresno, for appellants.

C. K. Bonestell, of Fresno, and Kitt Gould, of Clovis, for respondent.

BURNETT, J. The appeal is from a judgment of foreclosure of a mortgage on real estate. On the 12th day of June, 1912, the defendant George E. Brown delivered his promissory note in the sum of $1,000, payable 90 days after date, to the plaintiff, and to secure its payment executed a chattel mortgage upon certain personal property. Defendant Cynthia Brown was not a party to this note or mortgage, and when this suit was brought no action had been taken towards enforcing said chattel mortgage, and it existed as a valid lien on said personal property. Thereafter, on February 27, 1914, both of said defendants executed the real estate mortgage to secure the payment of this note. The land is community property, and prior to the execution of said mortgage the said defendant Cynthia Brown had executed and recorded, in due form, a declaration of homestead on said property.

The foregoing facts are undisputed, and in addition it is claimed by appellants that, when the real estate mortgage was signed by Cynthia Brown, it was agreed that the mortgagee would first exhaust the security on the personal property before resorting to the real estate mortgage.

The contentions of appellants are these: First, respondent was required to exhaust the personal property security before resorting to the foreclosure of the real estate mortgage; second, Cynthia J. Brown was a surety on the second obligation, and by virtue of section 2850 of the Civil Code she had a right to demand that the property of the principal, that is, the personal property, be first applied to the discharge of the obligation, or, at least, by reason of the homestead, such was in effect the situation; and, third, by virtue of said agreement, plaintiff was obligated to resort first to the personal security.

[1] As to the last of these, it may be dismissed with the statement that plaintiff tes-

tified positively that there was no such agreement, and we are bound by the finding to that effect.

The other contentions may be considered together, and to understand them fully some additional facts should be stated. Before the real estate mortgage was executed, Good became dissatisfied with the chattel mortgage security, and notified Brown that, unless further security should be forthcoming, he would be compelled to take possession of said personal property and dispose of it. Good testified as to this:

> "Well, I got Mr. Brown into the store and told him that it was absolutely necessary that I foreclose this chattel mortgage unless I was given additional security, because the stock was getting older every day and being much abused by the work given them, and my security was not sufficient. He at that time made a promise to me that he would give me a mortgage on a piece of property with his wife's signature to it. Later he brought the mortgage in and delivered it to me in my office at Clovis and I recorded it."

The following questions and answers indicate the nature of Mrs. Brown's connection with the transaction:

> "Q. (by the Court). Mrs. Brown, why did you sign the mortgage? A. Simply because I wanted to get this money to go on with the grain and harvest and to do summer fallowing. Mr. Brown gave us to understand that there was only between six or seven hundred on the thousand. If I signed it, Mr. Good was to put up barley and groceries and summer-fallow the land. My husband told me this. Q. You signed it upon your husband's statement to you that Mr. Good would furnish $300 more over the amount that was for the purpose of buying provisions? A. Yes."

[2] It may be further stated that the plaintiff testified that he agreed not to bring an action to foreclose until after harvest. It thus appears that Mrs. Brown was not a surety, but one of the principal obligors, to the mortgage, which was executed to secure the payment of a community debt, and the promise "to put up barley and groceries and summer-fallow the land" and to bring no action until after harvest afforded sufficient consideration to support the hypothecation of her interest in the community real estate. As to this position we deem the citation of authorities unnecessary.

[3] As to the claim that the personal security should have been exhausted first, the general rule seems to be that the foreclosure of a mortgage will not be barred by the existence of another prior mortgage which is security for the same debt. 1 Wiltsee on Mortgage Foreclosure, § 308.

Under the general weight of authority, the rule is the same where the prior one is a chattel mortgage (Id. § 309), although it has been held otherwise in Alabama (Koger v. Weakly, 2 Port. [Ala.] 516).

[4] But the situation is changed by the fact that a homestead had attached to the real property, and it is the humane policy of the law to preserve, if possible, the homestead for the use and home of the family.

The principle is developed and well expressed in Blood v. Munn, 155 Cal. 228, 100 Pac. 694. Therein the mortgagee held a lien on two parcels of land, one being the homestead of the mortgagor, and the other a tract not having that character. Discussing the relation of the parties to the enforcement of the lien, the Supreme Court said that the homestead claimants "stand in the same situation as a surety for the payment of a debt, or the situation of a third person who had a lien upon or interest in only one of two mortgaged parcels, with respect to a prior mortgage upon both." After declaring the equitable right of such surety or third person, and that the right of a homestead claimant is as sacred as that of a surety, the court proceeds:

> "For these reasons it has been decided that the homestead claimant may have his homestead protected and preserved as far as possible, when it is covered by a mortgage which also includes other property, by requiring the other property to be sold and applied upon the debt before the sale of the homestead."

In support of this doctrine a large number of authorities is cited. We shall go no further in that direction than to quote the following from 2 Freeman on Executions, § 440:

> "Perhaps a more difficult question is: May one who has a lien on homestead and other property be compelled by the homestead claimants to first resort to the latter? On the other side, it is insisted that the right to compel a marshalling of assets never existed in favor of judgment debtors, but only on behalf of persons claiming under them, and that the creation of the lien by the homestead claimants was, in effect, an agreement on their part that the lienholder might, at his discretion, sell any of the property which was subject to such lien, and that such agreement precludes such claimants from exercising any control over such discretion. But homestead laws should be liberally construed, and no intention should be presumed; nor should any interpretation be indulged which is at variance with the natural and obvious purpose of the parties. * * * Hence a mortgage on a homestead and other property may fairly be interpreted as a waiver of the homestead right only as far as may be necessary to secure the debt; in other words, as a stipulation that the homestead may be sold, if the other property proves inadequate to satisfy the mortgagee's demand. Under this interpretation, the homestead claimants are entitled to compel the sale of the other property in preference to the homestead, and need not submit to the sale of the homestead until the other securities have been exhausted, without fully discharging the debt."

Of course, it can make no difference in the application of the principle that the security is included in two mortgages instead of one, or that one covers personal property instead of real estate. In fact, there would seem to be greater reason in case of a chattel mortgage to compel the mortgagee to resort to that before demanding a sale of the homestead.

Nor do we think that the question is affected in the least by the fact that the chattel mortgage covered community property, as did the homestead. If the personal property had been the separate estate of the husband, the wife, regardless of the consideration of the homestead, could, probably, compel a resort to said personal property before a foreclosure of the mortgage on the community property.

The ruling principle here is, though, as we understand it, the superior solicitude of a court of equity for the preservation of a homestead over other property not charged with that character.

We think, therefore, that the court should have suspended judgment in the suit until such time as plaintiff had exhausted the security under said chattel mortgage.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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40 Cal. App. 772

LISENBEE v. LISENBEE et al. (Civ. 1996.)

(District Court of Appeal, Third District, California. April 24, 1919.)

HUSBAND AND WIFE ⚷262(1)—COMMUNITY PROPERTY—EVIDENCE.

In suit to quiet title, defendants relying on presumption that property acquired during coverture is community in character, *held*, that presumption was overcome by positive testimony of witness.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by J. N. Lisenbee against Maud Irene Lisenbee and another. Judgment for plaintiff, and defendants appeal. Affirmed.

J. F. Ramage, of Stockton, for appellants.

A. H. Carpenter, of Stockton, for respondent.

BURNETT, J. The action was brought to quiet title to 43 acres of land in San Joaquin county. Defendant Maud Lisenbee, who was married to Charles S. Lisenbee in 1912 and was his second wife, was the only serious contestant of plaintiff's claim. Her opposition is based primarily upon the contention that the land was community property, and that the conveyance to plaintiff was made to defraud her of her community rights. Twenty acres of the land in controversy were conveyed to Charles Rothwell Lisenbee, a son of Charles S. Lisenbee by a former wife, by a deed from A. S. Gunn and wife, on August 23, 1913. The remaining 23 acres were conveyed by the said Charles S. Lisenbee and Maud Irene Lisenbee to said son on April 17, 1915, and he conveyed both parcels to plaintiff for a valuable consideration on the 30th day of January, 1917. On May 22, 1915, the said Maud Lisenbee brought an action against her husband for divorce on the ground of cruelty. She was denied a decree for the reason that her testimony was not sufficiently corroborated, but on May 19, 1916, she was awarded a certain amount for maintenance, and on November 12, 1917, an execution was issued thereon. This was levied upon the property, and by virtue thereof it was sold to one Floyd Klinger to satisfy said judgment.

Among the court's findings were the following:

"That the title of the 20-acre tract described in the complaint herein never at any time vested in Charles Samuel Lisenbee or Maud I. Lisenbee, his wife, and that the purchase price therefor was paid by Rothwell Lisenbee, and the conveyance of said realty was made to him for that reason. * * * That the 23-acre tract described in the complaint herein was purchased by Charles Samuel Lisenbee with the proceeds derived from the sale of 320 acres of land in Calaveras county that had been his separate and individual property that he owned for more than 20 years prior to his marriage with the defendant Maud Irene Lisenbee, and that for that reason he could convey the title thereto without his said wife, Maud, joining in the conveyance thereof, and that if any fraud or threats were made or practiced, as alleged in the defendant Maud I. Lisenbee's cross-complaint, the evidence thereof was wholly immaterial and such allegations require no findings thereon, as they could not affect the plaintiff's title to the realty in controversy."

There is the additional finding:

"That the deed from Charles and Maud Irene Lisenbee to Rothwell Lisenbee, dated April 17, 1915, was not without consideration, and all the allegations of fraud in the defendant Maud Irene Lisenbee's cross-complaint herein are untrue."

These conveyances to the son were prior to the beginning of said action for divorce, which culminated in the judgment for maintenance, and it is apparent that, if said conveyances were and are valid, appellants are in no position to question the sufficiency of the conveyance to plaintiff.

As to the conveyance of the 20-acre tract to the son, Charles S. Lisenbee testified:

"I went there one Sunday. There was a gentleman told me, Mr. Robert's neighbor, said Mr. Roberts wanted to sell the place. He says, 'You can't see him unless you come here Sunday,' and I came Sunday to see him and brung Rothwell, my son, Charles Rothwell, with me, and Mr. Klinger went with me and went there and looked at the place. Rothwell said he wanted the place, for me to buy it for him, he would pay me for the place. He had a check book of $3,000 of his own and several hundred dollars besides, that he says I could use in buying it. 'Well,' I says, 'son, no use of that, your money is on interest; and I used my money I had off my place up yonder to buy it with, gave Mr. Roberts a check first."

He testified further that he was repaid a portion of it by his son. However, it is unimportant whether he was repaid the purchase price or not. He testified positively that he paid for the land out of money he received for the sale of other land which he owned prior to his marriage with appellant Maud. He therefore had the legal right to make a gift of it to his son or to convey it to him upon his promise to repay the purchase price. As to this transaction it may be stated there is no evidence whatever of fraud, nor does it appear that the conveyance to the son was in trust for any purpose. It may be added that appellants made no attempt to show that any of the money with which the land was purchased was community property.

Indeed, appellants rely as to that upon the presumption that property acquired during coverture is community in character. This presumption, however, was overcome in the opinion of the trial judge, by the positive testimony of the witness, and we must follow his finding.

The character of the other tract must be likewise considered. The said Charles S. Lisenbee testified positively that it was purchased with money obtained from the sale of land belonging to him before his second marriage. No attempt was made to disprove this. While he seems to have quibbled to a certain extent, was, apparently, an ignorant and somewhat stupid witness, yet his testimony, if believed, is amply sufficient to support the finding of the lower court. It was undoubtedly believed and acted upon, and it is idle to ask an appellate court to set the finding aside because the circumstances may be somewhat suspicious and there may be some reason for believing that he was trying to defraud his wife.

If we concede that the deed of April 17, 1915, executed after his wife had left him, was the result of an intention to place his property beyond her reach, and that it might have been set aside on the ground of fraud, it can be of no avail to appellants, since the deed was not attacked on any such ground, but solely for the reason that the signature of Maud I. Lisenbee was obtained by duress. But, as already shown, this circumstance was immaterial in view of the fact that, upon sufficient evidence, the court found that the land was separate property of the husband.

It follows from the foregoing that appellants' claim of the insufficiency of the evidence to show the delivery of the deed from Rothwell Lisenbee to plaintiff is of no decisive moment. They were not creditors of the plaintiff, and it is really of no legal concern to them whether or not the title became vested in respondent. But, it may be said, the deed to plaintiff was read in evidence without objection, and it carried with it the presumption of delivery at its date, irrespective of any testimony in regard thereto. McGarray v. Robinson, 135 Cal. 314, 67 Pac. 279.

Moreover, there was positive evidence that it was delivered to the attorney for plaintiff at the latter's request and by the former filed for record in the recorder's office.

As to the consideration for the deed, if any be sought, the testimony is uncontradicted that plaintiff gave his promissory note for $7,000 for the land and thereafter leased it to said Rothwell Lisenbee.

Counsel for appellant Maud I. Lisenbee complains bitterly of the treatment accorded her by her husband; but whatever justification there may be, on moral grounds, for condemnation of his conduct, there seems to be no doubt, from the record before us, upon well-established principles, that the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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41 Cal. App. 38

PEOPLE v. GOODRICH et al. (Cr. 466.)

(District Court of Appeal, Third District, California. May 1, 1919.)

1. LARCENY ⚷61—FROM THE PERSON—EVIDENCE—SUFFICIENCY.

In a prosecution for grand larceny by stealing a purse from the pocket of the complaining witness, evidence *held* to justify a conviction.

2. CRIMINAL LAW ⚷938(1) — NEW TRIAL —GROUNDS.

In a prosecution for grand larceny, it was not error to overrule a motion for new trial based on newly discovered evidence, where no showing of diligence was made, and it was not probable that the evidence if introduced would have changed the result.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Josephine Goodrich, alias Mrs. Phillips, and another, were convicted of grand larceny, and, from an order denying a motion for a new trial, they appeal. Affirmed.

Frank E. Murphy, Wm. P. Toscano, of San Francisco, D. P. Eicke, of Stockton, and Francis L. Borden, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendants were convicted of the crime of grand larceny, and they appeal from the order denying their motion for a new trial. The principal contention of appellants is that the evidence is insufficient to sustain the verdict. We are satisfied, however, that the claim is without substantial merit. After reading the record, we are convinced that, not only does the evidence support the finding of the jury, but there is no reasonable doubt of the guilt of the defendants.

It appears without conflict that on September 28, 1918, about 4 p. m., one Song Won Sook, a Korean, was in the act of boarding a railroad train at Stockton, and while getting on the train a purse containing the sum of $61.50 was abstracted and stolen from his pocket. It is a reasonable inference that the theft was committed by the defendants and one Ervine Williams acting in concert and collusion. As to which one actually picked the Korean's pocket there is some uncertainty, but that the three were participants in the crime stands out clear enough. The prosecuting witness understood English quite imperfectly, and, testifying without an interpreter, his statements are not altogether consistent, some of them being even unintelligible, but, regarding and giving full credit to his testimony as a whole, the jury could scarcely doubt the guilt of the defendants. The following from the transcript will indicate the difficulty with which he expressed himself, and it also shows the actual participation in the crime of the three said parties:

> "Mr. Rendon: Q. These two take money out of your pocket? A. Yes, two, one more, three. Q. Who take him money out of your pocket, him, two or the other man or three or more or two, how many? A. That time my money. Q. Which one? A. Three. Q. Which one take him out of your pocket? A. That lady. Q. The lady? A. Yes, this lady and give him to him. Q. How know he take him out of your pocket, what for you know? A. (Witness shows) Overcoat here, one man here, lady here, and one man here, take him this way, see. Q. How know he take him, you see him take him? A. No, I no see, I hear, no eye. Q. How you save (know)? A. I no see. One man here that side, nobody see him and she take him this way (shows). Q. How know she take him, how you save? A. Oh, overcoat here hanging down, nobody see that side. Q. How you know him take him money too? A. I know him take him money. I look to see. Q. I see; you feel him right there? A. Yes, sure."

He also testified that there was no one except these three near him at the time of the theft and he details other circumstances that we need not repeat.

Mrs. Winnie Honnold testified:

> That she was in the car which the Korean was entering. That she "was sitting there looking out the window, and I turned around, and I saw like a crowd gathered there, and I went to look and see what was going on, and the next thing I saw was a purse looked like it was dropping, and then the man put his hand under it and grabbed it and stuck it in his right-hand pocket, trouser pocket, and walked on out of the car. That man was Mr. Phillips, the defendant."

In describing the position of the parties when the purse was taken, she said:

> "The Korean was standing in the middle, and one man in front of him, and the lady (Mrs. Phillips) on the left-hand side and one man in the back," and that they were all right close to the Korean, and that she first saw the purse on the side where the lady stood, and that she saw Phillips catch it with his hand above the floor about the distance of the Korean's knees.

Many circumstances are related by various witnesses that tend to confirm the conclusion of the jury, but we shall do no more than to refer to them in a somewhat general way.

These defendants and said Williams were stopping for a time at the same place in Sacramento without visible means of support. It is true that Mrs. Phillips testified that they were canvassing for an atlas and that they were engaged in that business, but the record discloses certain facts that throw discredit upon her story. They went to Stockton together and put up at the same hotel, and here again the jury had a right to conclude that their visit was for no lawful purpose. They went to the depot together without any apparent reason. There is some pretense that their purpose was to inquire in reference to certain baggage belonging to them, but their subsequent conduct stamps that story as a mere subterfuge. While at the depot they saw the Korean purchase a ticket and replace his purse in his pocket. Defendant Phillips was seen talking suspiciously to his wife. The three arranged themselves in such position as to be able to accomplish the theft with the least difficulty and danger of detection. It is a fair inference that the three in entering the car had no other intention than to perpetrate the larceny. There is no evidence, indeed, that these defendants expected to become passengers, and the explanation of Mrs. Phillips as to why she entered the car is altogether too unreasonable for belief, and the jury undoubtedly rejected it as simulated. Williams testified that he intended to travel on the train, but it appears that he did not purchase a ticket, and there are other circumstances tending to discredit his statement. After the larceny was committed, Mrs. Phillips and Williams took a seat together, while Phillips hurriedly left the car and made his escape, although some time thereafter he was arrested. When the Korean charged Williams with the theft of his money, the latter and Mrs. Phillips in a fine frenzy of assumed innocence denied the accusation, but significantly suggested that he had lost it and volunteered to assist him in the search for it. As evidence of a guilty conscience, it may be added that Mrs. Phillips denied that she had ever met Williams before, and she made other statements that she afterwards contradicted.

[1] Without further disquisition, we think it may be said that the record is surcharged with indubitable proof that these defendants were justly convicted, and one can hardly resist the conclusion that they are "professional crooks."

[2] The only other point made by appellants is that the court should have granted their motion for a new trial on the ground of newly discovered evidence. All that is said by appellants in their briefs as to this is as follows:

> "The defendants' and appellants' motion for a new trial was based upon the fact that new evidence material to the defendants which could not with reasonable diligence have been discovered and produced at the trial, and affidavits (Clerk's Trans. pp. 29 and 30) were presented in support thereof. The affidavits, and motion for new trial are a part of the record and we believe any argument thereon is unnecessary. The facts as presented by the record, speak for themselves."

In view of such a general reference to the affidavits, we would be justified in passing the matter by without investigation. However, we have read the two affidavits, which were offered, and it is quite apparent that they are of slight, if any, importance, and it is not at all probable that if affiants had so testified at the trial the result would have been different. Besides, it may be added that no showing of diligence whatever was made by appellants, and the court was therefore justified in disregarding said affidavits.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

41 Cal. App. 6

HEAD et al. v. SOLOMON. (Civ. 2764.)

(District Court of Appeal, First District, Division 2. California. April 29, 1919.)

TRIAL ⚿404(2) — FINDINGS — ULTIMATE FACT—CONCLUSION OF LAW.

A finding that "the aforesaid agreement and its modifications was fully canceled and terminated in the month of July, 1916, by mutual consent of all the parties thereto," was a finding of an ultimate fact, and is not subject to the objection that it was a conclusion of law.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Gust Head and another against C. Solomon, Jr. Judgment for defendant upon the complaint and for plaintiff upon the cross-complaint, and plaintiffs appeal on the judgment roll alone. Judgment affirmed.

Rufus Thayer and C. F. Nichols, both of San Francisco, for appellants.

Robert S. Norman, of San Francisco, for respondent.

BRITTAIN, J. The appeal is on the judgment roll alone. The suit was for damages for breach of contract to buy and to pay for certain antimony ore. Plaintiffs alleged damages in the sum of $2,697.50. Under the terms of the contract as amended by a subsequent written instruction, the defendant in part payment was to deposit for the account of the plaintiffs the sum of $1,000 cash in a bank in San Francisco. The defendant by cross-complaint alleged a breach of the contract on the part of the plaintiffs to the defendant's damage of $1,000. The court found probative facts in regard to the tender of the deposit and in the same finding the ultimate fact that the defendant had fully complied with all the conditions to be performed under the said agreement as far as the plaintiffs permitted and allowed him to do so. It is contended on behalf of the appellants that the probative facts found are at variance with the ultimate fact of tender. It is also contended that a finding reading, "The aforesaid agreement and its modifications was fully canceled and terminated in the month of July, 1916, by mutual consent of all the parties thereto," was a conclusion of law, and that no finding of fact was made upon the essential issue of cancellation of the contract.

The suit was commenced in March, 1917. If by mutual consent the parties to the contract canceled the same before that time, the suit for its breach could not be maintained. The determination of the issue of cancellation adversely to the plaintiffs disposes of the appellants' contention in regard to the matter of tender. A finding "that plaintiff did not rescind said sales" has been held to be a finding of fact. Hollenbach v. Schnabel, 101 Cal. 317, 35 Pac. 872, 40 Am. St. Rep. 57. It was the ultimate fact, just as in this case the finding that the agreement was canceled and terminated by mutual consent of all the parties thereto was the ultimate fact. Weidenmueller v. Stearns, etc., Co., 128 Cal. 626, 61 Pac. 374. The court further found that the plaintiffs were not damaged, and that the defendant was not damaged.

Upon all the findings the court concluded the plaintiffs were not entitled to take anything by their action; that the defendant was not entitled to take anything by his cross-complaint, and the defendant was entitled to costs. Judgment was rendered accordingly. The judgment and conclusions of law are supported by the findings. They were sufficient and within the issues.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

41 Cal. App. 52

GALLICK v. BELL et al. (Civ. 2755.)

(District Court of Appeal, First District, Division 2, California. May 2, 1919.)

EVIDENCE ⟹98—FAILURE TO SUSTAIN BURDEN OF PROOF.

In a suit to foreclose a chattel mortgage, where the defense was an excessive charge contrary to Personal Property Brokers' Act, but there was no evidence that plaintiff was a personal property broker as defined in that act, the finding must be against defendant under the rule that, where no evidence is offered on the issue, the court must find the fact against the person having the burden of proof.

Appeal from Superior Court, Marin County; Emmet Seawell, Judge.

Suit by Mrs. M. Gallick against C. G. Bell and others to foreclose a chattel mortgage. Judgment for the plaintiff, and certain defendants appeal. Affirmed.

Gillogley, Crofton & Payne, of San Francisco, for appellants.

R. B. Gaylord, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendants C. G. Bell and Gertrude Bell from a decree of foreclosure and sale, made in an action by plaintiff to foreclose a chattel mortgage. The facts are briefly that the note and mortgage sued upon were executed by the appellants. The note was for the face value of $275, and bore interest at the rate of 2 per cent. a month. C. G. Bell, one of the defendants and appellants, testified that the sum of $35 was deducted from the face value of the note, and he was given only $240 for the note of $275, and no other consideration. Appellant contends that the court erred in making the decree of foreclosure because the note and mortgage sued upon were void under the provisions of the Personal Property Brokers' Act (Act 2637, General Laws of California), which statute provides that a personal property broker shall not charge or receive interest in excess of the rate of 2 per cent. per month, upon any loan; appellants' contention being that the retention of the bonus of $35 in addition to the 2 per cent. interest was a violation of the statute.

A personal property broker within the meaning of the statute is defined to be:

> "* * * Every person or corporation engaged in the business of loaning or advancing money or other thing and taking in whole or in part as security for such loan or advance any chattel mortgage. * * *" Section 1.

There is no evidence in the record that plaintiff was a personal property broker, and the court therefore properly found that plaintiff was not, at the time of the execution and delivery of the note and mortgage, a personal property broker. This finding is in accordance with the rule that, where no evidence upon a question is offered, the court must find the fact to be against the person having the burden of proof. Leviston v. Ryan, 75 Cal. 293, 17 Pac. 239. In the present case, as the appellants were relying upon usury as a defense, they had the burden of establishing the necessary elements contemplated by the statute.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

40 Cal. App. 776

WARNER et al. v. BERTHOLF. (Civ. 2817.)

(District Court of Appeal, First District, Division 1, California. April 24, 1919.)

1. APPEAL AND ERROR ⟹1011(1) — FINDING BASED ON CONFLICTING EVIDENCE — REVIEW.

Court on appeal cannot disturb finding on conflicting evidence.

2. MUNICIPAL CORPORATIONS ⟹705(10) — LOOKOUT FOR AUTOMOBILE—DUTY OF PEDESTRIAN.

Plaintiff had the right to use the street in the pursuit of her lawful intention to board street car, and contention that although she had once assured herself that no automobile was approaching, it was her duty not to walk along and with the street car without at all times looking behind her, cannot be sustained.

3. MUNICIPAL CORPORATIONS ⟹705(1)—USE OF STREET — DUTY OF DRIVER OF AUTOMOBILE.

It was the duty of defendant in driving her automobile to see persons upon the street in front of her, where, as in this case, her view was unobstructed.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Helen H. Warner and others against Ina Bertholf. Judgment for plaintiffs, and defendant appeals. Affirmed.

Albert H. Elliot, of San Francisco, for appellant.

Albert E. Carter and John D. Murphy, both of Oakland, for respondents.

WASTE, P. J. This is an appeal by the defendant from a judgment had by plaintiff for damages for personal injuries suffered when the plaintiff was struck by the automobile of the defendant.

As we read the record, it was stipulated by the attorney for the defendant that if any judgment at all should be rendered or entered against the defendant, the judgment of $600, awarded plaintiff in this case, is not excessive, and is proper so far as the amount of the damage is concerned.

Plaintiff was standing on the easterly side of College avenue, in the city of Berkely, intending to board a south-bound car, which she saw approaching on the westerly, or south-bound track. She crossed the street in front of the approaching car, signaled the motorman to stop, and stood waiting for the car to pass. As she so stood, she looked northerly on College avenue, and saw no automobile or vehicle approaching. As the street car passed her, it slowed down, then being some distance north of the customary stop sign. It passed plaintiff, who turned and walked southerly along with the car. At this time she was midway between the side of the car and the westerly curb line of the street. She was facing and walking south, and her back was to the north. While walking in this direction, she was suddenly struck in the back by the automobile of the defendant, and suffered the injuries complained of, and which resulted in the judgment which is brought here for review on this appeal.

The testimony of the plaintiff, as to her position in the street at the time of the accident, and her movements just prior thereto, is corroborated in detail by the testimony of the motorman of the car, and by the conductor, as to the point in the street where she was struck.

[1-3] According to the testimony of defendant and one of her witnesses, plaintiff stepped from the westerly curb of the street, directly in front of the approaching automobile. This conflict in the evidence was reconciled by the trial court, as it was its duty to do, and we cannot disturb its finding on that point. In view of the evidence, which the trial court found to be true, we see no merit in this appeal. The plaintiff had a right to the use of the street in the pursuit of her lawful intention to board the street car. We find no support in appellant's authorities under the facts of this case of the contention made here that it was the duty of the plaintiff, after she had once assured herself that no automobile or other vehicle was approaching, not to walk along and with the street car without at all times looking behind her. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743. It was the duty of the defendant, in driving her automobile, to see persons on the road in front of her, where, as in this case, her view was unobstructed. Barker v. Savas (Utah) 172 Pac. 672.

The judgment is affirmed.

We concur: RICHARDS, J.; NOURSE, Judge pro tem.

41 Cal. App. 49

GUIGNI et al. v. RATTO et al. (Civ. 2941.)

(District Court of Appeal, First District, Division 2, California. May 2, 1919.)

1. APPEAL AND ERROR 🔑801(5)—MOTION TO DISMISS—DETERMINATION.

On motion to dismiss an appeal from a judgment entered on stipulation, the court will examine the certified copy of the judgment roll solely to determine whether the appeal is within either of the two exceptions to the rule that an appeal does not lie from a consent judgment, namely, cases where there was no jurisdiction, and where the complaint did not state a cause of action.

2. LANDLORD AND TENANT 🔑291(8)—FORCIBLE DETAINER—COMPLAINT—SUFFICENCY.

Complaint alleging that plaintiff leased for a term of years certain premises of which defendant was in possession as a tenant by the month, and that they served written notice on defendant to vacate within three days and he refused to do so, sufficiently states a cause of action for forcible detainer.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by C. Guigni and others against Louis Ratto and others. Judgment was entered for the plaintiffs on stipulation, and defendants appeal. Appeal dismissed.

W. P. Caubu, John T. Williams, and Leo R. Friedman, all of San Francisco, for appellants.

Harry I. Stafford, of San Francisco, for respondents.

PER CURIAM. . The respondents move to dismiss the appeal from a judgment entered upon stipulation.

The respondents sued the appellant and ficticious defendants for unlawful detainer. After demurrer, the defendant answered on January 13, 1919. Under date of January 16, 1919, a stipulation, filed February 8, 1919, was made providing that judgment might be entered for the plaintiffs and against the defendants for restitution of the premises, cancellation of lease, and $250 damages. The stipulation further provided execution should be stayed until March 1, 1919. On February 8, 1919, judgment was signed in accordance with the terms of the stipulation, including provision for the stay of execution until March 1, 1919. By successive orders the stay was continued in force until March 20, 1919, when notice of appeal was given, and a further order was made staying all proceedings on the judgment until the "appeal shall have been dismissed or determined," upon the said defendant filing a stay bond with two sureties in the sum of $3,000. A transcript on appeal has not been filed. The notice of motion for dismissal was accompanied by a certified copy of the judgment roll, orders staying execution, and notice of appeal. No counter showing was presented on behalf of the appellant.

[1] The respondents rely on the rule that an appeal will be dismissed where the judgment from which the appeal was taken was entered upon a stipulation. Hibernia S. & L. S. v. Waymire, 152 Cal. 286, 92 Pac. 645. On behalf of the appellant it is contended there are two exceptions to this rule; the first being in cases where the lower court did not have jurisdiction of the subject-matter of the action, and the second in cases where the complaint is fatally defective. In each of these cases it is contended on behalf of the appellant that no valid judgment could be entered, even by consent, because jurisdiction cannot be conferred by agreement.

It is further contended by the appellant that, under the rule that an appellate court will not look into the record to determine upon the merit of a motion to dismiss the appeal, a complete answer to the motion has been made in this case by the suggestion that there was no jurisdiction in the court below to enter the judgment. To uphold this contention would necessitate the announcement of a rule which would enable parties to litigation entirely to disregard and needlessly delay the execution of judgments entered by consent. Without going into a consideration of matters which might be presented upon the appeal, if the appeal could be sustained in the face of the stipulation, since the appellant, in opposition to the motion to dismiss, relies upon an exception to the admitted rule covering such cases, the court is constrained to examine the certified copy of the judgment roll solely for the purpose of determining whether or not the appeal is within either of the exceptions claimed by counsel for the appellant to exist.

[2] The substantial averments of the complaint are that on and prior to October 15, 1917, Paul Arata and Irene Arata were the owners in fee of the premises in San Francisco, described in the complaint; that on the last-mentioned date the owners leased the premises for a term of five years, commencing on that date; that the plaintiffs entered into possession under the terms of the lease and since have been the lessees; that prior and up to that date, the defendant Ratto was a tenant of the premises from month to month; that on that day the plaintiffs served notice in writing upon Ratto to deliver up possession and vacate the premises, and Ratto had refused, failed, and neglected so to do; that on December 17, 1918, the plaintiffs served Ratto with a written notice within three days to vacate the premises, and he had failed, neglected, and refused so to do; and that plaintiffs had been damaged by Ratto's default in the sum of $5,000.

As to the second claimed exception, it cannot be said that the complaint was fatally defective. Neither can it be said as to the first exception that the court was without jurisdiction of the subject-matter of the action. The defendant demurred to the complaint on the ground that it did not state facts sufficient to state a cause of action, and on the ground that it was uncertain, in that it could not be ascertained from the complaint what notice in writing was given to the defendant to deliver up possession of the premises. The demurrer was overruled, whereupon the defendant answered, denying on information and belief the lease to the plaintiffs and their entry under the lease, and averring a lease of the premises from the owners to himself from December 15, 1917, to December 15, 1918. He also denied the plaintiffs were damaged. The answer was verified on January 13, 1919. If the parties had gone to trial upon the issues thus presented, a valid judgment might have been entered. The judgment entered upon the stipulation is equally binding. Even though the rule requiring dismissal of appeal in such cases may be subject to the exceptions claimed by counsel for the appellant, they have failed to bring the case within either exception.

The appeal is dismissed.

All concur.

40 Cal. App. 696

HENDERSON v. E. LAUER & SONS.
(Civ. 1924.)

(District Court of Appeal, Third District, California. April 17, 1919.)

1. SALES 🔑197—TITLE—RISK.

The common-law rule which is the rule in California is that the risk as to goods sold rests where the title resides.

2. SALES 🔑202(6)—SHIPMENT C. O. D.

The seller's shipment of goods C. O. D. as ordered with bill of lading attached and sent to a bank to be taken up by seller before delivery of goods showed seller's intention that ownership and right to possession of goods should not pass to buyer until the draft was paid.

3. SALES 🔑202(6)—SHIPMENTS C. O. D.—RESERVATION OF TITLE—EVIDENCE.

The effect of a sale C. O. D. and shipment with bill of lading and draft attached to reserve title in the seller until payment may be rebutted by evidence as to seller's contrary intention.

4. SALES 🔑202(6) — LOSS WHILE IN RAILROAD WAREHOUSE—RISK—TITLE.

Where goods ordered were shipped C. O. D. with bill of lading and draft attached and sent to a bank with notice to buyer that on payment of draft the bank would turn over the original invoice, the shipment showed seller's reservation of title until payment, so that loss of goods by fire while in railroad's warehouse would fall upon seller.

Appeal from Superior Court, Modoc County; Clarence N. Raker, Judge.

Action by J. S. Henderson against E. Lauer & Sons. From a judgment for plaintiff for part of his demand, and from an order denying motion for new trial, he appeals. Judgment and order affirmed.

J. T. Sharp, of Alturas, for appellant.

Jamison & Wylie, of Alturas, for respondent.

CHIPMAN, P. J. It is alleged in the complaint that defendant "became indebted to R. F. Smith & Sons Company, Chicago, Ill., in the sum of $471.31, lawful money of the United States, upon an express contract, for goods, wares, and merchandise sold and delivered to said defendant" at its special instance and request, that before filing the complaint Smith & Sons Company assigned the said claim to plaintiff, and that no part thereof has been paid.

The answer denies the averments of the complaint except that defendant herein admits that it is indebted to plaintiff in the sum of $31.91. The cause was tried by the court without a jury, and plaintiff had judgment for the sum of $31.91 and interest, amounting in all to the sum of $34. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The controversy arises out of a shipment of goods by plaintiff's assignor to defendant of the value of $440.40, which before delivery were destroyed by fire in the warehouse of the railroad company at Alturas.

Witness Ryerson, bookkeeper and credit manager of Smith & Sons Company, testified that the shipment was "C. O. D. draft with bill of lading attached, the original bill of lading and draft sent to the First National Bank of Alturas." On November 13, 1914, Smith & Sons Company wrote defendant as follows:

> "We are to-day shipping your C. O. D. order given to our Mr. Laney sending draft for $440.40 together with original invoice to the First National Bank at Alturas. When this draft is paid the bank will turn over the original invoice to you."

It was admitted that the goods remained in the warehouse of the railroad company for seven months, and until destroyed, June 28, 1915. It appeared also that the bank at Alturas notified defendant that the draft and bill of lading were in its possession, soon after being received by it. In answer to a letter written by Smith & Sons Company, defendant, of date July 22, 1915, wrote not to "be worried or alarmed over the claim of $440.40," and requesting that company to present the claim to the railroad company, which it did, and which was refused payment on the ground as testified to by the railroad company's general manager, that the company was acting only in the capacity of a warehouseman.

In its letter the Smith & Sons Company also said that, if the railroad company would not pay the claim, the E. Lauer & Sons Company would pay it. It is not contended that this promise was supported by any consideration or was otherwise than a voluntary offer. The letter went in as bearing upon the question as to the ownership of the goods while in storage. When on the witness stand, Mr. Lauer, president of Lauer & Sons Company was asked the question:

> "You understood all the time that these goods were being held for you and all you had to do was to go to the First National Bank and give your check and take the goods; isn't that the fact? A. Sure. Q. That was the way these goods were ordered C. O. D., were they not? A. Yes, sir."

We find in the record no explanation of defendant's failure to take up the draft and call for the goods. Witness Lauer testified:

> "Q. Did you tell them [Smith & Sons Company] that you would not receive the goods for any cause from the time they were shipped to you, and ordered here in Alturas, until after the fire? A. I do not think we had any correspondence over them at all."

He testified that his company ordered the goods shipped through Mr. Laney, salesman of Smith & Sons Company, that they came C. O. D. as ordered, and that his company had never repudiated the contract.

We find no evidence in the record from which the intention of the parties can be safely determined other than is to be found in the simple fact that the goods were ordered by defendant, and that they were shipped to Alturas C. O. D., as ordered, bill of lading with draft attached, sent to First National Bank, Alturas.

[1] We understand that the rule at common law is the rule in this state, viz. that the risk is placed where the title resides. Jue Yee v. Ch. Tetzen & Co., 12 Cal. App. 55, 106 Pac. 594; Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080; Seeligson v. Philbrick (C. C.) 30 Fed. 600.

[2-4] It was said in Seeligson v. Philbrick, supra:

> "Where a bill of exchange for the price of the goods is inclosed to the buyer for acceptance, together with a bill of lading, if he refuse acceptance, he acquires no right to the bill of lading, or the goods of which it is the symbol. Where a vendor deals with the bill of lading only to secure the contract price, the property rests in the buyer on payment thereof. See Benjamin on Sales (4th Ed.) § 339, and numerous cases cited."

In Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214, it was said that the transmission of the invoice of goods does not pass the property in the goods without an acceptance and payment of the draft drawn against them. An invoice is not a bill of sale, nor is it evidence of a sale. A bill of lading taken deliverable to the shipper's own order is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased.

It was held in Greenwood Grocery Co. v. Canadian County Mill & Elevator Co., 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261, that even if the bill of lading provides for the delivery to the consignee, "yet, if the consignor draws for the price attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment." Unless rebutted by evidence to the contrary, Mr. Benjamin says the fact of making the bill of lading deliverable to the order of the vendor is almost decisive to show his intention to reserve the jus disponendi and prevent the property from passing to the vendee. Benjamin on Sales (7th Ed.) § 379.

In Hilmer v. Hills, supra, the court quoted with approval from Sanborn v. Shepherd, 59 Minn. 144, 60 N. W. 1089, as follows:

> "There being no agreement of the parties to the contrary, the law presumes the sale to have been made for cash; and, upon a sale for cash, payment of the purchase money and the delivery of the property are concurrent and mutually dependent acts. Neither party is bound to perform without contemporaneous performance by the other. The payment of the purchase money was a condition precedent to plaintiff's right of possession."

We find nothing in Ramish v. Kirschbraun & Sons, 107 Cal. 659, 40 Pac. 1045, cited by appellant, controverting the rule above stated. Doubtless the parties may agree that title shall pass to the consignee or the purchaser of the goods upon delivery to the purchaser of the bill of lading with draft attached. The effect of a sale C. O. D. and shipment with bill of lading and draft attached, as shown, may, as Benjamin says, be rebutted by evidence to the contrary intention, as appeared in the cases cited by appellant, but we find no evidence in the record which warrants our holding that Smith & Sons Company intended that title should pass to defendant without first paying for the goods by taking up the draft.

The goods for which judgment was confessed were delivered to defendant and constituted a credit sale and the bill of lading stated "payable 30 days," whereas the bill of lading in question stated, "payable C. O. D. draft with B/L First National Bank," and in no sense constituted a credit sale. We think it quite clear that the vendor did not intend that the ownership and right to the possession of the goods should pass to defendant until its draft was paid. We think that the loss of the goods should fall upon plaintiff.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

40 Cal. App. 675

PEOPLE v. SCHIAFFINO et al. (Cr. 465.)

(District Court of Appeal, Third District, California. April 16, 1919.)

CRIMINAL LAW 🔑1182 — AFFIRMANCE — POINTS AND AUTHORITIES—EVIDENCE.

Appellants having failed to file points and authorities, with proof of service upon Attorney General, within 15 days after filing of transcript, as required by rule 2, or to apply for further time, and the case having been submitted upon the record on motion of Attorney General, there being no appearance at call of calendar of defendants, who were given notice that cause was placed upon calendar, judgment will be affirmed, where the evidence, though largely circumstantial, cannot be said to be insufficient to support verdict of guilty.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Charles Schiaffino and Tony Frankino were convicted of having feloniously and burglariously broken into and entered a store, and they appeal. Affirmed.

C. H. Brennan and T. M. O'Connor, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendants were tried jointly for the crime of having feloniously and burglariously broken into and entered the store of Herrick & Brooks, in the town of Middleton, county of Lake, on the 18th day of September, 1918, "with intent then and there to commit a crime," and "then and there opened a safe by use of nitroglycerin, contrary to the form, force, and effect of the statute," etc. The jury returned a verdict of guilty as charged, and the court sentenced defendants to the state prison at San Quentin. Defendants appealed.

The clerk's transcript was filed January 25, 1919, and the reporter's transcript was filed February 6, 1919. Under rule 2 (176 Pac. viii), the appellant in a criminal case is required to "file his points and authorities, with proof of service on the Attorney General, within 15 days after the filing of the transcript." The cause was placed upon the April calendar and due notice thereof sent to defendants' attorneys. They have filed no points and authorities, and have not applied for further time in which to file points and authorities. At the call of the calendar there was no appearance for defendants, and on motion of the Attorney General the cause was submitted on the record.

We have read the evidence in the case, and while it is largely circumstantial, we cannot say it is insufficient to support the verdict.

The judgment is affirmed.

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41 Cal. App. 23

MOSHER v. LACK. (Civ. 1897.)

(District Court of Appeal, Third District, California. April 30, 1919. Rehearing Denied by Supreme Court June 26, 1919.)

1. VENDOR AND PURCHASER 🔑44—RESCISSION OF SALE—MATERIAL MISTAKE—EVIDENCE—SUFFICIENCY.

In a suit to rescind a contract to purchase lands on the ground of fraudulent representations and mistake as to the amount of land conveyed, evidence as to the difference in value between the acreage received and the acreage intended to be sold *held* sufficient to justify a finding that the mistake was a material one.

2. VENDOR AND PURCHASER 🔑44—SUITS TO SET ASIDE PURCHASE—PRESUMPTIONS.

In suits to set aside purchases of land on the ground of mistake as to quantity, there is always a presumption that where the price per acre is considered the quantity influences the buyer as an inducement to pay the gross amount agreed upon.

3. VENDOR AND PURCHASER 🔑113—SUITS TO SET ASIDE—DISCREPANCY IN QUANTITY.

A purchaser of land may have his purchase set aside, where it appears that owing to a mutual mistake a materially less acreage was conveyed than was intended.

4. VENDOR AND PURCHASER 🔑127—SUIT TO SET ASIDE PURCHASE—RECOVERY FOR IMPROVEMENTS.

In suit to set aside the purchase of a half interest in land on the ground of a material mistake as to the quantity conveyed, it was not error to allow plaintiff to recover one-half the value of the improvements placed thereon.

5. EVIDENCE 🔑474(18)—OPINION—SPECIAL KNOWLEDGE—VALUE.

In a suit to set aside a purchase of land on the ground of material mistake as to quantity, it was not error to admit evidence by a civil engineer acquainted with the property as to the cost and value of improvements thereon.

6. EVIDENCE 🔑474(18)—OPINION OF OWNER—VALUE.

In a suit to set aside a purchase of land on the ground of material mistake as to quantity, it was not error to allow plaintiff to testify as to the cost of the items entering into the value of the improvements placed by him thereon.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by J. W. Mosher against M. D. Lack. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, for appellant.

George R. Freeman, of Willows, for respondent.

BUCK, Presiding Judge pro tem. This is an action to rescind a contract to purchase lands on the ground that the contract was entered into as a result of false and fraudulent representations and mistake in regard to the amount of land conveyed. The case was tried by the court without a jury, and findings were made establishing the mistake but negativing the fraudulent representations; a judgment was given for plaintiff, from which this appeal is taken by the defendant under the alternative method.

By the terms of the contract in question, which was made on November 2, 1914, the appellant agreed to sell, and the respondent agreed to buy, for the sum of $6,300, an undivided one-half of a piece of land described by metes and bounds and "containing 80 acres more or less." The purchase price was to be paid as follows: $1,500 at the time of the making of the agreement, $650 twelve months thereafter, $2,000 two years thereafter; and, as a credit upon the purchase price to the extent of $900, the respondent agreed to execute and deliver to the appellant a deed to certain real property in Shasta county known as the "old Graham place"; also, the respondent agreed to assume one-half of a mortgage on the property in the sum of $2,500.

On the issue of mistake, plaintiff, in his complaint, alleges as follows:

> "That in order to induce plaintiff to purchase a half interest in and to said land and to enter into said contract, defendant informed plaintiff that the land described in said contract contained 80 acres of land and the purchase price of a half interest therein was based on the belief that said land did contain 80 acres; that plaintiff at the time of entering into said contract and at the time he paid defendant the sum of $1,500 and at the time he executed the deed described in paragraph III hereof to defendant believed that said Glenn county land did so contain 80 acres and had no knowledge to the contrary until the month of May, 1915, when he caused a survey to be made and then discovered for the first time that said land did not contain 80 acres, but contained less than 40 acres; that said land does not contain 80 acres, and plaintiff would not have entered into said contract of November 2, 1914, had he not relied upon and acted upon the representation that said land did contain 80 acres; that plaintiff and defendant at the time of entering into said contract both believed that said land contained 80 acres and the purchase price of one-half interest therein was based upon the assumption by both parties that said land did contain 80 acres of land."

Upon conflicting evidence, the court made a finding substantially in accordance with this allegation, except that the court found that the land contained only 55.64 acres, instead of only 40 acres.

Counsel for appellant has filed able and instructive briefs. But his argument is based upon his contention that the foregoing basic finding "is not supported by the evidence, but in certain respects is in conflict with other findings of the court and contrary to all the evidence."

It is true that the testimony of plaintiff's witnesses is contradicted by witnesses for the defendant. But if the trial court believed the testimony of plaintiff's witnesses the evidence in the record is sufficient to sustain the above finding. From the evidence offered on behalf of the plaintiffs it sufficiently appears that the contract upon which the minds of the parties met was a contract pertaining to a half interest in a piece of land which each of the parties at the time of the contract believed contained 80 acres of land, when, as a matter of fact, it contained only 55.64 acres, and that this mutual mistake was a material mistake and induced the plaintiff to enter into the contract.

Also, from the testimony on behalf of the plaintiff, it appears that the price per acre was considered by the parties at the time of the trade. So it was not simply a sale in gross. The plaintiff's testimony is as follows:

> "Q. How was this figure (the price of the land) arrived at? A. I asked Mr. Lack what the value of this land was per acre, and he said that river bottom land, such as that was, was worth from $175 to $200 an acre, but that the bank had appraised it at a little less than that, and he was willing to exchange on that appraisement that the bank had put on it, but he said 'we value the cleared land at $175 an acre.' So that was the basis on which we made the exchange. Q. At the time of your negotiation and fixing of this price between yourself and Mr. Lack, how many acres were figured as cleared land? A. Sixty-three acres. Q. Was there any other land besides that 63 acres cleared land figured? A. No cleared land. Q. Any other land? A. Yes, supposed to be a little less than 20 acres covered with timber. Q. What did Mr. Lack say about that portion of the land, if anything? A. That portion of the land was supposed to be put in at about $100 per acre. Q. If you did not believe at that time, Mr. Mosher, that there were 80 acres in that land, would you have entered into this contract? A. No."

[1, 2] The difference in value between the acreage received and the acreage intended to be sold was sufficient to justify the court in finding that the mistake was a material one when taken in connection with the plaintiff's testimony that he would not have entered into the contract had he not believed that the land contained 80 acres. And there is always a presumption that, where the price per acre is considered, the quantity influences the buyer as an inducement to pay the gross amount agreed upon. McComb v. Gilkeson, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944, and cases cited in note; McCombs v. Church, 180 Pac. 535.

The court evidently believed that the plaintiff was told by the defendant that the land contained 80 acres; also, probably believed that the knowledge and standing of the defendant was such that plaintiff would be justified in believing anything that the defendant might tell plaintiff about the land. From the testimony of defendant it appears that for ten years he had occupied the responsible position of county assessor in the county of Shasta, and he further testified that—

> "Mr. Mosher did not really say anything. He apparently didn't know anything about the land business. Really all the information he got I volunteered. Q. You volunteered you would take $12,600? A. I did not. Q. You did volunteer that the bank had appraised the land at $12,600? A. He asked me what I considered the property worth. Q. And you told him the bank had appraised it? A. Yes, I told him the only knowledge I had was that they appraised it at $12,600. Q. Did you tell him why the bank appraisement was made? A. I don't know whether I did or not. Q. What did you know about the bank appraisement? A. I knew all about it. It was made at my request."

The bank appraisement referred to was offered in evidence, and the first words it contains relative to the appraisement are, "The place contains about 80 acres," and the appraisement which follows is based upon this acreage.

[3] This evidence may have had some weight with the court in reaching the conclusion that the defendant at whose request this appraisement was made had an honest, though mistaken, belief that the land did contain 80 acres, and that the same information was given to the plaintiff in regard to the acreage of the land as was given to the appraiser of the bank when the appraisement was made by the bank at the request of the defendant.

So far as mistake and rescission are concerned, this case comes within the principles enunciated by our Supreme Court in the case of Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094. See, also, Johnson v. Withers, 9 Cal. App. 52, 98 Pac. 42; Quarg v. Scher, 136 Cal. 406, 69 Pac. 96; Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 Pac. 117.

[4] The court did not err in allowing the plaintiff to recover one-half of the value of the improvements placed upon the property. Fountain v. Semi-Tropic L. Co., 99 Cal. 677, 34 Pac. 497.

[5, 6] The court did not err in permitting the plaintiff and the witness Stiles to testify in regard to the cost and value of the improvements placed upon the land. The witness Stiles was a civil engineer, and acquainted with the property, and the plaintiff testified fully in regard to the cost of the items which entered into the value of the improvements.

Judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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40 Cal. App. 574

MORSE et al. v. IMPERIAL GRAIN & WAREHOUSE CO. (Civ. 2400.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1919.)

1. WAREHOUSEMEN 🔑24(7) — LIABILITY — PROVISIONS OF RECEIPT.

In view of Deering's Gen. Laws 1915, Act 4320, a warehouseman cannot relieve itself from liability for loss of goods resulting from want of ordinary care and diligence by inserting in a receipt that the goods were deposited at the risk of the depositor.

2. WAREHOUSEMEN 🔑24(1) — LIABILITY — CONTRACT.

A warehouseman may by special contract assume liability for loss of goods due to any cause and make himself an insurer thereof.

3. WAREHOUSEMEN 🔑24(7) — LIABILITY — CONTRACT—LIMITATION.

Under a warehouse receipt reciting that the property deposited was received "for account and at the risk of" the depositor, and that the warehouseman "is not responsible for loss occasioned to the merchandise stored with them by fire or elements," the warehouseman was not liable where, through no lack of ordinary care or diligence on its part or its servants, the merchandise was stolen from the warehouse, in view of Deering's Gen. Laws 1915, Act 4320.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by C. F. Morse and Lionel Brackenberry, partners, doing business under the firm name and style of Morse & Brackenberry, against the Imperial Grain & Warehouse Company. From a judgment for defendant and an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

F. R. McNamee, of Los Angeles, Leo A. McNamee, of Las Vegas, Nev., and Luke J. McNamee and Parke Godwin, both of Los Angeles, for appellants.

Albert M. Norton and Emery & Rehart, all of Los Angeles, for respondent.

SHAW, J. Action to recover for 12 sacks of wool deposited with defendant as a warehouseman, and which defendant failed to redeliver on demand therefor.

Judgment went for defendant, from which and an order denying a motion for a new trial made by plaintiffs, they appeal.

The case was submitted for decision upon an agreed statement of facts, the material parts of which are as follows:

> "The respective parties hereto * * * agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The facts agreed upon are as follows: (1) The defendant is * * * a public warehouseman; (2) The plaintiffs * * * did, on April 15, 1916, duly deliver to defendant, as

such warehouseman, 69 sacks of wool for storage, which defendant agreed to receive, keep, and store in its warehouse in the city of El Centro * * * in accordance with the following warehouse receipt," which receipt, in addition to the matters required to be specified therein by section 2 of "An act to make uniform the law of warehouse receipts," stated the wool was received "for account and at the risk of Morse & Brackenberry," and also contained a provision that, "The Imperial Grain & Warehouse Company is not responsible for loss occasioned to the merchandise stored with them, by fire or elements"; "(4) on July 5, 1916, plaintiffs duly demanded a redelivery of said 69 sacks of wool, and then and there offered to pay defendant the full amount of its storage charges thereon; (5) upon such demand defendant redelivered 57 sacks thereof, but failed and refused to redeliver the remaining 12 sacks thereof, giving as a reason therefor that the 12 sacks, on some date unknown, had disappeared, or were stolen from its said warehouse, without any fault or carelessness, misconduct, or negligence of defendant, or its servants or either of them, and through no lack of ordinary care or diligence on the part of the defendant or its servants and while defendant was using ordinary care and diligence, which plaintiffs contend is no defense to this action, even if true."

By the stipulation "the points in controversy" as specified for submission to the court for its determination were:

"(1) Is not the liability of the defendant absolutely fixed by the provisions of its warehouse receipt above set out?" (2) Under the rule of "Expressio unius est exclusio alterius," does not the provision exempting defendant from loss due to fire or the elements estop it from making any defense other than that the goods were so lost? (3) Is defendant's liability restricted to such loss only as resulted from the want of ordinary care and diligence?

It was further provided that if the court upon the "above statement" should find for plaintiffs, judgment should follow in their favor; otherwise it should be for defendant.

An act of March 19, 1909, entitled "An act to make uniform the law of warehouse receipts" (Deering's Gen. Laws 1915, p. 2022), requires all receipts to embody certain provisions, and section 3 of said act provides that a warehouseman may insert in a receipt any other terms and conditions, provided that such terms and conditions shall not "in any wise impair his obligation to exercise that degree of care in the safekeeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own." And section 21 of said act provides that a warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to goods would could not have been avoided by the exercise of such care.

[1, 2] Counsel for both parties, as they must, concede the receipt should be interpreted in the light of the provisions of the act from which we have quoted. This being true, provisions having for their purpose the exemption of a warehouseman from liability which the law in express terms imposes upon him cannot be deemed effectual for any purpose. Hence it follows that defendant could not by the provision, "For account and at the risk of Morse & Brackenberry," so inserted in the receipt, relieve itself from liability for loss of the goods if such loss resulted from a want of ordinary care and diligence exercised by it. To this extent the law protects one who for hire deposits his goods for storage with a warehouseman who, while he cannot in any case exempt himself from the liability imposed by law, may by special contract assume liability for loss of goods due to any cause, thus making him an insurer thereof. However, there is nothing whatever in the receipt before us upon which such additional liability can be predicated.

[3] In support of their argument for reversal, appellants cite a number of cases to the effect that, since the provision, "For account and at the risk of Morse & Brackenberry," is to be disregarded, and since the loss of the goods was not due to fire or the elements, the contract should be construed as an absolute promise on the part of defendant to redeliver the goods, as was held in the case of Pope v. Farmers' Union Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87. In that case a number of sacks of wheat were received by a warehouseman upon an agreement to redeliver the same, subject alone to loss due to the elements. It was held that a failure to deliver the goods for any cause other than that they were destroyed by the elements constituted no defense. That case and others to like effect were decided prior to the adoption of the act of 1909 and at a time when the extent of a warehouseman's liability was the unrestricted subject of special contract.

The question as to whether defendant was guilty of negligence in the care of the wool must be determined from the facts agreed upon, which the trial court construed as a stipulation that the theft or loss of the goods was not due to negligence or want of ordinary care on the part of defendant. Appellants insisted that such interpretation was wholly unwarranted. We cannot assent to this contention. Construed in the light of the surrounding circumstances, and having in view the purpose which prompted it and the points submitted for determination, there can be no doubt that it was intended as an admission by plaintiffs that the loss of the goods, as alleged in the answer, was not due to carelessness or negligence of defendant, and that, as custodian thereof, it had exercised ordinary care. Otherwise construed, there could be no purpose in inserting defendant's reasons for failure to redeliver the 12 sacks of wool, which, as stated, "plaintiffs contend is no defense to this action, if true." That such was the intent appears from appellants' brief, wherein counsel, in referring to the language quoted, says:

> "In framing such clause plaintiffs had in view the decision of this court in Pope v. Farmers' Union Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87, supra."

Clearly the case was submitted to and decided by the trial court upon the theory that the fact as to whether defendant was negligent in the care of the wool was immaterial; that, conceding it had exercised ordinary care, nevertheless, since the goods were not destroyed by fire or the elements, it was, as decided in Pope v. Farmers' Union Milling Co., supra, bound upon demand therefor to make delivery thereof. The effect of the stipulation, taken in connection with plaintiffs' action thereunder, was to concede that defendant was not chargeable with negligence or want of ordinary care, which, upon their theory, constituted no defense to the action.

Since no appeal lies from the order denying the motion for a new trial, it is dismissed.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 778

ADLER v. SAWYER. (Civ. 2767.)

(District Court of Appeal, First District, Division 2, California. April 25, 1919. Rehearing Denied by Supreme Court June 23, 1919.)

1. GUARANTY 🔑4—DISTINGUISHED FROM INDEMNITY CONTRACT.

A contract by which defendant agreed to protect plaintiff against loss arising from the sale by defendant himself of a note and its security is not a contract of guaranty, within Civ. Code, § 2787, defining a guaranty as a promise to answer for the debt, default, or miscarriage of another person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

2. GUARANTY 🔑16(3)—SUFFICIENCY OF CONSIDERATION — STATUTORY PROVISIONS — APPLICABILITY TO OTHER CONTRACTS.

Civ. Code, § 2792, requiring a distinct consideration for contracts of guaranty not entered into at the same time as the original obligation, and not forming a part thereof, is applicable to contracts of guaranty only.

3. TRIAL 🔑404(1) — FINDINGS OF TRIAL COURT—CONSTRUCTION—LIBERAL CONSTRUCTION—RECONCILING CONFLICT.

The findings of a trial court are to be liberally construed in support of the judgment, all findings to be read together, and, if possible, to be reconciled, so as to prevent any conflict on material points.

4. APPEAL AND ERROR 🔑907(2)—REVIEW—PRESUMPTION — CONTRACTS — CONSIDERATION—EVIDENCE SUPPORTING.

On appeal on the judgment roll alone in an action on a contract, in which the allegations of the complaint and answer failed to raise the issue of consideration, it will be presumed in support of the judgment that the evidence by which good consideration for the contract sued upon was shown was received without objection, and that the case was tried by consent of the parties, as if such issue had been properly raised.

5. LIMITATION OF ACTIONS 🔑56(2)—ACCRUAL OF RIGHT OF ACTION—CONTRACTS—INDEMNITY.

The statute of limitations as to an action upon a contract of indemnity against loss does not commence running until the person indemnified suffers the loss against which the contract protects him.

6. APPEAL AND ERROR 🔑907(2)—REVIEW—PRESUMPTION—FINDINGS OF TRIAL COURT—EVIDENCE CONSIDERED.

Where, on appeal, there is no evidence before the court sufficient to determine when plaintiff suffered loss on a contract of indemnity and his right of action accrued, it will be presumed that the finding of the trial court that plaintiff's cause of action was not barred by the statute of limitation was sustained by sufficient evidence.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles Adler against F. W. Sawyer. From a judgment for plaintiff, defendant appeals. Affirmed.

F. W. Sawyer, of San Francisco, for appellant.

Gerald C. Halsey, of San Francisco, for respondent.

HAVEN, J. Defendant appeals, upon the judgment roll alone, from a judgment rendered against him in an action upon a written contract of indemnity. On August 18, 1911, in consideration of the payment of $3,000, the defendant sold and transferred to plaintiff a certain promissory note in that amount, dated July 17, 1909, the payment of which was secured by a deed of trust. On September 22, 1911, defendant executed and delivered to plaintiff the contract sued upon. That document recites the prior sale of the note to the plaintiff, the receipt of the consideration by the defendant, the fact that statements had been made as to the possible invalidity of the note, and concludes as follows:

"Said F. W. Sawyer hereby agrees to protect said Charles Adler against any and all possible loss or damages that he may sustain by not being able to in any manner realize the full benefits of note and trust deed or to recover the full amount of said note and trust deed from any reason whatever arising out of the transaction."

Appellant contends that this contract is one of guaranty, and, as such, it is unsupported by a sufficient consideration, for the reason that it was not entered into at the same time as the original obligation, and did not form a part thereof, and that the record shows there was no distinct consideration therefor, as required by section 2792 of the Civil Code. The argument is based upon the allegations of the complaint and the findings, a portion of which are set forth in appellant's brief. The full record on this matter is as follows:

In the complaint it is alleged:

"That subsequent to the transfer of the said note and of the said deed of trust by the said defendant, F. W. Sawyer, to the said plaintiff, Charles Adler, above mentioned and alleged, said defendant, F. W. Sawyer, and the said plaintiff, Charles Adler, entered into a certain agreement in writing, wherein and whereby, for the original consideration paid by the said Charles Adler to the said defendant, F. W. Sawyer, for the transfer of the said note and of the said deed of trust, and for other reasons expressed therein, the said defendant, F. W. Sawyer, agreed to protect the said Charles Adler against any and all possible loss for damage that he might sustain," etc.

In his answer the defendant denies:

"That the alleged agreement in said complaint alleged to have been entered into between Charles Adler and defendant, F. W. Sawyer, was entered into for any other consideration than is expressed in said agreement."

Upon this issue the court found:

"That all of the allegations of plaintiff's complaint on file herein are, and each of them is, true and correct, and fully sustained by the evidence, and the court further finds that there was a good and sufficient and valuable consideration for the making and execution and delivery of all of the written instruments particularly described in plaintiff's complaint. [The contract sued upon was one of the instruments thus referred to.] And the court further finds that the defendant, Sawyer, for a good and sufficient and valuable consideration, on the 22d day of September, 1911, agreed to protect plaintiff against any and all possible loss or damages that plaintiff might sustain by not being able to in any manner realize the full benefits of the note and trust deed described in plaintiff's complaint, or to recover the full amount of said note and trust deed from any reason whatever."

[1, 2] A guaranty is defined as "a promise to answer for the debt, default, or miscarriage of another person." Civ. Code, § 2787. In the contract here involved defendant agreed to protect plaintiff against loss or damage arising from the sale by defendant himself of the promissory note and its security. Section 2792 of the Civil Code is applicable to contracts of guaranty only. Upon the question of consideration, it is not necessary to decide whether the contract sued upon comes within that category. Even if it be assumed that the section relied upon applies to this particular contract, the contention of appellant is without merit.

[3, 4] The findings of the trial court are to be liberally construed in support of the judgment, and all the findings are to be read together. If possible, they are to be reconciled so as to prevent any conflict on material points. A judgment will not be reversed on the ground of a conflict in the findings, unless the findings are incapable of being harmoniously construed. Ames v. City of San Diego, 101 Cal. 390, 395, 35 Pac. 1005; Haight v. Haight, 151 Cal. 90, 92, 90 Pac. 197. So reading and construing the findings before us, it is clear that the court found that the contract sued upon was supported by a good and sufficient and valuable consideration, and that there is no such conflict in the findings as to lead to a reversal of the judgment. The allegations of the complaint and answer raised the issue of the consideration for the execution of the contract. But, even if they did not, upon this appeal on the judgment roll alone, it must be presumed in support of the judgment that the evidence by which the existence of a sufficient consideration was established was received without objection, and that the case was tried by consent of the parties as it such issue had been properly raised. Churchill v. Baumann, 95 Cal. 541, 547, 30 Pac. 770.

[5, 6] It is further contended by the appellant that the action is barred for the reason that the contract was dated September 22, 1911, and this action was not commenced until July 6, 1917. The contract sued upon is not a guaranty of payment of the promissory note transferred by defendant to plaintiff, but is rather a contract of indemnity against loss by reason of the inability of the plaintiff to realize upon the note and the security therefor. There is a marked difference between these two classes of contracts. Under a guaranty of payment, the liability of the guarantor becomes fixed by the failure of the principal debtor to pay at maturity; but under a contract of indemnity against loss no right of action accrues against the indemnitor until the person indemnified suffers the loss against which the contract protects him. In this case the plaintiff's cause of action against the defendant upon the contract arose when it was determined that plaintiff would not recover the full amount of the transferred note. In the absence of any evidence, we are unable to determine when this loss occurred and plaintiff's right of action accrued. The trial court found, however, that plaintiff's cause of action was not barred by any of the provisions of the Code of Civil Procedure relied upon. It must be presumed that this finding was sustained by sufficient evidence.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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40 Cal. App. 670

FERGODO et al. v. DONOHUE et al.

(Civ. 2645.)

(District Court of Appeal, First District, Division 1, California. April 16, 1919.)

JUDGMENT ⚷505—SETTING APART HOMESTEAD—COLLATERAL ATTACK—ERROR.

Error of a probate court in setting aside as a homestead absolutely for decedent's minor children land formerly community property, which upon the death of decedent's wife became his separate property within Code Civ. Proc. § 1468, was an error, committed in the exercise of its jurisdiction, which cannot be indirectly attacked in a later proceeding to quiet title to the land.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action to quiet title by George J. Fergodo and others against W. H. Donohue and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Cedric W. Peterson, of Pleasanton, and Neal Power, of San Francisco, for appellants.

W. S. Tinning, of Martinez, C. A. Gale, of Pleasanton, and W. H. L. Hynes, of Oakland, for respondents.

KERRIGAN, J. This is an action to quiet title. The complaint was in two counts. The cause was tried on the first count, and judgment went for the defendants. As to the second count a demurrer thereto was sustained, and, plaintiffs having refused to amend, judgment by default upon that count was also entered against them. The plaintiffs appealed from both judgments. That relating to the default judgment not being seasonably taken, it was heretofore, upon motion made in this court, dismissed.

The question involved in the remaining appeal concerns the construction of an order setting apart a homestead to minor children. The facts are undisputed and simply told. The property set apart was community in character, and had belonged to E. S. Fergodo and his wife. Mrs. Fergodo predeceased her husband, and the latter died in the year 1904, leaving him surviving as the result of this union 11 children, 6 of whom were minors. No homestead had ever been selected by either spouse in lifetime, but in the course of probate proceedings upon the estate of E. S. Fergodo, deceased, the court, upon petition of the guardian of the minor children, and after due notice and hearing, set apart absolutely in fee as a homestead to the minor children the property here involved. Subsequently the estate was closed, and the remaining property distributed to all the children, both adults and minors. After the latter reached majority they conveyed the homestead property to the defendants. No objection was made, at the time of the making thereof, either to the decree setting apart the homestead, or to the final decree of distribution, and no appeal was ever taken from either of them.

It is conceded that the property had been the community property of E. S. Fergodo and his wife; and assuming for the purposes of this case that upon the death of Mrs. Fergodo the property became the separate property of the surviving husband within the meaning of section 1468 of the Code of Civil Procedure, and that therefore the court committed error in setting it aside as a homestead absolutely instead of for a limited time, still we think it was but an error committed in the exercise of its jurisdiction, which cannot be indirectly attacked. It has been so decided. In the Matter of Moore, 96 Cal. 530, 31 Pac. 584, the probate court had set aside to the widow of the deceased absolutely a homestead from the separate property of the deceased; and in a proceeding similar to the present the same question came before the Supreme Court which, in passing thereon, said:

> "If it should be conceded that the court erred in setting apart any portion of it absolutely to the widow, still it was only an error committed in the exercise of its jurisdiction, and the order was not void. No appeal was ever taken from this order, and it is now in full force. This being so, the court erred in distributing, as part of the estate, the land so set apart as a homestead. By force of the decree setting it aside, the title to the homestead is, as against the heirs of the deceased, in the parties named in that decree."

See, also, Estate of Bette, 171 Cal. 584, 153 Pac. 949; Rountree v. Montague, 30 Cal. App. 170, 157 Pac. 623; McGavin v. S. F. Protestant Orphan Asylum Society, 34 Cal. App. 168, 167 Pac. 182.

Upon the authority of those cases the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

40 Cal. App. 708

PACIFIC MFG. CO. et al. v. PERRY et al.

(Civ. 2750.)

(District Court of Appeal, First District, Division 2, California. April 18, 1919. Rehearing Denied by Supreme Court June 16, 1919.)

1. Mechanics' Liens 🔑290(2) — Foreclosure — Finding — Amount of Work Done Prior to Abandonment.

In an action to foreclose contractor's and materialmen's liens, a finding as to the value of the work and materials already done and furnished at the time of contractor's abandonment of the work in contract couched in the language of Code Civ. Proc. § 1200, as it stood prior to its repeal in 1911, *held* to find the ultimate facts required by such section.

2. Mechanics' Liens 🔑164(1) — Foreclosure after Abandonment by Contractor —Liability—Contract Price.

The rights of mechanic's lien claimants on abandonment of performance of the contract by the contractor must be adjudged as of that date, and though a contract legally made limits the liability of the owner to lien claimants to the contract price, it is not error to fail to consider the cost to the owner of completion of the contract, since Code Civ. Proc. § 1200, as it stood prior to its repeal in 1911, recognized that the contract might be abandoned, and provided for an equitable determination of the amount of contract completed and portion of contract price applicable to liens.

3. Mechanics' Liens 🔑281(4) — Foreclosure—Amount of Contract Price Applicable—Evidence.

In an action for foreclosure of mechanics' liens after contractor's abandonment, where the testimony was conflicting, but testimony of experts showed the per cent. of the contract completed at the time of abandonment, evidence *held* sufficient to support findings.

4. Mechanics' Liens 🔑161(2) — Abandonment of Contract — Computation of Amount of Contract Price Applicable to Lien Payment.

In an action to foreclose mechanics' liens after abandonment by contractor, the actual cost of completion to the owners, which was increased by the abandonment, was properly not taken into consideration in determining the percentage of the contract completed, and percentage of the contract price applicable to payment of liens.

5. Evidence 🔑117 — Judgment Roll — Necessity of Other Evidence.

In an action to foreclose mechanics' liens after abandonment by contractor, where there was an entire absence of evidence connecting a payment referred to in a receipt with the claim sued upon, the trial court did not err in sustaining plaintiff's objection to the offer of the judgment roll containing the receipt.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Consolidated action by the Pacific Manufacturing Company and others against R. A. Perry and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

C. Irvine Wright, F. E. Boland, and John Douglas Short, all of San Francisco, for appellants.

W. B. Rinehart and Ezra Decoto, both of Oakland, and Robert B. Gaylord, of San Francisco, for respondents.

HAVEN, J. This is the second appeal in consolidated actions to foreclose contractors' and materialmen's liens, the opinion on the first appeal being reported in 31 Cal. App. 274, 160 Pac. 246. On June 10, 1910, the defendant R. A. Perry, acting on behalf of the defendant Winifred A. Perry, his wife, entered into a valid contract with defendant Magneson for the construction of a residence and garage for the total contract price of $23,567, which contract was recorded on June 13, 1910. The contractor commenced construction of the building thereunder, and continued until February 11, 1911, at which latter date he abandoned work under the contract. On March 22, 1911, the defendants R. A. and Winifred A. Perry filed for record a notice of abandonment by the contractor of said contract. The details of the contract, so far as they may be material, are set forth in the opinion on the former appeal, and need not here be repeated. The present appeal is by the defendants from a decree adjudging plaintiffs entitled to liens as set forth in their several complaints, and decreeing the foreclosure thereof. All the claims of lien here involved are based upon work performed or materials furnished prior to the abandonment of the contract. The controversy is concerned mainly with the proper portion of the contract price applicable to the payment of such liens under section 1200 of the Code of Civil Procedure, prior to its repeal in 1911, and particularly as to the correct method of computation to be adopted in arriving at that amount. The court found:

> "That the value of the work and materials already done and furnished at the time of the abandonment of said work and contract by the said defendant Magneson, as aforesaid, to wit, on the 11th day of February, 1911, including materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole contract price, exclusive of the extra work hereinafter mentioned and referred to, was and is the aggregate sum of $17,468.71, being 74.2 per cent. of the amount of the contract price, to wit, $23,567, on account of which there had been paid the contractor, the defendant Magneson, at the time of abandonment, the sum of $10,000."

The court also found that during the course of construction of the buildings, and prior to the abandonment of the contract, certain extra work was performed by the contractor, subcontractors, and materialmen, under authorization in writing from the defendants Perry and in conformance with the provisions of the contract, the reasonable value of which aggregated $4,016.36, on account of which there had been paid to the contractor the sum of $1,300, leaving a balance unpaid for said extras in the sum of $2,716.36.

[1, 2] Appellants attack the finding above quoted as not being a sufficient finding of fact under the terms of section 1200, Code of Civil Procedure. It is couched, however, in the language of that section, and is sufficient under the authority of Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 474, 126 Pac. 146. The ultimate fact is found as required by the section referred to. The real contention of appellants is that this finding is not supported by the evidence, for the reason that it does not appear that the cost of completion of the building was an element taken into consideration in arriving at the amount found to be applicable to the payment of liens at the time of abandonment. Appellants argue that the cost of completion after abandonment was much greater than it would have been if there had been no abandonment, and as the owners were obliged to pay this extra cost through no fault on their part, it should have been taken into consideration in arriving at the amount applicable to claims of lien which accrued prior to abandonment.

It is admitted by appellants that this contention is contrary to the rule laid down in Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 669, 143 Pac. 1025. But it is claimed that the rule announced in the case last referred to is contrary to all the previous decisions of the Supreme Court, and to the law of these cases as announced upon the former appeal. Particular reliance is placed by appellants upon the cases of Roystone Co. v. Darling, 171 Cal. 526, 533, 154 Pac. 15, McDonald v. Hayes, 132 Cal. 490, 64 Pac. 850, Hoffman-Marks Co. v. Spires, 154 Cal. 111, 116, 97 Pac. 152, and Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 126 Pac. 146, as announcing a rule which is inconsistent with that declared in the Ganahl Case, as construed and applied on the former appeal, and by the trial court in the instant cases. Upon a careful reading of the decisions referred to, we do not find the inconsistency claimed by appellants. In our opinion, the confusion of appellants arises from a failure fully to appreciate the fact, so clearly pointed out in the Ganahl Case, that upon abandonment the performance of the contract has come to an end, and the rights of all parties thereunder must be adjusted as of that date. It is true that a contract legally made limits the liability of the owner to lien claimants to the amount of the contract price; but the liability thus referred to is to lien claimants whose claims have arisen under the contract. Section 1200, Code of Civil Procedure, as it existed prior to its repeal, recognized that a building contract might be terminated by abandonment, and provided a method of arriving at the proportion of the contract price applicable to liens in that event. As stated in the Ganahl Case, if the contract is half performed, it is equitable, and a protection of the constitutional rights of all parties, to decree that one-half of the price agreed to be paid for the performance of the entire contract, less payments made, should be applied to the discharge of liens which had accrued prior to the abandonment. This is undoubtedly the rule established by the decision last above referred to; and, even if it could be construed as inconsistent with former decisions as claimed by appellants, we should consider ourselves bound thereby. We are of the opinion, however, that all the cases referred to are entirely harmonious.

[3, 4] The testimony was conflicting as to the value of the work done and materials furnished at the time of abandonment, and as to the reasonable value of all the labor and materials necessary to construct and complete the buildings according to the contract, plans, and specifications. The findings of the court are sufficiently supported, however, by the evidence of experts offered on behalf of the plaintiffs. These witnesses testified that the reasonable value, at the time the buildings were constructed, of all the labor and materials necessary and required to construct and complete the buildings according to the contract, plans, and specifications was the aggregate sum of $26,255.08; and that the aggregate value of the labor and materials actually used in the construction of the buildings and upon the ground at the time of the abandonment was $19,454.34. They then computed that the latter sum was 74.2 per cent. of the former, and therefore testified that the contract had been 74.2 per cent. completed at the time of the abandonment. Upon this testimony the court held that 74.2 per cent. of the contract price, less payments made, was applicable to the discharge of liens which had accrued prior to the abandonment. In our opinion, this method of computation follows the rule announced in the Ganahl Case and is justified thereby.

It is further claimed by appellants that a different rule is announced in the opinion rendered upon the former appeal in these cases, and that that opinion has become the law of these cases, even if it should be found to be inconsistent with the decisions of the Supreme Court. The court there held that it was "unable to formulate any equation under the rule of section 1200 as approved by the Supreme and appellate courts which would support the findings of the court for the full amount found subject to the liens, on the theory of a valid contract abandoned by the contractor." It is pointed out by the writer of that opinion that the amount for which the court gave judgment on the first trial exceeded the amount of the fund available for the discharge of liens, computed upon respondents' own theory, by $674.59. It was doubtless this discrepancy which made it impossible for the appellate court to formulate an equation which would support the findings of the court for the full amount found subject to liens, and led to a reversal of the first judgment. A careful reading of the entire opinion does not disclose any conflict with the rule above referred to. Special reference is made therein to the decision in the Ganahl Case, and it is stated that the meaning of section 1200, Code of Civil Procedure, as affecting the liability of the owner in the case of an abandonment of a valid contract, is very clearly pointed out in the case referred to. Appellants rely upon the following language in the former opinion:

> "But respondent makes no allowance for the cost of completing the buildings which, through no fault of appellants, were left in an unfinished condition. What the actual cost of completion was to appellants may be immaterial (Ganahl Lumber Co. v. Weinsveig, supra), but as was said in Hoffman-Marks Co. v. Spires, 154 Cal. 111, 116, 97 Pac. 152: 'When he (owner) is, without any default on his part, burdened with the cost of completing the building, it is but fair and just that he should be relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. In no other way can he be protected in his constitutional right to have his liability limited to the amount which, by a valid contract, he has agreed to pay.'"

There can be no claim in the instant cases that the owner has not been relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. As we understand the portion of the opinion above quoted, it means merely that, while the actual cost of such completion to appellants may be immaterial, the reasonable cost thereof, according to the plans and specifications, must be taken into consideration in arriving at the proper proportion of the contract which had been completed at the time of abandonment, and the proportion of the contract price applicable to liens at that time. Appellants' contention is that the actual cost of completion to the defendants should have been taken into consideration in arriving at the figures above referred to. This is contrary to the rule laid down in the Ganahl Case, and it is so stated in the portion of the opinion on the former appeal above quoted. We think, therefore, that the trial court was correct in construing the opinion on the former appeal in these cases as not being inconsistent with the rule laid down in the Ganahl Case.

[5] Objection is made by appellants to the allowance of the lien of the Pacific Manufacturing Company on account of a claimed error of the trial court in sustaining an objection to the offer in evidence by defendants of the judgment roll in another action by the same plaintiff against O. M. Magneson, the contractor herein, in which a judgment was recovered for $2,567.59 and execution issued thereon. Attached to the sheriff's return on such execution was a receipt signed by plaintiff's attorney in the sum of $2,611.45. Defendants sought to prove by this record that the claim here sued upon had been paid, but the record offered did not show that the indebtedness there sued upon is the same indebtedness as is involved in the present suit. Defendants offered no evidence to that effect. They now rely upon the concurring opinion of Mr. Justice McKee in Goss v. Strelitz, 54 Cal. 640, 644, as establishing the rule that any payment from the contractor to the Pacific Manufacturing Company should be applied in payment of the lien involved in this action, in the absence of any showing of other existing indebtedness. In the case referred to the payment which was applied was received from the contractor on account of bricks furnished for the particular contract. If there had been evidence here that the payment collected through the action referred to was so received on account of this particular contract, the authority would be applicable. Inasmuch, however, as there is an entire absence of any evidence connecting the payment referred to in the receipt mentioned with the claim sued upon in this action, the trial court did not err in sustaining plaintiffs' objection to the offer of the judgment roll.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

41 Cal. App. 17

STRADLEY v. UNION TRUST CO. OF SAN FRANCISCO (DELANO-ROCHDALE CO., Intervener). (Civ. 2836.)

(District Court of Appeal, First District, Division 1, California. April 29, 1919. Rehearing Denied by Supreme Court June 26, 1919.)

ATTACHMENT 🔑175—BANKS AND BANKING 🔑129—OWNERSHIP OF PROPERTY—DEPOSIT OF MONEY FOR ANOTHER — DELIVERY OF PASSBOOK.

Where one deposited money with a trust company in the name of his brother and delivered the passbook to the brother and received from the brother his own canceled note, as between the brothers the money was paid for the note, and the payor could not set up any claim to it after delivery of the passbook and receipt of the note, and an attaching creditor of the payor is in no better position than the payor.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by L. J. Stradley against the Union Trust Company of San Francisco, in which the Delano-Rochdale Company intervened. Judgment for plaintiff, and the intervener appeals. Judgment affirmed.

W. W. Kaye, of Bakersfield, for appellant.
Herbert Choynski and James Raleigh Kelly, both of San Francisco, for respondent.

NOURSE, Judge pro tem. The plaintiff, L. J. Stradley, brought an action against the Union Trust Company of San Francisco to recover a deposit of $3,600 held by said defendant. The Delano-Rochdale Company, having previously attached the account in an action instituted by it against B. F. Stradley, a brother of plaintiff, intervened in this action, claiming that the money deposited with the defendant bank was in fact the property of B. F. Stradley. The money in dispute having been paid into court, the action was dismissed as to the defendant bank, and, judgment going for plaintiff, the intervener brings this appeal.

The facts are that B. F. Stradley, being indebted to his brother for something like $3,997, evidenced by his promissory note, deposited $4,000 in the savings department of the defendant bank in the name of his brother, L. J. Stradley. When making the deposit he signed the name of L. J. Stradley, and did not at any time disclose to the bank that he was not the party in whose name the deposit was made. He then sent the passbook to his brother, accompanied by a letter notifying him that the deposit was made to repay his indebtedness. Upon the receipt of the passbook and letter L. J. Stradley returned to B. F. the promissory note of the latter. Some time thereafter B. F. Stradley wrote to his brother for money, and the brother mailed to him the passbook covering the $4,000 so deposited. With this passbook B. F. Stradley withdrew from the account $400, signing his brother's name for that purpose.

Thereafter the intervener commenced an action against B. F. Stradley and attached the account.

The whole question involved is whether at the time of this levy the money belonged to L. J. Stradley, in whose name it was deposited, or to B. F. Stradley, who actually made the deposit in his brother's name.

Whatever title B. F. Stradley had he parted with when he delivered his passbook to his brother and received his canceled note paid through the medium of this transaction. As between the two brothers there can be no doubt that the money belonged to L. J. Stradley, and that B. F. could not set up any claim to it, especially after he had delivered the passbook and received the note in exchange. As far as L. J. Stradley is concerned, the attaching creditor is in no better position.

The trial court had ample evidence to sustain the finding that the money was not the property of B. F. Stradley, but that the deposit was made in the name of and for the use and benefit of the plaintiff. Judgment properly went for plaintiff, and it is accordingly affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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41 Cal. App. 42

WONG FOO v. SOUTHERN PAC. CO. (Civ. 2672.)

(District Court of Appeal, First District, Division 1, California. May 2, 1919. Rehearing Denied by Supreme Court June 30, 1919.)

1. SALES 🔑197 — TITLE — EXECUTORY CONTRACT—DELIVERY—QUALITY OF GOODS.

Agreement for sale of potatoes in ground, of certain quality and weight, to be shipped to certain place where sale was to be consummated, which permitted buyer to reject potatoes if they failed to measure up to required standards, was merely an executory contract of sale, the title remaining in seller.

2. SALES 🔑202(4)—TITLE—CONDITION PRECEDENT—PAYMENT.

Where contract provided for payment of balance of purchase price after receipt of goods in good merchantable condition, such payment was a precedent condition of sale, without which title did not pass, though buyer did not reject goods.

3. SALES 🔑202(1) — TERMINATION OF CONTRACT—RIGHT TO POSSESSION OF GOODS.

Where goods were shipped by seller under contract making payment of balance of price a precedent condition to sale, seller was entitled to the property upon buyer's refusal to make payment, upon arrival of goods; such refusal terminating the agreement.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Wong Foo against the Southern Pacific Company. From judgment for plaintiff, and from order denying new trial, defendant appeals. Reversed.

F. A. Cutler, of San Francisco, and John A. Wilson, of Stockton, for appellant.

Pringle & Robbins, of San Francisco, for respondent.

KERRIGAN, J. This is an action to recover damages for the alleged conversion of 810 sacks of potatoes by defendant company in its capacity as warehouseman.

Plaintiff claimed to be the owner and entitled to the possession of the property, which had been deposited for storage in the warehouse of the defendant company at Stockton. It is alleged in the complaint that while the potatoes were in the possession of defendant, plaintiff demanded the same, and offered to pay the charges thereon, but that defendant not only failed to deliver them, but converted and disposed of the same to its own use.

The answer of the defendant specifically denied the allegations of the complaint, and for a separate answer alleged that on the 24th day of November, 1915, one James Donlon entered into an agreement with a produce firm called the Rourke Company, whereby said Donlon agreed to sell said company 810 sacks of potatoes at $1.30 a sack, and that under the terms of said agreement said potatoes were to be delivered f. o. b. at the river bank and shipped to Stockton, their arrival in good condition at said place to be considered as the time and place of the consummation of said sale. The answer further alleged that on December 2, 1915, Donlon shipped the potatoes to Rourke Company, and that defendant received them and stored the same in its warehouse, but that Rourke Company had not, prior to January 12, 1916, or at any time thereafter, paid Donlon any part of the purchase price thereof, but that on said last-named date Rourke Company had declared its inability to pay its debts, whereupon said Donlon gave notice to defendant company not to deliver the potatoes to said company, and demanded possession of them, in pursuance to which demand defendant delivered the potatoes to Donlon.

From the evidence it appears that the sale of the potatoes was negotiated by an agent of Rourke Company with one Hop Sing, who had charge of Donlon's land, and who was farming the same under an agreement with Donlon. It also appears that Hop Sing had no title to the potatoes, but that he was vested with authority to make a sale thereof. The material part of the agreement entered into by these parties on behalf of their principals is as follows:

> "Hop Sing hereby sells to Rourke Company * * * 810 fancy spuds at $1.30 per sack * * * being that certain lot in ground at Donlon Island * * * to be delivered f. o. b. bank and shipped to Stockton on or before Monday, next week, 1915, unless otherwise directed by Rourke Co. Must be new sacks, full, open-mouthed, contents properly graded and sorted and * * * to average 116 lbs. to sack.
>
> "In consideration I hereby acknowledge receipt of * * * one dollar in part payment of above sale; balance to be paid after receipt of goods in good merchantable condition as above mentioned. It is understood that arrival of goods at Stockton in good condition, as provided above, shall be considered as the time and place for the consummation of this sale. * * * "Rourke Co., Buyer,
>
> "By Kei Woo.
>
> "Dated Nov. 24, 1915."

On November 29, 1915, five days after the execution of this agreement, Rourke Company sold the potatoes to plaintiff, Wong Foo, for the sum of $1,053.

To support his claim of title to the property plaintiff introduced in evidence the agreement of sale above recited, and also evidence of his purchase from Rourke Company. In defense of the action defendant claimed that under the agreement the Rourke Company never acquired title to the property, and therefore it could convey none.

Judgment went for plaintiff; a new trial was denied, and this is an appeal from such judgment and order.

[1] We are of the opinion that appellant is correct in its contention that Rourke Company never acquired title to the property in question. At the time of the execution of the contract the potatoes were in the ground, and it was provided by the terms of the agreement that they be of a certain quality and weight, and further that they be shipped to Stockton, where the sale was to be consummated. These provisions of the agreement were for the purpose of permitting the Rourke Company either to elect to purchase the potatoes if they came up to the required standards, or to reject the same if they failed to measure up thereto. The agreement, therefore, amounted to no more than an executory contract of sale, the title to the property remaining in the vendor. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

[2, 3] In addition thereto the contract further provided that the balance of the purchase price was to be paid after receipt of the potatoes in good merchantable condition. The payment was therefore a precedent condition of sale, which suspended the completion of the contract until this condition was performed, and prevented the right of property passing to the vendee. Hilmer v. Hills,

138 Cal. 134, 70 Pac. 1080. There was no compliance with this part of the agreement, Rourke Company being insolvent, and Donlon was entitled to his property as the refusal to pay terminated the agreement. Liver v. Mills, 155 Cal. 459, 463, 101 Pac. 299.

Here no question of estoppel is involved, and Rourke Company, never having acquired title to the property, could convey none to plaintiff.

The contention of respondent that the contract of sale was fully executed upon the arrival of the goods at Stockton, for the reason that Rourke Company elected not to exercise its right of rejection, is without merit. Payment was the principal condition upon which the title depended; and no attempt was made by Rourke Company or its vendee to comply with this provision. As owner of the property Donlon was therefore entitled to its possession.

For the reasons given the judgment and order are reversed.

We concur: WASTE, P. J; RICHARDS, J.

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40 Cal. App. 715

PEOPLE, on complaint of CITY OF PASADENA et al., v. CITY OF MONTEREY PARK et al. (Civ. 2800.)

(District Court of Appeal, Second District, Division 1, California. April 18, 1919.)

1. Municipal Corporations 🔑12(1) — Organization — Jurisdiction — Pendency of Annexation Proceeding.

While valid annexation proceedings were pending, the county supervisors would not have jurisdiction to entertain and act upon a petition calling for proceedings to organize a city, including a part of the territory sought to be annexed, in view of St. 1913, p. 593, § 7, as amended by St. 1915, p. 309, § 4, dealing with exclusiveness of annexation proceedings.

2. Municipal Corporations 🔑29(4) — Annexation of Uninhabited Territory.

Annexation proceedings, under St. 1913, p. 587, *held* invalid in that they were upon their face an attempt to treat as inhabited various uninhabited tracts of land and to annex them to the city under the form of proceedings prescribed by said statute, which applies solely to the annexation of inhabited territory.

3. Municipal Corporations 🔑33(10) — Annexation Proceedings — Collateral Attack.

In quo warranto proceedings challenging defendants' right to exercise the franchise of a city and its respective offices, on the ground that part of the territory included was annexed to complainant city, defense based upon invalidity of annexation proceedings was available; the petition in the annexation proceedings being insufficient on its face.

4. Municipal Corporations 🔑12(1) — Organization — Jurisdiction — Pendency of Annexation Proceeding.

There being no valid pending annexation proceeding affecting any of the territory included in the proceeding for the incorporation of a city, the board of supervisors was authorized to receive and act upon petition for incorporation.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action in the nature of quo warranto by the People, upon the complaint of the Cities of Pasadena, South Pasadena, and Alhambra, against the City of Monterey Park, claiming and pretending to be a city of the sixth class, John M. Dutcher, and others. From the judgment rendered, plaintiffs appeal. Affirmed.

U. S. Webb, Atty. Gen., John Munger, City Atty., of Pasadena, William Hazlett, City Atty., of South Pasadena, Alfred Barstow, City Atty., of Alhambra, and Barstow, Rohe & Jeffers, of Los Angeles, for appellants.

Thomas A. Berkebile, of Los Angeles, for respondents.

CONREY, P. J. This is an action in the nature of quo warranto in which the plaintiffs challenge the right of the defendants to exercise the franchise of a city and its respective offices. The plaintiffs claim that by virtue of certain proceedings begun on the 17th day of April, 1916, and completed on the 14th day of August, 1916, certain territory was annexed to and became a part of the city of Alhambra. Defendants claim that by proceedings begun on the 8th day of May, 1916, and completed on the 29th day of May, 1916, the city of Monterey Park became a municipal corporation of the sixth class. The alleged city includes territory which was a part of the territory included in the annexation proceedings. The annexation proceedings were conducted under the annexation act of 1913 (St. 1913, p. 587), and the incorporation proceedings were conducted under the municipal corporations act of 1883 (St. 1883, p. 93). Both of the proceedings in question were conducted according to the regular forms of procedure provided by the respective statutes.

[1] The first proposition urged by appellants is that, since the petition for annexation was received and acted upon by the commission of the city of Alhambra and an annexation election had been called prior to the commencement of the proceedings for the organization of the city of Monterey Park, the board of supervisors of Los Angeles county did not have jurisdiction to entertain and act upon a petition calling for proceedings to organize a city including a part of

the same territory while the annexation proceedings were pending. In considering this contention let it be assumed that valid annexation proceedings were pending at the time when the incorporation proceedings of defendant city were commenced. The question involved does not appear to have been passed upon by the courts of this state. The only decisions referred to in the briefs are those cited by appellants, and they all sustain the proposition stated. Especially in point are People v. Morrow, 181 Ill. 315, 54 N. E. 839; Taylor v. City of Ft. Wayne, 47 Ind. 274; Independent District of Shelton v. Board of Supervisors, 51 Iowa, 658, 2 N. W. 590. The Illinois decision contains a statement of the other two cases, and the court said:

> "As between courts of co-ordinate jurisdiction, the tribunal first acquiring jurisdiction retains it, and is not to be interfered with by another co-ordinate court. The reason of the rule is that otherwise confusion and conflict would arise. Here power is given over the same territory to two parties authorized to act—one a city council or board of trustees, who may attach it to a municipality to which it is adjacent; the other a majority of the legal voters within its boundary, who may organize it into a village."

Further along it is said:

> "It cannot, we think, be presumed that the Legislature intended to give citizens and legal voters of certain territory the power to organize a village, and at the same time authorize other parties, by a subsequent proceeding, to defeat that right; and it is clear that to hold otherwise would be to bring into conflict, resulting in confusion, the two opposing powers, or, speaking in a general sense, jurisdictions. Had the petition for annexation been first presented to the city council and its action postponed from time to time, until, by a subsequent proceeding, the organization of the territory into a village had been perfected, the same question would be presented, and we do not think in that case it could reasonably be held that the power of the city council to carry out the annexation proceeding would be defeated. The question as it arises under our statute and decisions is a new one, and not wholly free from difficulty, but we think the foregoing views are sustained by both reason and authority."

Respondents endeavor to break the force of these decisions in two ways: First, they say that the rule to the effect that, when courts have concurrent jurisdiction of the same subject-matter, the first that assumes jurisdiction excludes the other, does not apply unless the parties are the same or stand in privity to each other and the points in litigation or the redress sought in both courts are identical. They insist that in each of the three cases above mentioned the territory over which the two municipalities sought to acquire jurisdiction was identical, whereas in the case at bar it is not identical, and that this fact creates an exception which takes the case out of the general rule. Reference to the decisions above cited, however, shows that the territory involved in the respective opposing proceedings was not identical, except in the Illinois case. Nor do we think that the fact that one proceeding includes some territory not included in the other is alone sufficient to take the case out of the rule.

The other contention urged by respondents in opposition of the proposition stated is based upon the provisions of section 7 of the annexation act of 1913, as amended in 1915. Stats. 1915, p. 309, § 4. That section deals with the exclusiveness of annexation proceedings first instituted by one city as against annexation proceedings affecting the same territory and instituted by another city while the first proceedings remain pending. As to a controversy arising out of such conflicting annexation proceedings, the statute speaks unnecessarily, if the unwritten law relied upon by appellants, and to which we have already referred, would be applicable to such a case. We are satisfied that it would so apply, and that section 7 is merely declaratory of existing law. Respondents argue, however, that by reason of the enactment of section 7 the Legislature sought to fix and limit the jurisdiction of a municipality attempting to annex under that act, and that it should be presumed that the Legislature expressed all it intended to express and granted all jurisdiction that it intended to grant to municipalities annexing thereunder. They say that the legal maxim applies, "expressio unius est exclusio alterius." We think, however, that section 7 was intended to declare and place beyond doubt the disability of one city to annex territory during the pendency of proceedings by another city to annex the same territory, and was not enacted as a limitation of the jurisdiction of the municipality first acting in the matter. The creation of a new and separate municipal corporation through the action of the county authorities and including the territory proposed to be annexed is not a part of the subject-matter of said section 7. That section and the entire act in which it is included dealt solely with the subject of annexations, and not with the original creation of municipal corporations.

[2] We come now to the question whether, as contended by respondents, the annexation proceedings were in fact void. The territory included in the annexation proceedings was in those proceedings treated as one tract of inhabited territory adjoining the city of Alhambra. Its real character was that of a series of parcels of land. This is made manifest by analysis of the description, and is exhibited to the eye by inspection of Defendants' Exhibit A, which is shown in the transcript. The entire territory contains 661.82 acres, far the greater part of which is, and at all times herein mentioned was, a tract of land belonging to the relators, situated

nearly 2 miles south of the south boundary of the city of Alhambra, as that city was constituted on the 17th day of April, 1916. For convenience, this tract is in the record called "new sewer farm." The remainder of the annexation territory consists of: (1) Three narrow strips (nowhere more than 300 feet wide) which run around the north, the east, and the south sides of a tract of land designated in the record as "old sewer farm," which belongs to the city of Pasadena and is located immediately east of the city of Alhambra; (2) five strips of land connecting the three above-mentioned strips with the new sewer farm. These five strips consist of: (a) A parcel 30 feet wide, being the south half of that part of Hellman avenue; (b) a parcel 70 feet wide, being the entire width of Garfield avenue; (c) a parcel 60 feet wide, being the entire width of Newmark avenue; (d) a parcel 70 feet wide, being the entire width of Ramona avenue; (e) a parcel 50 feet wide and approximately one mile in length, extending southwesterly from Ramona avenue to the new sewer farm. The only inhabitants of the annexation territory were eight persons who lived in three houses, all of which were situated on one acre on the strip lying east of the old sewer farm, at a point 3.54 miles from the north limits of the new sewer farm. The highways included in the annexation territory extend through a thickly populated section of Monterey Park, and the lines of annexation were so drawn that they exclude 31 electors, 38 homes, and 93 inhabitants living along and adjacent to said highways. Also the lines were so drawn that the ranch house and inhabitants thereof on the new sewer farm were eliminated from the annexation territory, as was also a power station and cottage located on an adjacent corner to the new sewer farm. These lines of exclusion made indentations into the area which naturally was a part of the same territory with the new sewer farm. The result of these exclusions was that all of the tracts involved in the annexation territory were uninhabited, except the tract on which said eight persons lived. These eight persons were all employés working on the old sewer farm, and they were the sole signers of the petition by which the annexation proceedings were instituted.

On these facts it is too plain to admit any doubt that the annexation proceedings were on their face an attempt by the flimsiest subterfuge to treat as inhabited various uninhabited tracts of land, and to annex them to the city of Alhambra under the form of proceedings prescribed by a statute which applies solely to annexation of inhabited territory. It is likewise clear that such proceedings were a palpable fraud upon the inhabitants of the community through whose lands the cord of connection was run from the land adjoining Alhambra to the limits of the new sewer farm. The annexation petition showed on its face that several of the parcels included were public highways, and that therefore they could not be inhabited territory.

> "It is not disputed that there are in force in California three separate statutes under which annexations of territory to municipalities may be made: Act of 1889 (Stats. of 1889, p. 358), of 1899 (Stats. of 1899, p. 37), and of 1913 (Stats. of 1913, p. 587). The distinctive features of these acts, as far as germane to the present consideration, and pointed out by respondents, are as follows: (1) Act of 1889 for annexation of inhabited territory upon petition of electors of existing city; (2) act of 1899 for annexation of uninhabited territory; (3) act of 1913 for annexation of inhabited territory upon petition of electors in territory proposed to be annexed, which territory may be either (a) one body (sections 2 to 4), or (b) two or more bodies, which must be submitted as separate propositions (section 6)." People v. City of Lemoore, 174 Pac. 93.

People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205, was an action to determine the validity of municipal annexation proceedings. The original city area was in the form of a square. The proposed annexation was of a broad band of territory completely surrounding the city. It was claimed that some of the included parcels of land were uninhabited, and therefore could not be annexed except by proceedings under the act of 1899. In response to this claim the court (148 Cal. 641, 84 Pac. 209) said:

> "Upon this branch of the case a full consideration of the acts of the Legislature satisfies us that the act of 1899 was never designed to in any way affect any of the provisions of the act of 1889, so far as territory which, taken as a whole, may fairly be said to be inhabited territory is concerned, and the evidence in the case at bar was such as to sustain the conclusion of the court below to the effect that the territory here annexed was of that character, notwithstanding the presence of several uninhabited tracts or parcels, each exceeding five acres in area. If the 'territory' proposed to be annexed, regarded as a whole, may fairly be said to be inhabited, the proceedings must be had under the act of 1889, regardless of the number of parcels of land included therein that are uninhabited. Any other construction of the act of 1899 would materially affect the act of 1889, which, it is clearly indicated, was never intended. It is expressly provided in section 5 of the act of 1889 [1899] that 'nothing in this act shall be deemed to repeal the provisions of any act now providing for the annexation of inhabited territory.'"

There may be cases wherein it would be difficult to pass upon the question whether a described territory, "regarded as a whole, may fairly be said to be inhabited," and wherein, therefore, a court would not readily disregard the action of municipal authorities in such proceedings. But in the case at bar the fact that several distinct portions of the territory were uninhabited is not only admitted, but, as we have shown, necessarily appears from the description contained in the annexation petition, which description is repeated in the subsequent resolution, ordinance, notices of election, and certificate by means of which the annexation proceedings were conducted and completed.

[3] Appellants contend that the defense based upon the invalidity of the annexation proceedings cannot be maintained, because such defense comes by way of collateral attack in a quo warranto case. They say that quo warranto is not a proceeding wherein the court may inquire into the question whether the commission of the city of Alhambra did or did not wholly and fairly and completely do and determine everything necessary to be determined when they granted the petition for annexation and annexed the territory in question. They rely upon People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205, where it was held that in a quo warranto proceeding the determination of the city board of trustees affirming the genuineness and numerical sufficiency of the signatures to the petition would not be inquired into in such proceeding, and that the findings and determination of the board must be deemed conclusive "in a quo warranto proceeding, or in any case where the order is collaterally attacked." In further elucidation of the basis upon which its conclusions rested the court said:

> "Under the decisions the order of the board calling the election must here be taken as conclusive evidence that the petition presented, sufficient on its face, was in effect sufficiently signed by electors to confer the requisite power, and that the finding of the board to that effect, be it express or implied, was sustained by satisfactory proof."

Assuming, without deciding, that the question whether or not all of the territory included was inhabited, was regularly submitted to and decided by the commission of the city of Alhambra, such decision is not final in this case. This is so because, for the reasons which we have stated, the petition was "on its face" not sufficient. And it is worthy of notice that in People v. City of Lemoore, supra, which was an action "in the nature of quo warranto," the judgment pronouncing against the validity of annexation proceedings was founded upon a complaint which charged that certain parcels of land included in the attempted annexation were in fact not inhabited. These allegations were treated as material and as tendering issues upon which evidence could have been received, and the judgment (entered on default of answer after an order overruling defendants' demurrer to the complaint) was affirmed.

[4] Since, therefore, there was in fact no valid pending annexation proceeding in existence on the 8th day of May, 1916, affecting any of the territory included in the proceedings for incorporation of the city of Monterey Park, it follows that the board of supervisors was authorized to receive and act upon the petition for such incorporation, and that the incorporation proceedings, conceded to be regular in form, are valid.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 54

PEMBROOK v. HOUSTON. (Civ. 2897.)

(District Court of Appeal, Second District, Division 2, California. May 2, 1919.)

1. FRAUD 🔑34 — CONDITION PRECEDENT — PAYMENT OR OFFER TO PAY BALANCE OF PURCHASE PRICE.

In action for damages for fraudulent representations, consisting in defendant's pointing out to plaintiff and representing to plaintiff as the land to be sold a different tract, plaintiff having elected to affirm the contract, complaint *held* not demurrable, though it appeared therefrom that plaintiff was indebted to defendant for the balance of the purchase price and had not offered to pay or paid.

2. FRAUD 🔑43 — FACTS CONSTITUTING— PLEADING.

In action for damages for fraudulent representations, consisting in defendant's pointing out to plaintiff and representing to plaintiff as the land to be sold a different tract, plaintiff having elected to affirm the contract, complaint, while insufficiently stating facts relied on as constituting actionable fraud, *held* sufficient as against general demurrer.

Appeal from Superior Court, Los Angeles County; J. E. Barber, Judge.

Action by Sarah V. Pembrook against T. H. Houston. Judgment for defendant, and plaintiff appeals. Reversed.

Olin Wellborn, Jr., and Stephen Monteleone, both of Los Angeles, for appellant.

Davis, Kemp & Post, of Los Angeles, for respondent.

SLOANE, J. This is an action for damages for alleged fraudulent representations by defendant in negotiating a contract of sale of real estate. General demurrer to the complaint was sustained, and, plaintiff refusing to amend, judgment was given for the defendant. Plaintiff appeals on the judgment roll.

Under the contract as pleaded the defendant agreed to sell, and the plaintiff agreed to buy, a tract of land described as the north 32 acres of lots 1 and 2 of fractional section 12, township 1 south, range 11 west, S. B. M., for $4,800. $500 was paid upon execution of the contract November 29, 1911, and $250 was to be paid on the 1st of October, 1912, and a like sum yearly thereafter until fully paid, with interest at 7 per cent., payable semiannually. The complaint for damages rests upon an allegation—if it is sufficiently pleaded—that the defendant, in negotiating the sale, pointed out and represented as the land to be sold a different tract than that covered by the description. The plaintiff had paid in all $1,051 on the contract price before discovery of the alleged fraud. She elects to affirm the contract, and sues for damages in the sums of $1,200, for improvements placed on the wrong tract of land, and $3,800, the alleged difference between the value of the land actually covered by the contract and $4,800, the value of the land she claims was represented to her.

[1] The first objection to the sufficiency of the complaint is that it appears therefrom that, although the plaintiff had elected to affirm the contract and sue for damages, and is seeking to recover $5,000, she is indebted to the defendant, under the terms of the contract, in the sum of $3,800, the unpaid balance of the contract purchase price, with accrued interest thereon, which she has not paid or offered to pay, a portion of which was due before she discovered the facts on which she bases fraud, and that a still larger sum was due before the commencement of this action. We doubt if the failure to allege payment or tender of the amount for which she was in default at the time of discovering the alleged fraud is fatal to plaintiff's right of action. If the defendant is shown to have been actually guilty of fraud, he was not in a position to declare a forfeiture; and we are of the opinion that the fraud, if it existed, justified the plaintiff in withholding the payments to recoup the damages she would be entitled to recover. We so construe the rule laid down by the Supreme Court in the case of Hines v. Brode, 168 Cal. 507, 143 Pac. 729. That was a case closely analogous to this, excepting for the fact that the plaintiff, the vendee, was not in default at the time of commencing suit, but he only averred ability and willingness to pay amounts accrued on his contract to the time of discovery of the fraud. In that case the contract price was for $2,000, and interest on deferred payments, and only $311.25 had been paid at the time of commencing suit. No tender or declaration of willingness or ability to pay the balance of the purchase price was made, although the plaintiff had elected to affirm the contract and sue for the deceit. He recovered judgment for damages in the same of $4,000, but no offset was made to defendant for the unpaid purchase price under the contract, and a new trial was granted on that account. As the opinion of the court sets out, in the ordinary case, where the contract has been wholly executed, its affirmance would give to the defendant the benefit of his entire consideration, and require him to answer in damages only for the difference between the actual value of the land sold and the value it would have had if it had been as represented. The court there lays down the rule, as applicable to executory contracts, as follows:

> "Nevertheless we think the rule not difficult of determination. Where, under an executory contract, a plaintiff seeks recoupment in damages for deceit while affirming the contract (and it must necessarily be an affirmance if the action be not after rescission), it must be conclusively taken as to such plaintiff that he stands ready and willing to pay the full consideration called for by the contract, and that the damages which he is entitled to recover are no other and no greater than those which would be awarded to a plaintiff who had fully executed his contract. Therefore, in case of an executory contract, from the award which the jury may make because of the fraud must be deducted the unpaid part of the purchase price or the value of any other consideration."

As we have already pointed out, the only difference between the case cited and the one before us is that in the case here the plaintiff was already in default in a small amount at the time of discovering the facts relied upon to establish fraud. But, if the discovery of the fraud suspends liability to make payments accruing after the discovery of the fraud and pending the action, as we believe it does, we see no reason why defendant should not be estopped by his fraud from claiming at this time a forfeiture for previous suspended payments. It is the fraud itself, and not the discovery, which imposes the disability upon the defendant.

There are facts set out in plaintiff's complaint that suggest the probability that the whole story of this affair has not been told. It appears that shortly after plaintiff gave notice to defendant of her discovery of the alleged misrepresentations of the property sold, the defendant made a demand for redelivery of possession, and that plaintiff surrendered to defendant possession of the premises. No explanation of this transaction is given. It may have been intended as a forfeiture of the contract or as a rescission; but there is nothing in the complaint to attach to it a significance that would defeat plaintiff's right of action, and we cannot assume one to exist.

[2] But another objection, or series of objections, is raised by respondent in support of his judgment and against the sufficiency of this complaint. It is claimed that the complaint does not state facts sufficient to constitute actionable fraud. It clearly does not sufficiently state the facts relied upon, and if special demurrer had been made on that ground, it would have been properly sustained. A careful scrutiny of the complaint fails to disclose any direct allegation of facts which would constitute misrepresentation as to the

land to be conveyed under the contract. It is alleged that in the course of the negotiations "defendant showed and exhibited to plaintiff certain land and real estate other and different from the real estate included within the description contained in the agreement of sale," and that "the defendant well knew that the land shown and exhibited was not the land included in the description"; but no word or act is pleaded to show that the plaintiff at any time represented that this outside parcel of land so shown, and so known to him, was to be included in the contract of sale. For all that appears, other than by inference, he may have pointed out this outside parcel as belonging to a neighbor. It is true the pleading avers that at all times the plaintiff relied upon "the representations" made by the defendant as to the land shown and exhibited to plaintiff being the land included in the description, and that at all times the defendant knew that plaintiff was relying "upon the representations" made by defendant to plaintiff to the effect that the land shown and exhibited to plaintiff was the land included within the description; but what were the representations? What was said or done in pointing out this land to justify plaintiff in the conclusion that defendant was intending to designate this outside land as the land he was selling nowhere appears by direct averment in the complaint. Moreover, although the complaint states that plaintiff wholly relied on the representations of defendant that the land pointed out was the land included in the description, it is further alleged that the plaintiff, at various times prior to the 25th day of August, 1913, stated to defendant that she had been informed by a party by the name of Blaine that he was the owner of portions of the property shown by defendant as agreed to be sold under the contract, and that the same did not belong to respondent. How long prior to the 25th day of August did this occur? Quite probably plaintiff may refer to a time subsequent to this contract of sale, but, under the rule that the averments must be construed most strongly against the pleader, this averment may include the period covering the negotiations preceding the contract.

Appellant in his brief states that these objections were not presented on the argument of the demurrer in the trial court, and it is probable that, if they had been, plaintiff would not have refused to amend, for they point out very serious defects in the pleadings; but this could not be sufficient reason for ignoring an objection to the sufficiency of a cause of action because raised for the first time in the appellate court. However, the only question of the sufficiency of this complaint was raised by general demurrer, and, as it is obvious that there has been an attempt to plead the facts relied on as establishing fraud, and that the weakness of the complaint is in the insufficiency of their statement, rather than an entire failure of statement, we are disinclined to hold the complaint insufficient, in the absence of special demurrer. Lattin v. Hazard, 85 Cal. 58, 24 Pac. 611; Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; Mullally v. Townsend, 119 Cal. 47, 52, 50 Pac. 1066.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

40 Cal. App. 782

PEIXOUTO v. PEIXOUTO et al.

(Civ. 2759.)

(District Court of Appeal, First District, Division 2, California. April 25, 1919.)

1. SPECIFIC PERFORMANCE ⊂=22—ORAL CONTRACT TO CONVEY REALTY.

Where a father promised defendant son orally that if the latter would build upon, live upon, and improve certain land, the former would convey same to the latter, and, in pursuance of such agreement, the boundaries of the tract were marked off, and defendant in reliance on agreement performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, specific performance will be granted against plaintiff seeking to quiet title.

2. APPEAL AND ERROR ⊂=1011(1)—FINDING—REVIEW.

The evidence being conflicting, but sufficient to warrant finding the court on appeal cannot disturb finding.

3. LIMITATION OF ACTIONS ⊂=102(3)—ACCRUAL OF RIGHT—CESTUI QUE TRUST—POSSESSION.

Where father promised defendant son, that, if the latter would improve certain land, the father would convey it to him, and defendant went upon the tract and performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, plaintiff held the bare legal title in trust for defendant, and the statute of limitations would not run against defendant while he was in possession.

4. LIMITATION OF ACTIONS ⊂=103(3)—REPUDIATION WHICH WILL SET THE STATUTE IN OPERATION.

Where a father promised defendant son that, if the latter would improve certain land, the father would convey it to him, and defendant went upon the tract and performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, the giving of notice by plaintiff that he desired defendant to surrender possession was not such a repudiation as would start the statute running against defendant.

5. LIMITATION OF ACTIONS 🔑102(3)—REPUDIATION OF CONVEYANCE OF LEGAL TITLE.

The ownership of the equitable title cannot be lost by the bar of the statute while the owner is in actual possession and enjoyment of his estate.

6. SPECIFIC PERFORMANCE 🔑49(2)—CONSIDERATION—SUFFICIENCY.

Where a father promised defendant son orally that if the latter would build upon, live upon, and improve certain land, the former would convey the same to the latter, and in pursuance of such agreement the boundaries of the tract were measured and marked off, and defendant in reliance upon agreement went upon the tract and performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, *held*, there was sufficient consideration to warrant specific performance against plaintiff seeking to quiet title.

7. SPECIFIC PERFORMANCE 🔑114(2)—CONSIDERATION—SUFFICIENCY—PLEADING.

It is not necessary that allegation as to adequate consideration be in express terms, it being sufficient to set out the facts and value of the land from which it affirmatively appears that the consideration was adequate.

8. FRAUDS, STATUTE OF 🔑129(7)—ORAL CONTRACT TO CONVEY LAND—PART PERFORMANCE.

The making of improvements upon the land was sufficient to take oral contract to convey without the statute.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Manuel A. Peixouto against F. A. Peixouto and others. From that portion of the judgment in favor of defendants on their counterclaim, plaintiff appeals. Affirmed.

B. C. Mickle, of Centerville, and Dixon L. Phillips, of Oakland, for appellant.

Peter J. Crosby and Stanley R. Sterne, both of Oakland, for respondents.

LANGDON, P. J. This action was brought to quiet title to certain land in the county of Alameda. The defendant F. A. Peixouto filed an answer and cross-complaint in which he set up an oral contract between the plaintiff's grantor and himself by which the plaintiff's grantor agreed to convey to defendant a small portion of the land to which plaintiff sought to quiet his title. The facts set up in the answer and cross-complaint are substantially as follows: That the plaintiff and defendant F. A. Peixouto are brothers; that Frank A. Peixouto, Sr., is the father of the plaintiff and said defendant; that in 1912 the said Frank A. Peixouto, Sr., was the owner and in possession of all the land described in plaintiff's complaint; that for a long time prior thereto the defendant had worked for his said father in and about said tract of land, and in April, 1912, the father promised the defendant, orally, that if the defendant would build upon, live upon, and improve a certain portion of said land, the father would give and convey to the said defendant such portion; that in pursuance of said agreement the said Frank A. Peixouto, Sr., measured and marked off the boundaries of said portion; that thereafter the defendant, in reliance upon said promise and agreement, entered into possession of the said portion of land and erected thereon a dwelling house of the value of $700 and expended the further sum of $300 in improving and fencing the land; that ever since April, 1912, the defendant has continued in open, notorious, and exclusive possession of said portion of the tract of land described in plaintiff's complaint; that the said Frank A. Peixouto, Sr., neglected and refused to grant and convey said portion of said land to defendant, and later conveyed the entire tract to the plaintiff; that the conveyance was made to the plaintiff without any valuable consideration, and while the defendant was in open and visible possession of a part of the same, and at a time when all the facts relating to the agreement between the defendant and his father were well known to the plaintiff herein. Defendant asked that the plaintiff be ordered and directed to execute and deliver to the defendant a deed and conveyance of that portion of the land described in the complaint which was included in the oral contract between the defendant and his father. The plaintiff denied substantially all the allegations of the cross-complaint. Judgment was given quieting title in the plaintiff to the land described in the complaint, excepting that portion thereof set out in the cross-complaint of defendant; and, as to that portion, judgment was given for the defendant, decreeing that the plaintiff holds the legal title thereto in trust for said defendant and cross-complainant, and that the said plaintiff execute to the defendant a good and sufficient deed therefor, and upon his failure so to do, within 30 days, a commissioner named execute and deliver such deed, which shall operate as a transfer from the plaintiff to the defendant of the property described therein; and that the plaintiff be enjoined from asserting any right in the said portion of the property held in trust for the defendant. From the latter portion of the judgment, the plaintiff appeals.

Appellant first contends that the pleading and proof does not show a contract sufficiently certain and unambiguous in its terms to warrant specific performance, and particularly for the reason that, as he asserts, there is no evidence that respondent has performed, or fully performed, because the alleged oral agreement was so indefinite and uncertain as to time and terms of performance by defendant that it would be impossible to say what year, month, or day performance was to be completed. The point made by appellant is that it is impossible to determine when the defendant was to build or complete his house. This matter can be of no importance here, because the house has been built and completed, and that side of the contract has been fulfilled. In so far as the part of the contract to be performed by the defendant is concerned, he alleged and proved that he fully performed all things to be by him performed. The contract alleged and proven does not disclose that there was a time limit placed upon his building of the house, and therefore time not being made of the essence of the contract, so far as the evidence discloses, it becomes immaterial just when he did complete the work. He has completed it in accordance with the contract found to exist by the court, and the date of the completed performance can be of no moment except in regard to the point raised by the appellant that the statute of limitations is applicable to defendant's claim, which contention will be considered hereafter.

[1, 2] The cross-complaint sets forth an oral gift of land, followed by possession on the part of the donee and the erection of valuable improvements. The property covered by the alleged oral contract is fully identified, and was located and staked out and agreed upon by the parties. The complaint states, the evidence clearly establishes, and the court found, that the defendant, in reliance upon such agreement, went upon the property, erected a home thereon, and improved and cultivated the land, and has been in possession of the same ever since. This is sufficient to justify a decree of specific performance on the part of the vendor or the party standing in the place of the vendor with notice of the rights of the cross-complainant. Magee v. Magee, 174 Cal. 276, 162 Pac. 1023. Contracts to convey land, under such circumstances, have always been enforced in this state. Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Manly v. Howlett, 55 Cal. 94; Bakersfield T. H. Ass'n v. Chester, 55 Cal. 98; Anson v. Townsend, 73 Cal. 415, 15 Pac. 49; Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220. The evidence as to the existence of the contract to convey is conflicting, but the finding is that such an agreement was made, and that finding cannot be disturbed by this court, as the evidence of the defendant and of his witnesses is sufficient to warrant it. We think that the contract alleged and proven is not lacking in certainty nor too indefinite for a court of equity to enforce.

[3] The main question in the case is as to the application of the statute of limitations. It is admitted that defendant completed the house and other improvements some time in 1912, and appellant contends that defendant's claim, accruing when he had performed the things to be by him performed, is now barred by the statute of limitations; the cross-complaint not having been filed until October, 1916. We think there is no merit in this contention. When there exists a contract to convey land and the vendee has fully performed and nothing remains to be done on his part, the vendor then holds the legal title in trust for the benefit of the vendee. Defendant having shown by his proof, and the court having found, that the plaintiff in this case took the land with knowledge of the defendant's rights, the plaintiff would be in the same position as his grantor and would be holding the bare legal title in trust for the defendant. Under such circumstances, while the cestui que trust was in possession, the statute of limitations would not run as against him. Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172; Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624; Beebe v. Dowd, 22 Barb. (N. Y.) 255; Lakin v. Sierra B. G. M. Co. (C. C.) 25 Fed. 337; Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276; Scadden v. Scadden, 121 Cal. 33, 53 Pac. 440; Smith v. Matthews, 81 Cal. 120, 22 Pac. 409.

[4] We are not unmindful of the argument made by appellant that the notice given by Frank A. Peixouto, Sr., to the defendant that the agreement was terminated and that he desired the defendant to surrender to him the possession of the property, served upon December 1, 1913 (which was after the defendant had fully performed, and while defendant was in the undisputed possession of the property), was such a repudiation as would set the statute in operation, even as against a cestui que trust. With this contention we cannot agree. It was said in the case of Bennett v. Morrison, 120 Pa. 390, 14 Atl. 264, 6 Am. St. Rep. 711, and the language is quoted with approval in the case of Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082, that, if the trustee wishes to start in operation the statute of limitations, he must in some way repudiate the agreement and must take possession, either in person or by agent, in order to break the relation his vendee sustained to him under the agreement before the statute will commence to run. So in the present case, we apprehend that even though the vendor had taken possession of the property, in addition to that possession, he would have had to bring home to the vendee, as in the case of tenants in common, knowledge that he thereafter denied his right to possession in order to rely upon the bar of the statute; and, clearly, notice of the denial of the ven-

dee's title, while the vendee was in undisputed possession, would have no effect whatever.

In the case of Rush v. Barr, 1 Watts (Pa.) 110, the language of which is quoted with approval in Luco v. De Toro, supra, the court said:

> "Whenever the legal title is in one, and the real interest in another, these form but one title, and the statute does not run between them until the trustee disclaims and acts adversely to the cestui que trust. * * * And so in all cases where two persons have each an interest in a tract of land, of such kind that both their interests form but one title, and by their agreement one is to possess for his own use and the use of the other. In such cases the statute does not run until he in possession disclaims the right and interest of the other—denies his right and refuses possession, and such disclaimer and denial must be such that the other has notice of it."

It is true that in some portions of the opinion in the case of Love v. Watkins, supra, cited by appellant, there is language that would indicate, if taken without any connection with the facts under discussion, that notice of adverse claim is sufficient to start the statute in operation; but we believe it will be found, upon an examination of that case and of other cases cited, that, where such language is used, it is used in relation to the particular facts of the case—and that those facts were that the one giving the notice was also in possession, or, at least, that the vendee himself was not in possession when the notice was given. If the vendor has possession, then, assuredly, it is only necessary for him to give notice of holding such possession adversely. Our conclusion seems evident from the quotations from cases contained in appellant's own brief. He quotes from the case of Love v. Watkins, supra, in which the court refers to the case of Harris v. King, 16 Ark. 122, and states that in that case "it was held that a vendor who had received the purchase money became the trustee of the vendee, and although actually in possession of the land held the naked legal title in trust for him, and the statute of limitations was no bar to an action for specific performance of the contract if the vendor had done no act inconsistent with the vendee's title, other than simply holding possession."

As was said in the case of McCauley v. Harvey, 49 Cal. 497:

> "A person all the while in possession according to his right, cannot, while holding the possession, be divested of that right in favor of another. If authority be needed in support of a proposition so self-evident, it may be found in Love v. Watkins, 40 Cal. 547."

The case of Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276, is to the same effect. There has been no dispute in the cases following Love v. Watkins, as to the holding of that case. That case has been quoted as authority for the proposition that the statute will not begin to run so long as the purchaser is in possession, in the following cases: Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172; Fleishman v. Woods, supra; Scadden, etc., Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Fogarty v. Fogarty, 129 Cal. 46, 49, 61 Pac. 570; Smith v. Matthews, 81 Cal. 120, 22 Pac. 409; Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082; McCauley v. Harvey, 49 Cal. 497. "Possession draws to it, or rather extinguishes all adverse claims and titles." Love v. Watkins, supra.

[5] Both upon principle and the weight of authority, it is necessary for us to hold in this case that no statute of limitations is applicable to the right which defendant is asserting in his cross-complaint. So far as equity is concerned, defendant was the absolute owner of an indefeasable estate and the vendor was a naked trustee having no interest, but charged with the simple duty of conveying to the vendee upon demand. Equity regards the vendee as the owner, upon the principle that it considers that as done which ought to be done. Defendant, therefore, could not be divested of his indefeasible estate while he was in possession, by any one out of possession. The owner of the equitable title is supposed, for the purposes of a court of equity, to have acquired and to hold the title, and the court will compel the conveyance of the legal title only because the equitable title is not recognized in a court of law; but, where it is recognized, it constitutes ownership, and it cannot be lost by the bar of the statute while the owner is in actual possession and enjoyment of his estate. Love v. Watkins, supra. Since the defendant could not be divested of his title by the operation of the statute, it follows that, having the equitable title, he is entitled to enforce a conveyance of the naked legal title as an incident to such equitable ownership. As long as the equitable title exists, it must exist with all its incidents.

[6, 7] Appellant contends that there is no allegation in the cross-complaint that the plaintiff has received an adequate consideration for the contract. It is not necessary that such allegation should be in express terms. It is sufficient if the cross-complaint set out the facts and the value of the land and it affirmatively appear therefrom that the consideration was adequate. Magee v. Magee, 174 Cal. 276, 162 Pac. 1023. In the numerous cases cited herein covering contracts similar to the one found by the trial court to exist in this case, it has been held that under facts very similar there existed a sufficient consideration to warrant specific performance. The case of Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829, presents a very similar state of facts.

[8] The objection that the contract should have been in writing is without merit. The contract had been partly performed, and the making of the improvements upon the property is sufficient to take it without the statute of frauds.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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41 Cal. App. 1

WARDEN v. BITTLESTON LAW & COLLECTION AGENCY et al. (Civ. 2885.)

(District Court of Appeal, Second District, Division 2, California. April 28, 1919. Rehearing Denied by Supreme Court June 26, 1919.)

1. Municipal Corporations 🔑581 — Sale for Delinquent Assessments—Notice to Redeem—Sufficiency.

Where land owned in common was sold for delinquent assessment levied under Street Improvement Act 1909, notice by purchaser to one co-owner that on the 7th day of August, 1915, or thereafter, unless sooner redeemed, application would be made for a deed, and notice to the other co-owners to the same effect, but stating date as August 31st, were insufficient under section 17 of the act to cut off the right of the co-owners to redeem, and plaintiff has only "the lien of the assessment" as provided by section 15.

2. Municipal Corporations 🔑581—Street Improvements—Assessment—Right of Redemption—Termination.

The right of redemption from a sale under Street Improvement Act 1909 continues in the owner indefinitely until notice of redemption is given and a deed executed in accordance with the provisions of the statute.

3. Municipal Corporations 🔑581—Sale for Delinquent Assessment—Notice of Redemption—Statute.

Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the notice of redemption which is to divest the owner of his title, that notice must be given.

4. Municipal Corporations 🔑456(1), 575 —Street Improvements—Separate Assessment of Interest of Co-owner.

Under Street Improvement Act 1909, the undivided interest of each co-owner is neither assessed nor sold for delinquent taxes separately.

5. Municipal Corporations 🔑581—Street Improvements—Delinquent Assessment—Redemption.

While, under Street Improvement Act 1909, §§ 14, 16, a co-owner as a "party in interest" may redeem, still he must pay the same amount that would be paid by a sole owner, were the land owned in severalty.

6. Municipal Corporations 🔑581 — Assessment for Improvements — Sale — Redemption by Cotenant.

A redemption by a tenant in common is a redemption of the entire estate, and not merely of his undivided interest, though he doubtless would have a claim against his cotenants for reimbursement to the extent of their proportionate shares.

7. Municipal Corporations 🔑581 — Assessments for Improvements — Cutting off Right of Redemption of Co-owners.

Purchaser cannot proceed piecemeal to cut off right of redemption of each co-owner.

8. Municipal Corporations 🔑581 — Delinquent Assessment—Redemption.

Street Improvement Act 1909 contemplates but one sale for delinquent assessment and but one redemption, so that if the whole estate be owned in common by two or more as cotenants, and if any one of them retains the right to redeem, his right of redemption not having been cut off by sufficient notice, all may redeem.

9. Municipal Corporations 🔑581—Delinquent Assessments—Redemption—Notice.

Under Street Improvement Act 1909, a notice of redemption must set forth the time when the purchaser will apply to the tax collector for a deed, and the time fixed must be definite and certain.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Julia P. Warden against the Bittleston Law & Collection Agency and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff sued to quiet title to a parcel of land in the city of Los Angeles, claimed by her by reason of an assessment sale under the Street Improvement Act of 1909. Stats. 1909, p. 1042. Defendants recovered judgment; plaintiff appeals. The appeal presents for our consideration the sufficiency of certain notices of redemption.

[1] Defendants Robert H. Punter and Rebecca Punter were owners of the land as tenants in common. On March 19, 1914, they mortgaged the property to defendant Krug. Pursuant to a decree foreclosing the mortgage, Krug purchased the property at sheriff's sale on July 20, 1915, and on July 27, 1915, recorded the sheriff's certificate of sale. On August 5, 1914, which was subsequent to the mortgage to Krug, but prior to the foreclosure sale thereunder, the city tax and license collector, pursuant to the provisions of the Street Improvement Act, sold

the property to plaintiff for a delinquent assessment levied to pay for certain street improvements. Thereupon the tax and license collector delivered to plaintiff a certificate of sale, as provided by the act. On July 7, 1915, which was shortly prior to the expiration of the time allowed by law to the co-owners for redemption from the foreclosure sale to Krug, plaintiff caused to be served upon defendant Rebecca Punter, one of the two co-owners, a notice that—

> "On the 7th day of August, 1915, *or thereafter*, unless sooner redeemed, application will be made * * * to the city tax and license collector * * * for a deed."

This notice was not served on the other co-owner, Robert H. Punter, but thereafter, on July 29, 1915, plaintiff did cause a notice of redemption to be served upon Robert. The notice so served on Robert Punter set forth that—

> "On the 31st day of August, 1915, *or thereafter*, unless sooner redeemed, application will be made * * * to the city tax and license collector * * * for a deed."

Though served upon Robert, this notice was not served upon Rebecca Punter. No notice to redeem from the street assessment sale to plaintiff was served on Krug, the mortgagee and purchaser at the foreclosure sale. On September 1, 1915, the city tax and license collector executed a deed to plaintiff. Claiming to be the owner under this deed, plaintiff brought this action to quiet her title. We think the notices of redemption that plaintiff caused to be served upon Robert and Rebecca were insufficient, and that plaintiff has only that which she acquired under the assessment sale to her on August 5, 1915, i. e., "the lien of the assessment," as provided by section 15 of the act. Stats. 1909, p. 1051.

[2] The right of redemption from a tax sale or from a sale under a Street Improvement Act, such as is here under consideration, continues in the owner indefinitely until notice of redemption is given and a deed executed in accordance with the provisions of the statute. By section 17 of the Street Improvement Act (Stats. 1909, p. 1051), it is provided that—

> "At any time after the expiration of twelve months from the date of sale, the tax collector must execute to the purchaser, * * * if such purchaser * * * has complied with the provisions of this section, a deed of the property sold. * * * The purchaser * * * must at lease thirty days before he applies for a deed, serve upon the owner of the property, and upon the occupant of such property, if the same is occupied, a written notice, setting forth * * * the time when such purchaser * * * will apply to the tax collector for a deed."

The service of notice upon the owner, as provided by the act, means personal service.

> "When a statute requires service on a person it means personal service, unless some other service is specified or indicated." McDermont v. Board of Police, 25 Barb. (N. Y.) 647.

[3] Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the notice which is to divest the owner of his title, that notice must be given. None other will suffice. A court will not be justified in saying that some other kind of notice would be equally effective. The express requirements of the statute cannot be avoided on the ground that they serve no useful purpose. It is never a question whether, by reason of some omission, the owner has been injured or misled; but whether there has been a compliance with everything the law makes a condition precedent to the right to a deed.

[4-6] Under the statute the undivided interest of each co-owner is neither assessed nor sold separately. Each parcel of land is assessed and sold in solido. Each parcel must be sold to the person who will take the least quantity of land and pay the amount of the assessment penalty, and costs due, including fifty cents for the certificate of sale. Stats. 1909, p. 1050, § 14. At any time before the expiration of one year from the date of the sale the parcel sold may be redeemed by "any party in interest." Section 16. The party so redeeming must pay to the tax collector the full amount for which the property was sold, and in addition thereto a penalty of 10 per cent. if redeemed within 6 months, or 25 per cent. if redeemed within 12 months. Section 16. It will thus be seen that though a co-owner, as a "party in interest," may redeem, still he must pay the same amount that would be paid by a sole owner were the land owned in severalty. A redemption by a tenant in common is a redemption of the entire estate, and not merely of his undivided interest, though he doubtless would have a claim against his cotenants for reimbursement to the extent of their proportionate shares.

[7, 8] If a co-owner cannot proceed by "piecemeal" to effect redemption—and he cannot—the converse is equally true, and a purchaser at the tax sale cannot proceed by "piecemeal" to cut off the right of redemption of each part owner. The statute contemplates but one sale of the parcel sold, and but one redemption—a sale of the whole estate in its entirety and a redemption, if any be made, of the estate in its entirety. So that, if the whole estate be owned in common by two or more as cotenants, and if any one of them retains the right to redeem—his right of redemption not having been cut off by a sufficient notice—all may redeem. That is, until the purchaser has complied with the statute as to all the co-owners, the right of redemption remains to all—to those actually served with

notice as well as to those not served. White v. Shaw, 150 Mich. 270, 114 N. W. 210.

[9] A notice of redemption must "set forth"—that is, fix—"the time when the purchaser will apply to the tax collector for a deed." The time fixed must be definite and certain. A notice that at an indefinite time the purchaser will apply for a deed fixes no time when the right to redeem will expire. Railroad Company v. Mecartney, 104 Cal. 621, 38 Pac. 448.

Tested by these principles, it must be held that the right of redemption of the co-owners, Robert H. Punter and Rebecca Punter, has not been cut off. If the first notice—the notice served on Rebecca Punter—be regarded as superseded by the second—that served on Robert—then the case stands as though Rebecca Punter had never been served with any notice. And if all co-owners are not served with notice, the time for redemption remains for all. If the first notice be regarded as not superseded by the second, then the two notices must be read together, just as though they were contained in one document. So considered, the notices are in irreconcilable conflict—one giving notice that redemption might be made at any time on or after August 7th, and the other that redemption might be made at any time on or after August 31st. Such a notice does not set forth or fix "the time" when the purchaser will apply for a deed. A notice so indefinite is no notice at all. This conclusion makes it unnecessary to consider whether notice should have been served upon Krug, the purchaser at the foreclosure sale.

If the foregoing is the only fatal objection to plaintiff's title—and our attention has not been called to any other—then, though appellant has not become the owner of the property, she is, nevertheless, still left with the lien of the assessment. Upon filing the copy of the certificate of sale in the tax collector's office, "the lien of the assessment shall vest in the purchaser, and is only divested by a redemption of the property as in this act provided." Section 15. Had the judgment of the trial court simply adjudged that plaintiff is not the owner, an affirmance of the judgment, under the views above set forth, would be in order. But defendants, in their answer, pray for affirmative relief. In compliance with their prayer for such relief, the judgment adjudges defendant Krug to be the owner by virtue of the sheriff's certificate of sale issued to him upon the foreclosure sale, and defendants Robert and Rebecca Punter to be entitled to redeem from such sale to Krug. In granting affirmative relief to defendants, the trial court should have adjudged that any title that is in Krug, as purchaser at the sheriff's sale, or in Robert and Rebecca Punter, as the original co-owners, is subject and subordinate to plaintiff's lien of assessment, vested in her by reason of the tax collector's sale of the property to her to pay the delinquent street assessment. The findings do not find any fact upon which such a judgment may rest. On the contrary, the court found that "it is not true that plaintiff acquired an interest in said property by reason of a sale by the city tax and license collector." For these reasons the case must be sent back for a new trial.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

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41 Cal. App. 59

HIBERNIAN PETROLEUM CO. v. DAVIES.

(Civ. 2883.)

(District Court of Appeal, Second District, Division 2, California. May 2, 1919.)

1. FRAUDS, STATUTE OF ⚿103(1)—"MEMORANDUM"—SUFFICIENCY.

Acceptance by defendant of checks with memoranda indorsed thereon to the effect that checks were from plaintiff company on account of first installment of bonus on lease that S. had contracted for and indorsements of defendant "in full settlement of within account," the checks being approved by S. as president and countersigned by secretary, did not constitute a memorandum within the statute of frauds sufficient to evidence a contract to execute a lease to plaintiff company.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

2. LANDLORD AND TENANT ⚿22(4)—AGREEMENT TO EXECUTE LEASE—EVIDENCE.

In action to recover $5,000 paid as a bonus for a lease and costs of improvements made on the premises, *held*, court was justified in finding that defendant at no time contracted to execute a lease to plaintiff company, and was at no time obligated to do so.

3. APPEAL AND ERROR ⚿1071(5) — ERRONEOUS FINDING—HARMLESS ERROR.

A finding that defendant was unaware that the sum of $5,000 received by him from S. was the money of the plaintiff, though erroneous, is without prejudice, since the fact that a third person was paying the obligation did not alter the contractual relations so far as defendant is concerned.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Hibernian Petroleum Company against J. F. Davies. Judgment for defendant, and plaintiff appeals. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant.

Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, for respondent.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SLOANE, J. The complaint in this action alleges that the plaintiff is a corporation, and that in May, 1911, the defendant entered into a contract in writing with the plaintiff whereby he agreed, that upon the payment to him of a bonus of $10,000, he would execute and deliver to plaintiff a lease of certain land for oil and mineral purposes; that during the said month of May the plaintiff paid defendant $5,000 of this bonus, and that on the 30th day of September, 1911, it tendered to the defendant the remaining $5,000 of the stipulated bonus, and demanded the execution and delivery of the lease; that defendant refused, and has ever since refused, to make such lease; and that plaintiff, relying on the agreement with defendant, entered into possession of the lands in question and expended $20,000 thereon in improvements.

The action is brought to recover the $5,000 paid on the bonus and the cost of the improvements made.

The case was tried on the issues made by the complaint and the denials of the answer, and the court found that it was not true that defendant entered into a contract with the plaintiff in writing, or at all, but that it was true that the defendant was paid by one H. E. Sinclair the sum of $5,000 on account of a bonus for a lease of the premises in question, which sum of $5,000 was the money of plaintiff, but that defendant was not aware that it was plaintiff's money. There are other collateral matters covered by the pleadings and findings, but the facts as stated cover the gist of the action.

Judgment was given for the defendant, and the appeal is taken by plaintiff on the judgment roll, supported by a bill of exceptions, on the insufficiency of the evidence to support the findings of the court.

The only evidence introduced tending to show any privity of contract between the plaintiff and defendant was the checks by which the $5,000 bonus payment was made, and certain memoranda thereon written. There were two checks, one of date of May 15, 1911, for $1,000 and one of May 31, 1911, for $4,000. The first check or order was as follows:

> "Bakersfield, Cal., May 15th, 1911. Hibernian Petroleum Company: Pay to the order of J. F. Davies, one thousand dollars ($1,000.00). Approved: Harry E. Sinclair, President, Countersigned: Cecil H. Soltau, Sec'y. To Bank of Bakersfield, Bakersfield, Calif."

This check contained the following memorandum, indorsed upon it at the time it was drawn, or at least before delivery to payee:

> "Hibernian Petroleum Company $1,000, to J. F. Davies, Dr. Bakersfield, Cal., May 15th —first installment of bonus on lease in Sunset Field, northwest quarter and west half of northeast quarter of the northeast quarter of Sec. 4, township 11 north, range 23 W., S. B. & M., sixty acres more or less."

Also indorsement:

> "In full settlement of within account. [Signed] J. F. Davies"

—and further indorsements not relevant to this case. The second check, for $4,000 and indorsements thereon, was in the same form, excepting for the date and amount.

The evidence discloses that the only negotiations which were had with the defendant up to a period some time after the making and delivery of these checks, with regard to this mining property lease, were by one H. E. Sinclair. So far as disclosed, he appeared to the defendant to be acting for himself, though the defendant admitted on the trial that he understood that Sinclair was getting the lease to sell or negotiate. But up to the time of these payments, nothing is shown to have occurred to give the defendant notice that any one but Sinclair was immediately concerned in the transaction. The record discloses that the defendant was not himself the owner of this property, but was acting under an agreement whereby he was obtaining a lease from the owner to a larger tract, including the land in question, subject to a $10,000 bonus on his part; and he proposed to turn over to Sinclair 60 acres of this land, as described in the pleadings, in consideration of Sinclair paying to him the bonus, which he, in turn, was to pay to the owner, and to execute to Sinclair a lease to the 60 acres. Sinclair, in his own name, accepted this proposition, and thereafter made the payments heretofore referred to by orders or checks on the plaintiff company, and a lease was executed to him on the first payment of $1,000, with the knowledge on his part that the lease would not be effective until he had paid all of the stipulated bonus and a like amount had in turn been paid to the owner of the land. Sinclair was, at the time, a stockholder and the president of the plaintiff company, and, as we glean from the rather obscure evidence in the record, had been let in as a stockholder and made president of the company because of his undertaking to secure for the company valuable leases. It is probably true that he was acting as trustee for the corporation in negotiating and obtaining this lease; but the court finds that defendant had no notice or knowledge of this fact at the time the $1,000 and $4,000 bonus payments were made. This finding is supported by the evidence, excepting as to such notice as was given by the checks themselves and the indorsements thereon.

The lease to Sinclair bears date May 12, 1911, and is acknowledged as of date May 16, 1911. The defendant testified that the lease was delivered to Sinclair on May 18, 1911. This was after defendant had received the first bonus check of $1,000 from Sinclair. He will be presumed, therefore, to have had at that time such notice of the connection of the plaintiff corporation with the transaction as this check and its contents imported.

[1] The principal question on this appeal arises on this point: Did the acceptance of these checks, with the recitals therein that they were from the Hibernian Petroleum Company, and on account of bonus on the lease that Sinclair had contracted for, and the fact that they were approved by Sinclair as president and countersigned by the secretary of the company, create any liability on the part of the defendant, Davies, to the plaintiff company?

Plaintiff's counsel contend that these checks, either or both of them, with defendant's indorsement and signature thereon, constitute a memorandum in writing, signed by the party to be charged, sufficient to evidence a contract to execute a lease to the plaintiff company of the lands in question, and within the statute of frauds. No justification in law is shown in support of such a conclusion. The memoranda indorsed on the checks does not indicate to whom the lease was to be executed, and it was not signed by the defendant, the party to be charged. His signature on the back of the check was an acknowledgment of receipt of the payments "in settlement of the account," referring, we must assume, to the installments on the bonus agreement he had entered into with H. E. Sinclair personally. The evidence justifies the conclusion that he accepted these checks as payment of the obligation of Sinclair, and in pursuance of his agreement to execute a lease to Sinclair; but there is nothing in the transaction to indicate that Sinclair, or the defendant, or the plaintiff company itself, understood as intended by this memorandum anything more than a direction of the payment of this money on account of the agreement previously made between Sinclair and the defendant. It is true, as appellant sets forth in its brief, that defendant was notified by the contents of these checks that Sinclair and the secretary of the corporation had drawn them on the Hibernian Petroleum Company, and that they had no implied authority to use the corporation's funds for Sinclair's personal contracts; but he might properly assume, what doubtless is a fact, that the corporation was acquiring an interest in this lease through and in the name of Sinclair, as it legitimately could have done.

[2] In pursuance of the agreement with Sinclair, and on the payment of the first $1,000 of the stipulated bonus, the defendant executed the lease in question to Sinclair. He was under no obligation to make the lease until the entire bonus of $10,000 was paid; but, as he testifies, he made it at this time with notice to Sinclair that it would not be effective until the remaining payments were made, and defendant's obligations to the owner of the property, from whom he in turn was leasing, had thereby been met. Soon after the payment of $4,000 by the second check had been made, Sinclair seems to have severed his connection with the plaintiff corporation, which had, in the meantime, entered into the possession of the leased property, and apparently by virtue of this lease. In any event, the officers of the corporation came into the possession of this lease long before the alleged tender and demand on defendant. There is nothing to indicate that the improvements and development work made by plaintiff on this property were not under and in reliance on this lease. It is not until later, when the corporation had evidently become financially involved and had defaulted in the conditions contained in the lease agreement, and a surrender of the premises had been demanded by defendant, that steps were taken to assert an independent contractual relation with the defendant, and to demand the execution of a new lease directly to the plaintiff corporation. A written offer was made to pay to defendant the remaining $5,000 of the bonus, on condition of the execution of a lease directly to the corporation. This defendant refused to do, on the ground that he had already made the lease to Sinclair in pursuance of his contract. Previous to this time the lease had become effective by the performance by defendant of the conditions of his contract with the owner of the premises; the plaintiff company was in possession under it, and was doubtless entitled to all its benefits, both as against Sinclair and the defendant. There is no reason to doubt, under the facts disclosed by the record, that the plaintiff company authorized the payments made to the defendant out of the company's funds; that in taking the lease in his own name, whether with or without the company's consent, Sinclair was acting as plaintiff's agent, and held the lease in trust for its benefit; and no reason is shown, unless it was financial inability, why the plaintiff did not or could not have secured to itself all the benefits of this lease that it would have been entitled to had it been named therein as lessee, providing it had complied with the terms of the contract with defendant. The court was justified in its findings that the defendant at no time had contracted to execute a lease to plaintiff, and was at no time obligated so to do.

[3] The third finding of the trial court, to the effect that the defendant was unaware that the sum of $5,000 received by him from Sinclair was the money of plaintiff, is probably not justified by the evidence, in view of the fact that it was paid by checks drawn on the plaintiff company by its president and secretary. But a finding in favor of plaintiff as to such knowledge would not alter the liability of the defendant. His contract was with Sinclair, and the fact that a third party was paying the obligation did not alter these

contractual relations, so far as defendant was concerned. The finding, if erroneous, was without prejudice.

The same may be said as to other specifications as to unsupported findings. They were all collateral to the main issue of a contractual relation between the plaintiff company and the defendant, and, in the absence of such relation, are not material to the decision.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

41 Cal. App. 88

DENEHY v. STEWART et al. (Civ. 1966.)

(District Court of Appeal, Third District, California. May 6, 1919. Rehearing Denied by Supreme Court July 3, 1919.)

1. Fraudulent Conveyances 🔑263(2)—Constructive Fraud — Fraudulent Intent.

In view of Civ. Code, § 1573, and under section 3442, declaring that any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by party while insolvent shall be fraudulent and void as to existing creditors, it is necessary where constructive fraud is relied on to allege fraudulent intent.

2. Fraudulent Conveyances 🔑273—Fraudulent Intent—Presumption.

While a transfer of property with intent to delay or defraud creditor is void under Civ. Code, § 3439, as to creditors, intent to delay or defraud will not be presumed from the fact of transfer, for section 3432 allows a debtor to prefer one creditor over others, and under section 3442 it is only where the transfer is made or given voluntarily or without a valuable consideration by a party while insolvent that the transfer is deemed to be fraudulent and void as to creditors.

3. Fraudulent Conveyances 🔑87(1)—"Voluntary Transfer."

Where a mortgagee demanded payment and the mortgagor to satisfy him conveyed his equity of redemption, *held* that the conveyance cannot be deemed voluntary within Civ. Code, § 3442, declaring that where a transfer is made or given voluntarily or without valuable consideration it shall be void as to existing creditors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Transfer.]

4. Fraudulent Conveyances 🔑76(2)—"Valuable Consideration."

Within Civ. Code, § 3442, providing that, where transfer is made voluntarily or without valuable consideration by a party while insolvent, it shall be void as to existing creditors, a valuable consideration is such as money or the like, and the adequacy or the inadequacy of the amount or its disproportion to the actual value of the property does not affect the kind of consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration.]

5. Fraudulent Conveyances 🔑273 — Actions—Burden of Proof.

Where a deed was supported by a valuable consideration, the burden of showing that it was made with fraudulent intent is upon creditors of the grantor attacking it.

6. Fraudulent Conveyances 🔑115(1), 156(1)—Validity—Preferential Conveyance.

A conveyance is not open to attack as fraudulent because by means thereof the debtor prefers one creditor over another, and to successfully attack such conveyance it must be shown that the grantee had knowledge of the grantor's insolvency and of his intention to defraud other creditors, or of facts sufficient to put a reasonable man on inquiry.

7. Fraudulent Conveyances 🔑74(2)—Inadequacy of Price.

Proof of inadequacy of price will not alone establish a fraudulent intent on the part of the grantor, participated in by the grantee, which will allow creditors of the grantor to attack the conveyance as fraudulent, unless the inadequacy is so glaring as to stamp the transaction with fraud.

8. Fraudulent Conveyances 🔑301(1)—Actions—Evidence—Sufficiency.

In a suit by creditors of a grantor to set aside a conveyance as fraudulent, where it appeared that he conveyed the equity of redemption to the mortgagee upon demand for payment, and that the land was estimated to be worth $5,000, the mortgage being for about $1,800, evidence *held* insufficient to establish grantee's knowledge of grantor's insolvency, or to show fraudulent intent on part of the grantee.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by D. S. Denehy against John Stewart and wife and Mary E. Wyckliffe. From a judgment for plaintiff, defendants appeal. Reversed.

Daly B. Robnett, of Alturas, for appellants.

Jamison & Wylie, of Alturas, for respondent.

CHIPMAN, P. J. Plaintiff is a judgment creditor of John Stewart, and brings the action to set aside a deed made by said Stewart and wife to their codefendant, Mary E. Wyckliffe, conveying to her certain land described in the complaint. It is alleged in the complaint that, at the time said deed was executed, to wit, December 22, 1915, defendant Stewart was wholly insolvent, and "the consideration named in said deed was the sum of $10," and that the land so conveyed was then and is now "reasonably worth the sum of $5,000." It is further alleged, on information and belief, that said deed was executed "for a grossly inadequate consideration, with intent to hinder, delay, and defraud the creditors of the said John Stewart, including this plaintiff, and that the said defendant Mary E. Wyckliffe accepted and received the said deed with knowledge of said fraudulent intent on the part of the said John Stewart, and with the intent upon her part to assist the said John Stewart in his said fraudulent purpose, and to hold the said land as a secret trust for the said John Stewart in order that he might occupy the same and receive benefits therefrom, regardless of his said creditors and their claims, including the claim of this plaintiff as aforesaid"; that the said John Stewart "has no other property, other than the aforesaid lands out of which this plaintiff can realize and collect his said judgments or any part thereof."

Defendants demurred to the complaint on the grounds: (1) Insufficiency of facts; (2) that two causes of action have been improperly united in this that an attempt is made to set forth a cause of action to set aside a deed on the alleged ground that it was given in constructive fraud of creditors, united with an alleged ground of actual fraud of creditors; (3) that the complaint is uncertain, in that it cannot be ascertained therefrom whether or not the plaintiff (defendant Stewart) executed said deed in constructive fraud of creditors or in actual fraud of creditors; (4) that the complaint is uncertain in this, that it cannot be ascertained therefrom whether plaintiff is attempting to set aside said deed on the ground that it was given without consideration and when the grantors were insolvent or on the ground that there was no consideration, and that the deed was given with fraudulent knowledge and intent on the part of the grantors to defraud existing creditors; nor can it be ascertained from said complaint whether or not defendant Wyckliffe had any knowledge of the existence of any other creditors of defendants the Stewarts when she accepted said deed.

The demurrer was overruled. Defendants the Stewarts answered: Admitted the execution of the said deed, but alleged that $10 was not the true and sole consideration therefor; that these defendants executed and delivered said deed "to said Mary E. Wycliffe at the instance and request of one D. O'Brien, and in satisfaction of a certain note and mortgage held by said D. O'Brien, assignee of Julia O'Brien, on the said property so deeded from these defendants, which said mortgage was for the principal sum of $1,600 and these defendants further allege that there was at said time due said D. O'Brien from these defendants on account of said note and mortgage the sum of $1,795, and that said deed was given by these defendants in payment and discharge of said note and mortgage and of the amounts so due thereon, to wit, $1,795, and the sum of $5 cash" denied that said lands were reasonably worth the sum of $5,000, or any sum in excess of $1,800; denied specifically the averments of the complaint alleging inadequacy of consideration for said deed, or that it was executed to hinder, delay, or defraud creditors or plaintiff, or that defendant Wycliffe received said deed with knowledge of any fraudulent intent on the part of the grantors, or that she held said lands as a secret trust.

Defendant Wyckliffe answered, and, among other things, alleged that the consideration for said deed was as stated in the answer of her codefendants; denied that the consideration for said deed was inadequate, or that the deed was executed with fraudulent intent, or to hinder, delay, or defraud creditors, or that this defendant had any knowledge of such intent; and denied that when said deed was executed she had any knowledge of the existence of any creditors of said Stewarts or of the claim of plaintiff.

The court made the following findings of fact:

I. That plaintiff recovered judgment against the defendant John Stewart on October 28, 1916, as alleged in the complaint, for the sum of $3,232.23;

II. That, prior to December 22, 1915, defendant John Stewart, and wife executed and delivered to Julia O'Brien their note for $1,600, secured by mortgage on said land, and that subsequently, prior to December 22, 1915, she assigned said note and mortgage to her father, Dennis O'Brien.

III. That, on December 22, 1915, defendants Stewart and wife executed and delivered to defendant Mary E. Wyckliffe, daughter of Dennis O'Brien, "their deed to the lands described in the said complaint at and for an alleged consideration of $10."

IV. "That at the time the said deed last aforesaid was executed to the said Mary E. Wyckliffe there was due and owing to the said Dennis O'Brien, upon said note and mortgage the sum of $1,795, and that at or about the time of the execution of said deed the said Dennis O'Brien paid to the said John Stewart the sum of $5 in cash, and released and satisfied the said note and mortgage. And thereupon the said Mary E. Wyckliffe went into the possession of said lands and the whole thereof, and has remained in possession thereof ever since the execution of said deed, receiving the rents and profits thereof, and that the full amount for which said mortgage is a lien upon said property against the said judgments of plaintiff is the said sum of $1,795, with no accrued interest since December 22, 1915."

V. That, at the time the Stewarts executed said deed, "the said John Stewart was indebted to plaintiff in a large sum of money, to wit, the amounts set forth in the aforesaid judgments," and at that time the said John Stewart had no property subject to execution except said lands, but was then and ever since has been, and now is, insolvent.

VI. That said land, at the time of the execution of said deed and ever since, has been of the value of $5,000, and "that the equity of redemption owned by the said defendant John Stewart in the said land at the date of the execution of the said last-named deed was, ever since has been, and now is of the value of $3,200."

VII. "That the only consideration that was paid to the said John Stewart for the conveyance of said land to the said Mary E. Wyckliffe, or ever received by him for said conveyance was the sum of $5 and the said last-named sum was received and accepted by the said John Stewart in full settlement and satisfaction for all his right, title, and interest in said lands over and above said mortgage lien and debt; that is to say, for his equity of redemption in the said lands."

VIII. "That the said conveyance and deed was executed by the said John Stewart and Ida E. Stewart, his wife, to the said Mary E. Wickliffe for a grossly inadequate consideration, with the intent upon their part to hinder, delay, and defraud the creditors of the said John Stewart, including this plaintiff, and that the said defendant Mary E. Wyckliffe accepted and received the said deed with knowledge of said fraudulent intent, and with the intent upon her part of assisting the said John Stewart and the said Ida E. Stewart, his wife, in such fraudulent purpose, and to hold the said lands in secret trust for the said John Stewart and Ida E. Stewart in order that they might occupy the same and receive benefits therefrom regardless of the creditors of the said John Stewart, including this plaintiff."

As conclusions of law the court found that defendant John Stewart is the owner of the lands in question; that he is now and was, when he and his wife executed the deed referred to, indebted to plaintiff as alleged in the complaint; that Stewart and his wife executed and delivered the aforesaid deed to defendant Wyckliffe, with intent to hinder, delay, and defraud his creditors, and particularly to defraud this plaintiff, "and that said Mary E. Wyckliffe accepted and received the said deed with the knowledge of the fraudulent intent on the part of the said John Stewart and Ida Stewart, with the intent upon her part to assist the said John Stewart and Ida E. Stewart in said fraudulent purpose, and to hold the said lands as a secret trust for the said John Stewart, in order that he might occupy the same and receive the benefits therefrom, regardless of his creditors and their claims, including the claim of this plaintiff"; that the defendants the Stewarts at the date of the execution of said deed, were, ever since have been, and now are insolvent; that the said deed is fraudulent and void; that plaintiff is entitled to a decree adjudging that said deed is void, "and that the said lands be sold, subject to the said mortgage, and the proceeds thereof applied in satisfaction upon the said judgments, interest, and costs, and that plaintiff have judgment" for costs of this suit. Judgment was accordingly entered, from which defendants appeal.

In presenting his case, plaintiff introduced the judgment roll, showing defendant John Stewart's indebtedness to plaintiff as alleged; also execution issued on said judgment, showing return, judgment wholly unsatisfied; also deed of Stewart and wife to Mary E. Wyckliffe, dated December 22, 1915, referred to in the complaint. Plaintiff testified as a witness in his own behalf that said judgment is wholly unpaid; that defendant John Stewart, at the time said deed was recorded, owned no property other than the land in question, and has had no property since, and has none now out of which said judgment or any part of it could be satisfied; that the land consisted of 80 acres near Cedarville, "worth about $60 an acre," and 80 acres of timber land, worth $10 per acre. Other witnesses testified to the value of the land, placing it at a figure justifying the finding of the court as to value. Upon this evidence the plaintiff rested.

Defendants moved for a nonsuit on the ground "that plaintiff has failed to show any fraud in this transaction, showing the deed was made to defraud any creditor or for the purpose of hindering or delaying any creditor of John Stewart or Ida E. Stewart; and particularly that they have failed to show that Mary E. Wyckliffe had knowledge of any such design to defraud any creditor whatever"; that plaintiff has "failed to show that the deed was given in constructive fraud of creditors as defined by the Civil Code in section 3442, that it is a voluntary transfer without any consideration by the party who contemplates such fraud.

"The Court: I will hear the evidence in this case, and see what you have got. The motion for a nonsuit is denied."

We will not stop to consider the ruling of the court upon the motion for a nonsuit, inasmuch as the subsequent proceedings disclosed the facts as to the transaction in its entirety and furnish a safe basis on which to rest the decision.

It appeared, without conflicting evidence that Stewart had been indebted to O'Brien for some time, and, on August 1, 1912, the note and mortgage were executed to cover the indebtedness, including interest and also taxes paid by O'Brien, amounting in all to $1,600. The note was made payable to Julia O'Brien, daughter of Dennis O'Brien, and by her later transferred to him. The note being past due and no part of the interest having been paid, O'Brien wrote Stewart that a settlement must be made. Stewart went to Alturas and met O'Brien, and it was agreed that Stewart and wife would convey the land to O'Brien in discharge of the note and mortgage and $5 in money. On December 22, 1915, the indebtedness amounted to

$1,795. O'Brien paid Stewart $5 in money, surrendered the note to Stewart, and canceled the mortgage of record and by his direction Stewart and wife deeded the property to O'Brien's daughter, defendant, Mrs. Wyckliffe, the consideration being in fact $1,800, although the deed mentioned $10 as the consideration. Both O'Brien and his daughter, Mrs. Wyckliffe, testified that they knew nothing of Stewart's indebtedness to any person other than O'Brien, and that they had no intention of defrauding any creditor of Stewart. Mrs. Wyckliffe testified that she received the deed as a gift of the land from her father, and he testified that in other transactions he had made like gifts to others of his children, stating instances. Stewart testified that he made the transfer because he could not pay the principal or interest, and he wanted to avoid expense of foreclosure, and both he and O'Brien testified that they were acting in good faith, with no intention to hinder or delay or defraud other creditors. O'Brien testified that he believed he was making a fair settlement and allowing a fair value for the land. On his cross-examination, defendant John Stewart was asked the following questions:

> "Now, you owed Mr. O'Brien $1,790 on the mortgage, so you sold your right of redemption in that land for $5, didn't you? A. I don't know what you call it, I just gave him the ranch to pay the mortgage, that was the only thing I done, I wanted to pay the mortgage."

O'Brien's testimony was that Stewart and wife conveyed the title to the land in consideration of $5 in money and the surrender of the note given by Stewart and wife and the cancellation of the mortgage. On cross-examination he testified:

> "Q. Didn't you agree with John Stewart at the time this deed was made that he should remain in possession of the property a certain length of time? A. No, sir; we had no agreement at all about that."

Stewart testified, on cross-examination:

> "Q. What was the arrangement between you and Dennis O'Brien by which you remained in possession of this property? A. There was no arrangement at all, only I turned the deed over to him. Q. You had been living on the property ever since? A. I rented it. Q. Where is your lease, if you rented it? A. Well, I guess it is right here. I think it is."

It appeared that some time after the deed was delivered Mrs. Wyckliffe leased the land to Stewart for the term of five years at the annual rental of $250. The lease contained the following provision:

> "The said lessee, as the lessee, has the privilege of buying the above-described property at any time during the duration of this lease."

The testimony of the parties to the transfer of the premises was that the leasing of the property was arranged after the transfer of the title, and that there was no understanding as part of the transaction that Stewart was to have the property back on payment of the debt. Stewart testified that he wanted a place for his family while he was away at work in Nevada, and he turned the place over to his son, who paid the rent. Mrs. Wyckliffe testified that Mr. Stewart's son paid the rental. The testimony was that there was no definite agreement as to what Stewart was to pay in repurchasing the land. The matter seems to have been left as stated in the lease. The deed was acknowledged December 22, 1915, and was recorded December 24, 1915; the present action was commenced January 11, 1917.

The evidence in rebuttal consisted exclusively of testimony of the value of the land. On this question there was a conflict, but, as before remarked, there was sufficient to justify the finding of the court.

It remains to apply the law to the foregoing facts. While the complaint seems to combine charges of constructive fraud and actual fraud, the case was tried and decided, as the findings of fact show, upon the issue of actual fraud.

[1, 2] We had occasion to consider the question of constructive fraud in Hopkins v. White, 20 Cal. App. 234, 246, 128 Pac. 780, 785. We there said:

> "In a case where constructive fraud is relied on, it is necessary to allege the fraudulent intent, under section 3442. Schell v. Gamble, 153 Cal. 448, 95 Pac. 870. It is only by reason of the proviso in that section that fraud becomes established constructively or as a matter of law. Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Section 1573 of the Civil Code provides that constructive fraud is 'any such act or omission as the law specially declares to be fraudulent. The transfer of property with intent to delay or defraud creditors is declared by section 3439 of the Civil Code to be void as to creditors. But the intent in such a case is a question of fact, and is not to be presumed from the mere fact of the transfer, for section 3432 expressly provides that 'a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.' McKee v. Title Ins. & Trust Co., 159 Cal. 206–217, 113 Pac. 140. It is only where the transfer is 'made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency,' that the statute declares such transfer to 'be fraudulent and void as to existing creditors.' Civ. Code, § 3442."

[3, 4] In no legal sense can the deed in the instant case be said to have been made voluntarily. And we think it quite clear that it was supported by a valuable consideration. "A valuable consideration is such as money or the like, and the adequacy or inadequacy of the amount, or its disproportion to the actual value of the property, does not affect the

* * * kind of consideration. The adequacy of the consideration is an element of the good faith of the transaction, and has no bearing upon whether the consideration is a valuable or good one." Lindley v. Blumberg, 7 Cal. App. 140, 147, 93 Pac. 894, 897, citing cases. Respondent contends that the words "valuable consideration," as found in section 3442 of the Civil Code, "could have but one meaning, and that was, a value commensurate with that of the property conveyed," citing Carter v. Richardson (Ky.) 60 S. W. 397. In that case the sale was for cash of a stock of sample goods for what the court felt authorized to assume was 50 per cent. of their value. The conduct of the vendor, at the time and immediately after receiving the pay check, together with other circumstances mentioned in the opinion, led the court to conclude that the consideration was not a "valuable" one. Among the circumstances, the court stated that the vendee learned of the fraudulent intention of the vendor shortly after delivering his check in payment, and had ample time to stop payment, but did not. A large part of the goods was new; the vendee had the invoices, showing values, before him. It was in view, we think, of the circumstances shown, as well as the fact that the purchase price was but 50 per cent. of the value, which led the court to say that the price was so inadequate as to "cause surprise, or warrant a suspicion of fraud or contrivance, on the part of the purchaser."

[5, 6] The deed being supported by a valuable consideration, the burden of showing that it was made with fraudulent intent was upon the plaintiff. Goldner v. Spencer, 163 Cal. 317, 125 Pac. 347. We are unable to discover sufficient evidence to justify the finding of fraudulent intent upon the part of Stewart and wife in making the deed. And there is not the slightest evidence tending to show that either O'Brien or his daughter, Mrs. Wyckliffe, knew of Stewart's insolvency, or that he was seeking to hinder, delay, or defraud his creditors in making the deed. The intent of Stewart to prefer O'Brien as a creditor, if shown, would not be sufficient to justify the findings of the court, for it has frequently been held that a debtor may exercise a preference in the payment of creditors. It was essential to show that O'Brien and Mrs. Wyckliffe had actual knowledge of Stewart's insolvency and of his intention to defraud his creditors (Goldner v. Spencer, supra; Scholle v. Finnell, 167 Cal. 90, 138 Pac. 746), or that they had knowledge of facts sufficient to put an ordinarily prudent man upon inquiry.

[7] The rule as to inadequacy of consideration is variously stated in the books, but with substantial agreement:

> "Proof of inadequacy of price is not alone sufficient to establish fraudulent intent on the part of the vendor, participated in by the vendee, which will invalidate the transaction, unless the inadequacy is so manifest as to shock the moral sense and create on its mere mention a suspicion of fraud. 12 R. C. L. 542. "Inadequacy of price may be evidence of fraud which, however, in order to avoid a deed, must be so glaring as to stamp the transaction with fraud and to shock the commonest sense of honesty, as coupled with such facts as that the vendor was illiterate, weak-minded, or in necessitous circumstances." 8 R. C. L. 963.

In support of the text, Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375, 379, is cited. In that case there was no evidence in the record as to the fraudulent participation of the grantee of the deed other than the mere inadequacy of consideration contained in the deed. The consideration on which the deed rested was $200 while the property conveyed was estimated as worth $700 or $800. Said the court:

> "It is not such glaring inadequacy as of itself to stamp the transaction with fraud, by shocking the common sense of honesty, and thereby render the deed void."

The rule stated in Am. & Eng. Ency. of Law, vol. XIV, p. 516, is as follows:

> "Inadequacy of consideration where the vendor is greatly indebted is recognized as a mark of fraud, and while it is not of itself, unless very great, sufficient even as against creditors of an insolvent vendor to authorize the court to find fraud as a conclusion of law, it is one of the circumstances which may be considered by the jury in determining the question of fraud in fact, and may become a controlling force coupled with other circumstances tending to prove fraud."

[8] We do not think the disproportion alone of the price paid in the present case to the value of the property as found by the court is so great as to justify an inference that O'Brien or Mrs. Wyckliffe knew of or was put upon inquiry as to Stewart's insolvency, or that he intended by the conveyance to hinder, delay, or defraud his creditors. There was no evidence that O'Brien knew or had reason to believe that he was getting property worth $5,000 for $1,800. His testimony was that he believed he was allowing a fair price for it. It would seem to us that before fraud should be imputed to him it should appear that he knew or had reason to believe that the consideration was grossly inadequate. Nor do we think that any of the circumstances shown attending the transfer were of a character calculated to arouse suspicion that fraud was intended. The circumstance, aside from inadequacy of price, relied upon by respondent is the fact that Stewart remained in possession under the lease above referred to, which is spoken of as a "secret arrangement" because not recorded. If as a condition to passing the title it had been agreed that Stewart was to remain in possession with the right to a reconveyance upon payment of the debt, it would have changed the com-

plexion of the transaction, and would have amounted to no more than a mortgage. But there was no evidence that such was the case. The undisputed testimony was that the agreement to lease with the privilege of purchase was made after the sale, and had nothing to do with the transfer of the title. It is not reasonable, under the circumstances appearing, that O'Brien would have taken a deed which amounted to no more than a mortgage. It was perfectly legitimate for the grantee after absolute title passed to lease the land to Stewart or any one else with the privilege of purchase.

The finding, marked VII, that the only consideration paid Stewart for the conveyance was $5, and that said sum was received by him "for his equity of redemption in the said land," is wholly unsupported. The undisputed evidence was that Stewart received, not only $5 in money, but the discharge of his indebtedness to O'Brien. In the transaction nothing was said or done with reference to any equity of redemption.

We are unable to find in the record support of the findings of fraud, whether considered as constructive or actual.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

0 Cal. App. 700

MANFORD v. MEMIL SINGH. (Civ. 1910.)

(District Court of Appeal, Third District, California. April 17, 1919.)

1. Constitutional Law ⚷204, 251—Privileges and Immunities of Citizens—Due Process.

Const. art. 1, § 1, relating to inalienable rights, and section 13, relating to due process of law, prescribe nothing not contemplated by the federal Constitution, and in no degree enlarge or abridge the civil immunities of a citizen, nor operate to increase the authority of the legislative department of the state government.

2. Master and Servant ⚷69—Wages—Statutory Regulation—Validity.

Prompt payment of employés' wages, regulated by St. 1911, p. 1268, as amended by St. 1915, p. 299, is a matter within the police power of the Legislature, and the legislation is valid and applicable to corporations and to individuals who are employers.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by L. V. Manford against Memil Singh. Judgment for plaintiff, and defendant appeals on the judgment roll. Affirmed.

Claude F. Purkitt, of Willows, for appellant.

George R. Freeman, of Willows, for respondent.

BURNETT, J. The appeal is on the judgment roll and involves the construction of "An act providing for the payment of wages," approved May 1, 1911 (Stats. 1911, p. 1268), and the amendment thereof, approved April 28, 1915 (Stats. 1915, p. 299). The question was carefully considered by this court in Moore v. Indian Spring Channel Gold Mining Co., 174 Pac. 378, and the legislation was upheld as within the constitutional authority of the lawmaking power. Therein many decisions are reviewed, and the reasons justifying such legislation are clearly stated. Our faith in the legal soundness of that decision has not been shaken, and its authority is of controlling force in the instant case.

[1] Appellant, however, contends that a distinction exists between a corporation and a natural person as to the operation of the law, which was not urged or considered in the Moore Case, and that, while the statute may be and is valid as to the former, it must fail when challenged by an individual as violative of his fundamental rights expressed in section 1, art 1 of our state Constitution as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness"—and also section 13 of said article, "* * * nor be deprived of life, liberty of property without due process of law." It is claimed that due consideration of these primary maxims in connection with the Fourteenth Amendment to the federal Constitution will furnish protection to the individual employer against the application of the drastic penalty of said law. It is manifest, though, that as far as any substantial right or privilege of the citizen is concerned and the protection which must be accorded to it by the law, said provision of the state Constitution prescribes nothing that is not comprehended by said section of the federal Constitution. Of course, the sonorous phrasing of the inalienable rights of the individual in said section is felicitous and impressive, but it effects in no degree an enlargement or abridgment of the civil immunities of the citizen, nor does it operate to limit or increase the authority of the legislative department of the state government. And said section 13 is manifestly in scope and purpose identical with said provision of the federal Constitution. It may be said, therefore, that the principle of constitutional law invoked by appellant was the subject of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

earnest attention in the Moore Case, supra.

In support of his contention that such legislation may be upheld as against a corporation, but not against an individual, appellant cites the case of Leep v. St. Louis, Iron Mountain & Southern R. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109, wherein the Supreme Court of Arkansas held that such legislation was valid as to a corporation by reason of the fact that under the act or charter of incorporation there was reserved the power in the Legislature to amend the corporate charter. It was concluded that in the case of a railroad company the Legislature in its wisdom, finding that "better servants and service could be secured by the prompt payment of their wages on the termination of their employment," and that thereby the legitimate purpose of the corporation would be promoted, might require the company to pay its employés at the termination of their employment, although such legislation might interfere with contracts purely and exclusively private. As against the railroad corporation the statute involved in that case was upheld for the reason stated, while it was declared to be unconstitutional as applied to the individual for the reason that it was an unwarranted interference with the constitutional right to make contracts.

The opinion discusses interestingly and persuasively the essential principles involved in such inquiry, and it is well worth careful consideration, although, manifestly, it is not of authority here. Moreover, there is to be said of the decision that the discussion as to the effect of the law upon natural persons was somewhat gratuitous, since the action was against a corporation solely. Besides, the statute therein construed differed materially from our law on the subject, in that it penalized the employer for discharging the employé either with or without cause, and by implication at least it denied the employer the ordinary defenses for the misconduct of the employé or his failure to comply with the terms of his contract. Under the peculiar terms of the statute of Arkansas it would not be surprising if the Supreme Court had declared it to be invalid even as against a corporation.

[2] But appellant concedes that our statute is within the sanction of the Constitution if it can be reasonably held that the prompt payment of employé's wages is a matter that affects the public generally and is within the police power of the Legislature. That suggests the very reason why such legislation is permissible, imposing, as it does, a certain limitation upon the right to contract.

This consideration is fully set forth in the Moore decision, supra, and there is no necessity for further specific attention to it.

We may add that, manifestly, the statute should have reasonable construction. Its design is to protect the employé and to promote the welfare of the community. Without defeating that purpose, it should be construed so as to hamper as little as possible the valuable right and privilege of making contracts. But it is to be observed that the most formidable objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employé is guilty of culpable conduct. The statute is not subject to such reproach. It contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim. Indeed, the fullest right to contract as to payment is but slightly restricted, and an employer can easily provide in advance for the contingencies that may arise under the statute. If he refuses to pay what is due as therein provided, it is not unjust that he should be subjected to a penalty.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

41 Cal. App. 13

CRAWFORD v. MEADOWS. (Civ. 2884.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1919. On Petition for Rehearing, May 28, 1919; Denied by Supreme Court June 26, 1919.)

1. SALES ⚷480(4) — CONDITIONAL SALE — EVIDENCE.

Evidence *held* to establish conditional sale of automobile sought to be recovered by seller in claim and delivery.

2. SALES ⚷480(1)—CLAIM AND DELIVERY—CONDITIONAL SALES CONTRACT—DEFAULT.

Where automobile was delivered on express condition that title was not to pass until payment of at least $100, and default was made in payment, and automobile removed from county without seller's consent, seller could recover automobile in an action of claim and delivery.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Harry J. Crawford against Rebecca Meadows, administratrix of the estate of Mobley Meadows, deceased. Judgment for defendant, and plaintiff appeals. Reversed.

Alfred M. MacDonald, Samuel J. Crawford, and John S. Cooper, all of Los Angeles, for appellant.

Thomas A. Sanson and Duke Stone, both of Los Angeles, for respondent.

THOMAS, J. This is an action in claim and delivery. Plaintiff alleged ownership of a certain automobile and the right of possession thereof in himself. This was denied by defendant. After trial judgment went for defendant. From that judgment, plaintiff appeals.

Appellant claims that "the evidence is insufficient to justify the decision" and that "the findings of fact do not justify the conclusions reached." The last contention need not be considered if the first is established. Primarily, at least, therefore, there is only one point made, viz., insufficiency of the evidence to support the findings.

Counsel admit and recognize the rule that, when there is any evidence to support the findings, this court will not disturb the judgment thereon. In this case, however, there is no conflict in the evidence as to the ownership and the right of possession to the said automobile at the time this action was commenced. Plaintiff's testimony shows clearly the ownership of the property and the right of possession thereof in himself at the time this action was commenced. Respondent has not pointed out to us any testimony which in the least conflicts therewith. Lest, however, an injustice might be done by respondent's failure to point out such testimony, if the record contained it, every member of this court has, regardless of the rule which makes such labor on our part unnecessary, read the entire record. It wholly fails to disclose anything derogatory to plaintiff's proven ownership and right of possession.

It was stipulated that plaintiff was the owner of the automobile in question on the 17th day of June, 1914. Plaintiff also testified, among other things, as follows:

> "At the time this lease contract was signed, which bears date July 22d, the car belonged to me. It also belonged to me when it was changed from $100 to $800 in September, 1914. At the time the lease contract was changed in September, I had not received the purchase price."

There is absolutely nothing in the record which contradicts this, or which is in any way in conflict therewith.

We are satisfied that the findings are not supported by the evidence. In view of that fact, therefore, it is unnecessary to discuss the second proposition referred to above.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

On Petition for Rehearing.

PER CURIAM. Respondent has petitioned for a rehearing on this appeal, and suggests that we have overlooked the contention of her counsel that there had been a completed sale and delivery by plaintiff of the automobile in question. This is precisely what we think the evidence failed to show. The only evidence before the court as to the contract under which, if at all, respondent has any claim, was the written instrument itself and the testimony of plaintiff and his brother. It is admitted that, at the time the contract was entered into, plaintiff was the owner of the automobile. The contract in itself, which is in the form of a memorandum of lease, acknowledges that one Williams, under whom respondent claims, has hired the automobile from plaintiff; that Williams was to pay rental as follows: "$——— in advance this day 7—22—1914, and the further sum of $100.00, on the 22d day of each month thereafter, during the said term, until the full sum of $800.00 is paid;" that in case of default of any payment or removal of the property from Los Angeles county without written consent of the plaintiff, the latter would be entitled to retake possession of the machine; and "that under no conditions shall any title vest in the hirer." The uncontradicted testimony of both witnesses was that the consideration for this transaction was the transfer to plaintiff of certain equities in real estate and the payment of $100 for tires, and certain advances in money to meet required expenditures on or concerning the automobile; that all of this occurred before the delivery to Williams of the automobile, and on the express condition that no title was to pass until the $100 was paid, and until plaintiff had satisfied himself that the liabilities against the real property did not exceed a certain sum; that on the discovery, as claimed, that there were $700 of liabilities beyond the amount represented, this $700, by agreement with Williams, was added to the original $100 still owing, and the total amount named in the contract was raised from $100 to $800.

[1, 2] All the evidence as to the terms of the contract was to this effect. It clearly establishes a conditional sale contract. Even conceding that the alteration of the lease memorandum, by including the extra $700, was unwarranted, the original $100 still remains. Eliminating the $700, we have this situation: A conditional sale contract for a consideration, of which full payment was acknowledged, excepting $100, which the lessee agreed to pay, and the payment of which was a condition precedent to his obtaining title. There seems to be no question, under the evidence, that the automobile was delivered to Williams on the express condition that the title was not to pass until he paid, at least, this $100. The undisputed testimony is that this payment was never made, that defendant was in default, and that he had removed the property without plaintiff's consent from Los Angeles county. This gave to plaintiff his right of action to recover possession of the automobile.

Petition for rehearing denied.

40 Cal. App. 723

MEYER et al. v. SULLIVAN et al.

(Civ. 2647.)

(District Court of Appeal, First District, Division 1, California. April 19, 1919. Rehearing Denied May 19, 1919; Denied by Supreme Court June 16, 1919.)

1. Customs and Usages 🔑15(1)—Action for Failure to Deliver—Explanation of Contract.

In an action for failure to deliver wheat sold, evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. steamship clauses of the contracts.

2. Sales 🔑88—Interpretation of Contract—Province of Court.

It was the province of the court to apply its knowledge, gained from the testimony of witnesses as to the meaning of "f. o. b." steamship, used in the contract of sale, breach of which was sued for, to the surrounding circumstances in which the parties were placed, and to find and determine what the term as used in the contract implied.

3. Sales 🔑79—Construction of Contract—F. O. B.

Generally, if the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery, but the effect of the "f. o. b." depends on the connection in which it is used, and, if used in connection with words fixing price only, it will not be construed in fixing place of delivery.

4. Sales 🔑87(3)—Contract—Term as Referring to Price—Sufficiency of Evidence.

In an action for failure to deliver wheat sold, evidence *held* to support the trial court's finding that the term "$1.43⅓ per 100 lbs. f. o. b. Kosmos steamer at Seattle" referred to the price of the wheat and not to the place of delivery.

5. Sales 🔑87(1)—Obligation of Sellers—Transfer of Goods—Waiver.

The buyers of wheat free on board a steamship, if the sellers were obligated to transfer the wheat from the dock to the deck of the steamship, could waive such covenant for their benefit.

6. Sales 🔑172—Impossibility of Performance—War.

The sellers of wheat at a price f. o. b. the steamer of a certain line at a specified port were not released from liability to the buyers, nor the buyers from liability to them, because war conditions rendered it impossible to furnish a steamer of the line specified.

7. Sales 🔑418(2)—Failure to Deliver—Damages—Statute.

In arriving at the amount of damages suffered by the buyers of wheat from the sellers' failure to deliver, the court properly considered the difference between the price agreed to be paid by the buyers and the market price, which might be taken as the value of the same wheat in the contemplated port of delivery during the month when delivery was called for; the excess of the value of the wheat to the buyers during such time over what would have been due to the sellers as the price being the detriment, under Civ. Code, § 3308, caused to the buyers by the sellers' breach.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George H. C. Meyer and others against F. J. Sullivan and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Andros & Hengstler and Louis T. Hengstler, all of San Francisco, and Golden W. Bell, of Berkeley, for appellants.

McCutchen, Olney & Willard and J. M. Mannon, Jr., all of San Francisco, for respondents.

WASTE, P. J. This is an appeal by the defendants from a judgment in the sum of $2,613.30, entered in favor of plaintiffs for damages alleged to have been suffered by reason of the breach of defendants to deliver a cargo of wheat to plaintiffs at Seattle during the month of September, 1914.

After negotiations between the parties looking to the purchase and sale of a quantity of wheat, the plaintiffs wrote to defendants two letters, which were as follows:

454 California St.
San Francisco, Cal., June 26th, 1914.
Friday.
Sept. Shipt. Received June 27, 1914.
Answered ....

Messrs. F. J. Sullivan & Co., 310 California St., City—Dear Sirs: It is hereby confirmed that you have sold us and that we have bought from you, two hundred and fifty (250) long tons of No. 1 white Walla Walla wheat, for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar forty-three and one-third cents ($1.43⅓) per 100 lbs. f. o. b. Kosmos steamer at Seattle, with the usual official certificate of the grain inspector to accompany the draft on us from the north.

We send you this in duplicate. Kindly return one copy to us with your signature.

We are, dear sirs, yours very truly,
GM/P Meyer, Wilson & Co.
Approved: F. J. Sullivan & Co.

454 California St.,
San Francisco, Cal., July 1st, 1914.
Wednesday.

Messrs. F. J. Sullivan & Co., 310 California St., City—Dear Sirs: It is hereby confirmed that you have sold us, and that we have bought from you, two hundred and fifty (250) tons of No. 1 white Walla Walla wheat, for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar, forty-one and two-thirds cents ($1.41⅔) per 100 lbs. f. o. b. Kosmos steamer at Seattle, you to accompany your invoice for the grain with the usual certificate of the grain inspector.

We shall in due course give you the marks for this lot, as well as the prior lot of 250 tons for September shipment.

We send you this in duplicate. Kindly return one copy to us with your signature.

We are, dear sirs, yours very truly,

GM/P Meyer, Wilson & Co.

Approved and accepted: F. J. Sullivan & Co.

The letters were duly received by the defendants, who thereupon indorsed their approval upon each of the letters as above appears, and each of the letters, containing the approval of the defendants indorsed thereon, was returned to, and duly received by, plaintiffs. On the respective dates of the letters, plaintiffs engaged space from the management of the Kosmos line, for the shipment of the wheat referred to, in the steamer of that company, leaving Seattle in September. This fact was not communicated to defendants by plaintiffs, but on July 20th defendants were directly informed by the Kosmos line that the wheat was to be taken on board the steamer Karnak; leaving Seattle in September, 1914. Plaintiffs at no time furnished, or designated, or named, any vessel or vessels, or any Kosmos steamer, at Seattle or elsewhere, on board which the wheat would be placed, loaded, or shipped, or to which said wheat should be delivered.

Subsequently, owing to the war conditions then prevailing, the Kosmos Line canceled their sailing schedule. On August 13th defendants notified plaintiffs of that fact and requested to know their position with regard to the two contracts for purchase of the wheat. Not receiving a reply to their communication, defendants wrote to plaintiffs again on August 22d, making similar request. In the meantime, wheat had advanced in price. On August 26th, not having replied to these letters, plaintiffs informed defendants that the wheat bought from them had been sold, on a c. i. f. basis, to a firm in Valparaiso, not at all desirous of canceling, but, on the contrary, desirous of more business, and requested that defendants make a proposition as favorable as the then higher market would permit, which plaintiffs might cable to its Valparaiso correspondent. This proposition was stated to be "a merely tentative idea advanced without prejudice, and not to be regarded as in any way affecting our (plaintiffs') rights in the premises." Defendants made no counter proposition for either compromise, or cancellation, in the matter, and on September 5th plaintiffs wrote defendants, stating they would require defendants to deliver the wheat, "in the manner customary on Puget Sound, viz., in warehouse there." Further details of the delivery were referred to in the letter. This communication was followed by another letter on September 8th, in which plaintiffs demanded that defendants deliver "the said 500 long tons in warehouse at Seattle." On September 16th defendants replied, and, referring to the previous letters from plaintiffs relative to delivery of the wheat, stated that, on account of the circumstances mentioned in the correspondence, they must decline to make delivery of the same. The receipt of this letter from the defendants was followed by two letters from plaintiffs, which were personally handed to defendants, demanding, respectively, the fulfillment of each of the contracts for sale of the wheat and suggesting that the delivery might be made to plaintiffs at the warehouse on Arlington dock, Seattle, as that was the usual pier at which the Kosmos steamer loaded, or, if more convenient to defendants, delivery might be made to plaintiffs at any other warehouse in Seattle harbor, where grain was customarily received and loaded on steamers. At the time of handing these letters to defendants, plaintiffs produced and tendered to defendants in gold coin the purchase price of the wheat referred to in the contracts, which tender the defendants declined and refused, basing their action in so doing solely upon the ground that no Kosmos steamer was available at Seattle upon which said wheat could be loaded. The refusal of the tender was followed by a letter dated the last day of September, delivered to plaintiffs, which was as follows:

September 30, 1914.

Messrs. Meyer, Wilson & Co., San Francisco, Calif.—Gentlemen: Referring to your letters of September 22, 1914, and your demand for a fulfillment of the contracts mentioned therein, we are now in a position to state positively that, owing to the fact that no Kosmos steamer has been available for shipment in September, we consider the said contracts as canceled.

Yours very truly,

F. J. Sullivan & Co.,
By F. J. S.

After notifying defendants that plaintiffs would hold them responsible in damages for failure to carry out the contracts, plaintiffs brought this action.

The sole issue on this appeal narrows down to an examination of the question: Were the defendants justified in refusing to deliver the wheat, solely upon the ground that no Kosmos steamer was available at Seattle during the month of September, upon which the wheat could be loaded? The answer to the question appears to depend upon the interpretation that shall be placed upon the language in the two contracts, "f. o. b. Kosmos steamer at Seattle."

Appellants contend that these words (the term, f. o. b., meaning "free on board") implied a condition as to the place of delivery of the wheat, and limited such delivery to the deck of a Kosmos steamer, and nowhere else; that, the limitation and condition being impossible of fulfillment, they were absolved from the contract. The trial court took the counter view of the respondents, and found that the f. o. b. clauses were used in connection with the price of the wheat, and not the place of delivery; that, in view of the established custom of the trade, prevailing on the Pacific Coast, and which was and is well known to the parties, the place of delivery contemplated by them was the Arlington dock in Seattle, the dock at which the Kosmos steamers customarily loaded, and not the deck of the vessel itself; that therefore plaintiffs' offer to receive the wheat at the dock, coupled with the tender of, and ability to make, full payment of the contract price, was sufficient and full compliance, on their part, of the contract. The court further found that, if the said clauses of the contracts implied any covenant on the part of the defendants to transfer the wheat from the dock to the deck of the vessel, such covenant was solely for the benefit of the plaintiffs, and could be waived by them.

In order to determine whether or not delivery was to be made on the deck of the Kosmos steamer, as contended for by defendants, or merely on the Arlington dock, in Seattle, as claimed by plaintiffs, the trial court admitted evidence of the nature of the transaction, and the usages and custom of the trade in such matters. Appellants vigorously attack the findings and conclusions of the court, and particularly its action in admitting testimony in proof of the custom of the trade.

[1] We are satisfied of the correctness of the trial court's findings in these matters. The fact that the parties to this action have come to such a vigorous disagreement over the meaning of the terms of the contracts is some indication that the court might be compelled to look to other sources of information than the contracts themselves in order to arrive at a proper interpretation of the disputed point. That the evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. clauses of the contracts is borne out by the authorities. Cowas-Jee v. Thompson, 5 Moore P. C. 165, 13 Eng. Reps. 454; Stock v. Inglis, 5 Asp. M. C. 294; George v. Glass, 14 U. Can. Q. B. 514; Marshall v. Jamieson, 42 U. Can. Q. B. 115.

The admitted evidence fully supports the court's finding that it was and is a general custom, among buyers, sellers, and shippers of wheat in the city of Seattle, and in the city of San Francisco, and, generally, in Pacific Coast ports, "under contracts for the sale of wheat f. o. b. steamer, or f. o. b. designated steamer, for the seller to deliver, and for the buyer to receive and accept, the wheat upon the dock alongside of ship's tackle."

R. D. Girvin, a grain merchant on the Pacific Coast for 35 years testified that, by sale of grain "f. o. b. steamer," the obligation of the seller is to deliver the grain to the buyer, free of cost, at the ship's tackle, that is, delivery at ship's side ready to be hoisted into the vessel, and not that the seller has to put it on board the vessel. Otto Hillefeld, shipping agent and grain broker on the Pacific Coast for 16 years, testified that, under a contract of sale "f. o. b. steamer," the custom is for the seller to deliver the goods to the dock, and that neither the buyer nor the seller delivers the goods on the steamer; that the steamship company issues a receipt therefor, and the cost of taking the goods from the ship's tackle, or from the dock, into the steamer is borne by the steamship company, and the dock is the point at which the buyer receives the goods from the seller. R. D. Bird, freight agent, engaged in the business of shipping and the operation of steamers on the Pacific Coast for many years, testified that it is a universal rule, and the custom, to take delivery on the dock. Other witnesses, including a general agent of the Kosmos Line, testified that the shipper had nothing whatever to do with loading the cargo from the dock into the vessel; that work being done by the vessel, or the vessel's agents.

The witnesses on the part of the defendants testified as to the use of the terms f. o. b. and "f. a. s." (free-along-side) in contracts. The evidence discloses that contracts might be made, between buyer and seller, using either of these terms, although sales f. a. s. seem to be of infrequent occurrence, and not readily made in the community. In both f. a. s. sales and f. o. b. sales, however, the seller of the goods pays the cost of all handling on the dock; and the cost of stevedoring, or transferring the cargo from the dock to the ship, is paid and absorbed by the shipowner from the freight, which in turn is paid by the buyer. The only distinction between the two kinds of sales appears to be as to the time when the responsibility of the seller ends. In the case of f. a. s. sales, it seems to end with delivery on the dock. In the case of f. o. b. sales, the responsibility of the seller appears to end when the commodity is on board ship. The element of cost, to either buyer or seller, does not appear to enter into the matter at all.

[2-4] It was the province of the trial court to apply the knowledge, gained from the testimony of these witnesses, to the surrounding circumstances in which the parties were placed, and to find and determine what the term "f. o. b. Kosmos steamer at Seattle," as used in the contracts, implied. It duly determined that it was used therein in connection with the price of the grain only, and not as fixing the exact place at which it should be delivered. In arriving at this

conclusion, the trial court was assisted by the position of the clause in the contracts, used, as it was, in connection with the words fixing the price of the wheat sold. The general rule seems to be that—

> "If the agreement is to sell goods 'f. o. b.' at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of the 'f. o. b.' depends on the connection in which it is used and if used in connection with the words fixing the price only it will not be construed as fixing the place of delivery." 35 Cyc. 174; Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Burton et al. v. Nacogdoches Lumber Co. (Tex. Civ. App.) 161 S. W. 25.

In Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928, the contract read: "Bill the cargo of coffee 'at the same price, f. o. b. Pittsburgh.'" It was held that whether or not delivery was to be made at Pittsburgh was a question of fact. To like effect are Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Davis v. Alpha Portland Cement Co. (C. C.) 134 Fed. 274; U. S. Smelting Co. v. American Galvanizing Co. (D. C.) 236 Fed. 596. These authorities seem to firmly establish the rule that the f. o. b. clause may be used solely with reference to the price. The finding of the court that the term "$1.43⅓ per 100 lbs. f. o. b. Kosmos steamer, Seattle," in one contract, and the like clause in the other, as between plaintiffs and defendants, must be held to refer to the price and not to the place of delivery, seems to us to be fully supported by the testimony.

[5] Appellants attack the court's finding on the second point, which is that even if it be assumed that defendants had agreed and were obligated by the contracts, to transfer the wheat from the dock in Seattle to the deck of the Kosmos vessel, that this provision was in the nature of a covenant for the benefit of the plaintiffs, which they could, and did, waive. This finding, we believe, should also be upheld. Neill v. Whitworth, 18 C. B. (N. S.) 435, 144 Eng. Reps. 513. Paraphrasing the language of the case just cited, we cannot see how it can be of any importance to the defendants whether they delivered the wheat on the Arlington, or some other dock in Seattle, as directed by plaintiffs, or on board a Kosmos steamer, provided such delivery did not impose on them any additional expense or undue delay. It seems to be clear to us that, even if the contracts so implied, it was a stipulation inserted for the benefit of the vendees, which they could, and under the facts of this case did, waive. That a party to a contract may waive a provision intended for his benefit, see Ellsworth v. Knowles, 8 Cal. App. 630, 97 Pac. 690. Counsel for both sides discuss in their briefs a recent case bearing upon the subject of the waiver of a covenant similar to the one under consideration here, to wit: Comyn & Mackel v. Douglas Fir Exploitation & Export Co., in the United States District Court for the Northern District of California, October 21, 1918. In that case the contract was for the sale of four cargoes of lumber. The vessels on which the cargoes were to be shipped were designated, and the further stipulation of the contract was:

> "Delivery f. o. b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. (at ship's tackles), mill wharf, Knappton, Washington."

One of the vessels, the W. H. Marston, never came to Knappton. The seller claimed that this was a breach of condition precedent, and that the buyer could not claim the right of delivery on barges, or at the dock, as the contract contemplated the presence of the vessel, W. H. Marston, ready to receive the lumber, in order to bind the seller to the obligation to deliver. Mr. Justice Van Fleet held that the provision, as to the lumber being delivered convenient to the ship's tackle was for the benefit of the purchaser, which he could waive, and was not one on which the defendant might rely.

[6] Defendants contend that both buyers and sellers were excused from performance of the contracts, by reason of the fact that war conditions rendered the contemplated means of performance unavailable; that is, because it was impossible to furnish a Kosmos steamer, both parties were released from all liability in the matter. We cannot agree with such contention. It is admitted that the plaintiffs were at all times ready, willing, and able, and attempted, to perform their part of the contract. There is no showing but that defendants were fully able to deliver the wheat contracted for, and as directed by the plaintiffs, at the place designated.

[7] In arriving at the amount of damages suffered by the plaintiffs, by reason of the breach of the contract, it was proper for the court to take into consideration the difference between the contract price agreed to be paid for the wheat by plaintiffs, and the market price, which may be taken as the value, of the same wheat in Seattle, during the month of September, 1914. The excess of the value of said wheat to the plaintiffs during that time, over and above the amount which would have been due to the defendants under the contract as the purchase price thereof, if it had been fulfilled, was the detriment caused by the breach of the defendants' agreement to deliver. Section 3308, Civ. Code.

We have considered the other points made by the appellants and have examined many cases cited in their briefs. We see no merit in the points presented on this appeal. Neither do we feel justified in attempting to distinguish the many cases cited by appellants. They are not sufficient, in our judgment, to overturn the legal conclusions arrived at by the trial court on the facts of this case.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

40 Cal. App. 703

BAKERSFIELD IMPROVEMENT CO. v. BAKERSFIELD THEATER CO. et al.
(Civ. 2760.)

(District Court of Appeal, First District, Division 2, California. April 18, 1919.)

1. PROCESS ⚷59 — PARTIES NOT SERVED WITH PROCESS.

In action against corporation and two individuals, sureties on its bond, on their joint and several liability, where corporation was never served with summons and did not appear, Code Civ. Proc. § 414, providing that, where summons is served on one or more, plaintiff may proceed against the defendants served as if they were the only defendants, applies.

2. JUDGMENT ⚷240 — SEVERAL LIABILITY —SEVERAL JUDGMENT.

Where there is a several liability, the court may render a several judgment against any defendant without regard to the liability of any other defendant.

3. LANDLORD AND TENANT ⚷184(1)—SURETY BOND FOR PAYMENT OF RENT—EXTENSION OF TIME FOR EXECUTING BOND.

Where plaintiff's lease to defendant corporation, dated August 7, 1913, was not to begin until July 1, 1914, and required a bond to secure rent to be executed on or before January 1, 1914, and made a bond a condition precedent to taking effect of lease, a bond executed March 27, 1914, was good, as lessor might enlarge time for giving bond.

4. LANDLORD AND TENANT ⚷184(1)—SURETY BOND TO SECURE RENT—CONSIDERATION.

Consideration for such bond was execution and delivery of lease.

5. LANDLORD AND TENANT ⚷184(1)—OPERATION OF LEASE—"CONDITION PRECEDENT."

The parties did not intend that such lease should go into effect when it was signed, but it was not to go into effect until all conditions precedent were performed by lessee; a "condition precedent" being one which must be performed in order to have any rights vest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition Precedent.]

6. LANDLORD AND TENANT ⚷184(1)—CONDITIONS OF LEASE—CONSTRUCTION.

The provision did not limit or enlarge rights of lessor or lessee, as, regardless of such provision, the agreement to provide security was a condition and not a covenant, permitting lessor to insist upon performance of condition or to waive it.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Bakersfield Improvement Company against the Bakersfield Theater Company and F. A. Giesea and Irving C. Ackerman as its sureties. Judgment for plaintiff against defendants Giesea and Ackerman, and Ackerman appeals. Affirmed.

Leon E. Morris, of San Francisco, for appellant.

Purcell Rowe, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant Irving C. Ackerman from a judgment in favor of the plaintiff in the sum of $3,000 against him and the defendant F. A. Giesea, as sureties for the payment of rent under a lease in which the defendant corporation was the lessee.

[1, 2] Appellant contends, first, that, as the corporation defendant was never served with summons and did not appear, the action was never at issue and a trial was improper. The action was prosecuted against the several defendants upon their joint and several liability. Section 414, Code of Civil Procedure, applies to such a situation, and provides that, when summons is served on one or more, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. Where there is a several liability, the court has a right to render a several judgment against any defendant, without regard to the liability of any other defendant. Anderson v. Nawa, 25 Cal. App. 151, 156, 157, 143 Pac. 555.

[3, 4] The appellant next presents the argument that the bond was given without consideration, and relies for this contention upon the following facts: The lease between the plaintiff and the corporation defendant was dated August 7, 1913. It provided that a bond should be executed on or before January 1, 1914, guaranteeing the payment of the rent thereunder. The term of the lease was not to begin until July 1, 1914. It was provided in the lease that the execution and delivery of the bond should, at the option of the lessor, be a condition precedent to the taking effect of the lease. The bond was not executed on January 1st. The bond in suit, in accordance with the requirements of the lease and in terms referring to the lease and guaranteeing its performance, was executed on March 27, 1914. The appellant insists that, as the bond was not executed contemporaneously with the lease, it required an independent consideration. Counsel for appellant admits that under the rule laid down in the case of Stroud v. Thomas, 139 Cal. 275, 72 Pac. 1008, 96 Am. St. Rep. 111, the execution of the lease would furnish a

good consideration for the bond, even though they were not executed contemporaneously, where the lease itself, as in this case, provides for the execution of the bond at some future time. In order, however, to escape the operation of this rule, counsel urges that there was a special time limit placed upon the lessee within which to give the bond, and that, if it was not executed within that time, the privilege of exacting the bond came to an end, and the lessor was compelled either to avoid the lease under its option or to permit it to become effective without the giving of the bond. And this places counsel in a position where he must insist—as indeed he does —that the lessor could not enlarge the time for the giving of the bond, and could not indulge the lessee in further time without sacrificing his substantial rights.

The provision requiring a bond was clearly for the benefit of the lessor; the lessee was not to be given possession under the lease until six months after the time originally provided for the giving of the bond, and we know of no rule of law which would prevent the lessor from extending the time for the giving of the bond. It appears this was what was done in the present case. Under the lease, the Bakersfield Theater Company went into possession of the premises on July 1, 1914; the bond guaranteeing the payment of the rent having been executed and delivered prior thereto, to wit, March 27, 1914. This was the bond required by the lease, and the consideration therefor was the execution and delivery of the lease. While it is true that the lease provides that the bond shall be given on or before January 1, 1914, time was not made of the essence of the contract, and the lease does not provide at what date the option of the lessor to make the giving of the bond a condition precedent to the taking effect of the lease must be exercised. No time being provided within which this option might be exercised, it will be presumed that it was to be exercised within a reasonable time. Therefore it would seem that the lessor might be indulgent with the lessee in the matter of extending his time without waiving the option reserved to the lessor. The trial court found that the bond was executed and delivered for a good and valuable consideration, to wit, the execution and delivery of the lease, and that the plaintiff did not, prior to the execution and delivery of the bond to it, waive any of its rights or any option secured to it under said lease, and that said lease did not become binding and effective as an agreement between the parties until the execution and delivery of the bond. We think these findings are sustained by the evidence.

[5] Furthermore, and approaching the matter from another angle: It appears to us, from an examination of the entire lease, that the lease was never intended by the parties to go into effect until the various conditions precedent provided therein had either been fulfilled by the lessee or waived by the lessor. There was no oral evidence offered in the trial court, and we have before us for consideration merely the written instruments involved in the controversy. The lease provides that the execution of the bond shall be a condition precedent, at the option of the lessor, to the lease taking effect. It also provides that the expenditure of a certain sum of money by the lessee upon the premises for lights, display signs, etc., shall at the option of the lessor be a condition precedent to the lease taking effect. These provisions indicate to our minds that the parties did not intend the lease to go into effect at the time it was signed. A condition precedent is one which must be performed in order to have any rights vest. The lease, then, did not go into effect, and the lessee had no rights in the premises, until all conditions precedent to be performed by it had been performed or waived.

[6] The condition in the lease regarding the bond is as follows:

> "It is further agreed that the second party will execute and deliver to the first party on or before the 1st day of January, 1914, a good and sufficient undertaking, with two or more sureties satisfactory to the first party, in the sum of three thousand dollars, conditioned for the payment of the rent hereinbefore reserved, and for the performance of the other covenants in this lease specified to be performed by said second party."

However, the appellant contends that the words which follow the above-quoted condition, and which read:

> "The executing and delivery of said bond as is herein provided for, shall at the option of the first party be a condition precedent to this lease taking effect"

—limit and restrict the rights of the lessor in some way so as to put upon said lessor the duty of taking some affirmative action, failing in which he must give up the right to insist upon the condition. We think that this last-quoted sentence neither limited nor enlarged the rights of the lessor or the lessee, for even without the express stipulation that this agreement should be a condition precedent, such an agreement to provide security for the payment of the rent stipulated in the lease is a condition and not a covenant. Knight v. Black, 19 Cal. App. 518, 126 Pac. 512.

> "There is a decided distinction between the creation and effect of a condition and a covenant. * * * A breach of a condition upon which an estate is granted works a forfeiture of the estate, while a breach of a covenant is merely ground for a recovery of damages." Knight v. Black, supra.

In view of the right given by the law to insist upon the performance of the condition, and in view of the further right given by the law to the lessor to waive this condition if he so desired, this sentence expresses nothing more than what the law would imply, viz., that the lessor might insist upon the performance of the condition, but that he might waive that condition if he wished. This being true, the burden is upon the defendant and appellant here to show such waiver. He has not shown it. On the contrary, it appears that the defendant executed and delivered a bond to secure the payment of the rent to become due under the lease, and that the lease went into effect at the commencement of the term thereof. This bond is the one originally provided for, and has the same force and effect as if given at the time originally contemplated by the parties. This being true, the bond relates back to and takes effect in pursuance of the original agreement, and is supported by the original consideration. Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

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